The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-029

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct payment of the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student has received diagnoses including "mild mental retardation", autistic disorder, anxiety disorder, and developmental coordination disorder (Parent Ex. N at p. 5).[1] The student demonstrates difficulties with cognition, academics, pragmatic language, language processing, activities of daily living (ADL), and social/emotional functioning

[1] The term mental retardation is no longer used in State regulations and has been replaced by the term "intellectual disability," which has the same definition (compare 8 NYCRR 200.1[zz][7], with 34 CFR 300.8[c][6]).

(Parent Exs. D at pp. 1-2; G at pp. 1-7; H at pp. 1-5). The student has attended Cooke since the 2010-11 school year (Tr. p. 458; Parent Ex. D at p. 1).[2]

By letter dated October 12, 2011, the district sought the parent's consent to conduct a multi-disciplinary evaluation for the student's mandated triennial reevaluation, to which the parent agreed on October 20, 2011 (Parent Ex. B). On April 17, 2012, the parent executed a second form granting the district consent to evaluate the student using assessments including a social history, psychoeducational evaluation, classroom observation, and other assessments necessary to determine the student's needs (Parent Ex. C). On April 26, 2012, the district conducted a psychoeducational evaluation of the student (Parent Ex. M).

On May 15, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Parent. Ex. D). Finding the student eligible for special education as a student with autism, the May 2012 CSE recommended a 12-month program in a 12:1+1 special class placement in a specialized school with the following related services: three 45-minute sessions per week of speech-language therapy in a group (5:1) and one 45-minute session per week of counseling in a group (5:1) (id. at pp. 1, 10-11, 13-14).[3, 4] Additionally, the May 2012 IEP indicated that the student would participate in the New York State alternate assessment due to his global delays (Dist. Ex. D at p. 12-13). By final notice of recommendation (FNR) dated June 6, 2012, the district summarized the special education services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent. Ex. K).[5]

On May 30, 2012, the parent executed an enrollment contract with Cooke for the student's attendance for the 10-month 2012-13 school year (Parent Ex. Z at pp. 1-2).[6] On June 8, 2012, the parent executed a contract enrolling the student in a three-week program at Cooke for summer 2012 (Parent Ex. AA at pp. 1 -2).

In a letter dated June 15, 2012, the parent notified the district of her intention to unilaterally place the student at Cooke at public expense for the 12-month 2012-13 school year (Parent Ex. W

[2] Prior to entering Cooke for the 2010-11 school year, the student's educational history included attendance in a general education district classroom for three years, one year in a district classroom providing integrated co-teaching services, three years of homeschooling, and one year in a district 12:1 special class in a community school (Tr. pp. 456-458, 481-485; Parent Ex. G at p. 1).

[3] The student was previously classified as a student with a speech or language impairment (Tr. pp. 137-38; Dist. Ex. E at p. 1). The district school psychologist, at the parent's request, changed the student's classification to autism after the May 2012 CSE meeting upon receiving documentation from the parent regarding his diagnosis of autism (Tr. pp. 80-82, 138; see Parent Ex. N at p. 5).

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

[5] The June 6, 2012 FNR indicated that the student's classification was a speech or language impairment, rather than autism as indicated on the May 15, 2012 IEP (compare Parent Ex. K, with Parent Ex. D at p. 1).

[6]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]).

at p. 3). The parent indicated that because the district failed to conduct mandated triennial evaluations of the student, the student's May 2012 IEP was developed without adequate evaluations and, as a result, the district failed to offer the student a FAPE for the 2012-13 school year (id.). Additionally, the parent indicated that she had received the June 2012 FNR and informed the district that she would visit the assigned public school site to determine whether the school and program were appropriate for the student (id.). The parent also stated that she was willing to consider other district placement recommendations (id. at p. 4).

In a letter dated August 9, 2012, the parent notified the district that she visited the assigned public school site identified in the June 2012 FNR and she was rejecting the school because it was not an appropriate placement for the student (Parent Ex. X at p. 3). The parent identified several aspects of the school that rendered it "inappropriate," including that (1) the student would not have been appropriately grouped with the other students in the proposed classroom; (2) the student had previous "detrimental social experiences" in similar school settings and had been "a victim of his classmates' behavioral problems"; (3) the student would regress behaviorally and "would not be able to handle the overwhelming environment and behavioral issues of the students" at the assigned school; (4) a teacher in a 12:1+1 special class at the assigned school would not be able to ensure that the student progressed both academically and socially; (5) the curriculum at the assigned school did not include social skills training that was important for the student to develop relationships with his peers and to foster his independence; and (6) the related service providers at the assigned school had limited availability (id. at pp. 3-4). Therefore, the parent advised the district of her intention to unilaterally place the student at Cooke at public expense for the 12-month 2012-13 school year (id. at p. 4). By letter dated August 21, 2012, the parent advised the district that she had not received a response to her prior letters and reiterated that, based on the reasons set forth in her previous letters, the student would attend Cooke for the 2012-13 school year and she would seek public funding therefor (Parent Ex. Y at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated June 11, 2013, the parent requested an impartial hearing, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year because the district failed to (1) adequately evaluate the student before substantial changes were made to the student's May 2012 IEP; (2) recommend an appropriate program to meet the student's needs; and (3) offer the student an appropriate placement (Parent Ex. A at pp. 1, 3).

Regarding the development of the May 2012 IEP, the parent alleged that the IEP was "fatally defective" because the May 2012 CSE, without adequately evaluating the student or considering new evaluations, made the following substantial changes to the student's IEP: (1) in the student's eligibility classification; (2) from a 12:1 special class placement to a 12:1+1 special class placement; (3) from a 10-month school year program to a 12-month school year program; and (4) indicating that the student would take the New York State alternate assessments instead of receiving testing accommodations (Parent Ex. A at p. 3). Further, the parent alleged that the district's failure to provide the May 2012 CSE with comprehensive evaluative material for the student's triennial review deprived the CSE of critical information it needed to develop an appropriate IEP for the student (id. at p. 5). In addition, the parent contended that the district failed to provide her with notice that additional data was not needed to develop the student's IEP (id. at

pp. 5-6). The parent also asserted that the district failed to conduct a vocational assessment for the student in order to determine the student's transition needs (id. at pp. 4-5). Next, the parent contended that the CSE failed to conduct an evaluation of the student's occupational therapy (OT) needs or explain why one was not necessary, despite the parent's concern that the student had difficulty with fine motor skills (id. at p. 4).

The parent further asserted that the May 2012 IEP did not reflect the results of new evaluations, including the results of the recently conducted psychoeducational evaluation, nor did the district provide the parent with a copy of the evaluation (Parent Ex. A at p. 4). More specifically, the parent asserted that the absence of the April 2012 psychoeducational evaluation at the May 2012 CSE meeting rendered the IEP substantively deficient because it deprived the CSE of timely and relevant information regarding the student's disabilities and deficits (id. at p. 6). Additionally, the parent argued that the May 2012 IEP failed to describe the student's learning disabilities (id.). The parent also argued that in the present levels of performance section of the May 2012 IEP, a math assessment was incorrectly stated as a reading assessment (id. at p. 5 n.1). The parent further argued that the IEP did not reflect the student's past history of being assaulted and bullied, or how this history may have impacted the student's academic and social/emotional needs (id. at p. 7). Finally, relative to the student's transition plan, the parent alleged that the transition goals identified in the May 2012 IEP were not meaningful and that the transition activities were vague and not individualized for the student (id.). The parent also alleged that the IEP failed to identify the school district or agency responsible for providing the transition services to the student (id.).

With respect to the recommended placement, the parent alleged that the 12:1+1 special class placement was not appropriate because it would not provide the level of support required for the student's academic and social needs (Parent Ex. A at p. 7). Relative to the assigned public school site, the parent alleged that the school was "too large" and "chaotic" (id. at p. 8). The parent further contended that the student would have been inappropriately grouped with students who experienced emotional and behavioral difficulties, which would impede the student's ability to progress academically and socially because the student's sensitivity to noise would trigger a regression to negative behaviors (id. at p. 8). Next, the parent argued that the level of academic instruction and support provided to the student at the assigned school would not allow the student to make academic progress (id.). Additionally, the parent alleged that the related service providers at the assigned public were not available to work "on-site" and could only visit the school twice per week, which limited their availability with the student (id.).

The parent indicated that the student's unilateral placement at Cooke was appropriate because the program at Cooke was designed to meet the student's individual needs, including the student's need for a high degree of academic support, speech-language services, and aid in the development of the student's social/emotional skills (Parent Ex. A at pp. 8-9). Moreover, the parent asserted that the student's progress and teacher reports demonstrated that the student was making progress at Cooke (id. at p. 9). As relief, the parent requested that the district provide direct payment to Cooke for the costs of tuition for the student's attendance at Cooke from September 2012 to June 2013 as the parent did not have the financial resources to pay the costs of the student's tuition at Cooke (id.).

B. Impartial Hearing Officer Decision

On September 18, 2013, the parties proceeded to an impartial hearing, which concluded on November 7, 2013 after three days of proceedings (Tr. pp. 1-504). In a decision dated January 9, 2014, the IHO determined that the district offered the student a FAPE for the 2012-13 school year and that the parent had not established the appropriateness of the student's unilateral placement, and denied the parent's request for direct funding for the costs of the student's tuition at Cooke for the 2012-13 school year (IHO Decision at pp. 22-30).

Initially, the IHO found that the May 2012 CSE reviewed and relied upon several sources of evaluative information in developing the student's May 2012 IEP and that the parent and a representative from Cooke were provided with a meaningful opportunity to participate in the May 2012 CSE meeting (IHO Decision at pp. 22-23). With respect to the parent's concerns that the April 2012 psychoeducational evaluation was not considered during the CSE meeting, the IHO found that the CSE had sufficient information to develop the student's IEP and address the student's needs (id. at p. 23). The IHO further found that although the district failed to comply with the IDEA's reevaluation requirements, the lack of the April 2012 psychoeducational evaluation during the May 2012 CSE meeting did not rise to the level of a denial of a FAPE (id.). Additionally, the IHO determined that the failure to conduct an OT evaluation did not rise to the level of a denial of a FAPE because the student was not receiving OT at Cooke (id. at p. 24).

With respect to the May 2012 IEP, the IHO found that the parent and Cooke staff provided the May 2012 CSE with present levels of academic achievement and social/emotional functional performance to determine the student's needs and that the IEP developed by the CSE was reasonably calculated to provide the student with a meaningful educational benefit (IHO Decision at pp. 24-25). In addition, the IHO noted that although present levels of performance in the IEP incorrectly indicated a math assessment as an informal reading assessment, it did not rise to the level of a denial of a FAPE (id. at pp. 23-24). Lastly, the IHO found that the May 2012 IEP included an appropriate transition plan and that the parent failed to establish that the student's transition plan was not appropriate or that the lack of a vocational assessment resulted in a denial of a FAPE (id. at p. 25).

With respect to the annual goals, the IHO found that the goals and objectives in the May 2012 IEP corresponded to the student's needs and were appropriate (IHO Decision at pp. 25-26). The IHO further found that the annual goals and short-term objectives in the May 2012 IEP were measurable and provided sufficient information regarding the manner in which the student's progress throughout the year would be measured (id. at p. 26).[7]

Relative to the 12:1+1 special class placement recommended by the May 2012 CSE, the IHO found that it the placement was sufficient to address the student's needs (IHO Decision at p. 25). With respect to the assigned public school site, the IHO found that the parent's claims were speculative and that the district was not required to establish that the assigned school would have

[7] Although the parent raised issue only with the "transition goals" in the due process complaint notice, the IHO made findings with respect to "annual goals"; however, the parent does not appeal these findings.

appropriately grouped the student or that the assigned school staff would have addressed the student's needs (id. at pp. 26-27).

Turning to the unilateral placement, the IHO found Cooke was not appropriate because the parent was not able to establish how Cooke met the unique needs of the student (IHO Decision at p. 29). More specifically, the IHO determined that the hearing record was unclear as to how much special education the student received at Cooke or how the student progressed academically (id.). Finding that the parents did not establish the appropriateness of Cooke, the IHO did not address whether the equities favored the parents and denied the parent's request for direct funding for the costs of the student's tuition at Cooke for the 2012-13 school year (id. at p. 30).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year and that Cooke was not an appropriate placement for the student. First, the parent contends that the IHO erred in finding that the district's failure to comply with the triennial reevaluation requirements of the IDEA did not rise to a level of a denial of a FAPE. More specifically, the parent contends that the district failed to conduct a full comprehensive triennial evaluation of the student and that the parent did not receive notification from the district with respect to whether additional assessments were needed to develop the student's May 2012 IEP. Additionally, the parent contends that the district's failure to review the April 2012 psychoeducational evaluation during the May 2012 CSE meeting significantly impeded the parent's opportunity to participate in the decision making process regarding the student's education. The parent further contends that the IHO erred in finding that the district's failure to conduct a vocational assessment did not rise to a denial of a FAPE.

Next, the parent argues that the May 2012 IEP failed to describe the student's learning disabilities with specificity and did not describe the student's level of intellectual functioning or rate of progress. Additionally, the parent maintains that the student's transition plan was not appropriate because the post-secondary goals were vague and inadequate, the transition activities lacked specificity, and the May 2012 IEP failed to identify the school district or agency responsible for providing the transition services to the student.

Next, the parent argues that the IHO erred in finding that a 12:1+1 special class placement in a special school was sufficient to address the student's special education needs. The parent contends that a 12:1+1 special class would not have allowed the student to progress because the student required more instructional support and the program could not provide the balance between academic instruction and community activities that the student required to progress.

Relative to the assigned public school site, the parent contends that the IHO erred in finding that the parent's claims with respect to the assigned public school site were speculative. The parent maintains that the assigned school was inappropriate for the student because it was large, chaotic, and the student would be grouped with students with behavioral problems.

With respect to the unilateral placement, the parent argues that the IHO erred in determining that the parent failed to establish that Cooke was an appropriate placement for the student. The parent maintains that Cooke was tailored to meet the student's special unique

education needs. Although the IHO did not make a determination with respect to equitable considerations, the parent contends that equitable considerations weigh in favor of her request for direct reimbursement because she participated in good faith during the May 2012 CSE meeting and she did not impede the district's ability to offer the student a FAPE. Finally, the parent contends that an award of direct payment is appropriate because she lacks the financial means to pay the student's tuition at Cooke for the 2012-13 school year.

In an answer, the district responds to the parent's petition by denying the material allegations therein and asserting that the IHO correctly determined that it offered the student a FAPE for the 2012-13 school year. More specifically, the district asserts that the CSE's failure to review the April 2012 psychoeducational evaluation during the May 2012 CSE meeting did not rise to a level of a denial of a FAPE because the May 2012 CSE had sufficient evaluative information available to it in order to develop an appropriate IEP for the student. The district further asserts that the lack of a vocational assessment did not rise to a level of a denial of a FAPE because the district included post-secondary goals and transition plans—provided by the Cooke representative—in the May 2012 IEP. Next, the district contends that the IHO was correct in finding that the 12:1+1 special class placement was appropriate, the parent's claims with respect to the assigned public school site were speculative, and that the parent did not establish that the unilateral placement was appropriate for the student. Lastly, the district argues that equitable considerations do not favor the parent's request for relief because the parent had no intention of placing the student in the assigned public school site. The district further argues that the parent should not be entitled to direct funding for the costs of the student's tuition because the parent did not provide any evidence regarding resources available from the student's father.

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. May 2012 IEP

1. Sufficiency of Evaluative Information

The parent asserts that the IHO erred in finding that the district's failure to comply with the procedures related to conducting a triennial reevaluation did not rise to a level of a denial of a FAPE because the May 2012 CSE had sufficient information to address the student's needs. More specifically, the parent asserts that the May 2012 CSE's failure to consider sufficient evaluative information, namely the April 2012 psychoeducational evaluation, significantly impeded the parent's ability to participate during the May 2012 CSE meeting. Additionally, the parent contends that the district failed to conduct a full comprehensive triennial reevaluation of the student and that the parent did not receive notification from the district with respect to whether additional assessments were needed to develop the student's May 2012 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). A CSE may direct

that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and 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]).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (20 U.S.C. §§ 1412[a][6][B]; 1414[b][2][B]; 34 CFR 300.304[b][2]; 8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments; as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

Turning first to the IHO's finding that the May 2012 CSE had sufficient evaluative information available to it during the May 2012 CSE meeting, the hearing record reveals that the May 2012 CSE considered several sources of evaluative information in the development of the student's May 2012 IEP, including a May 2012 transition goals report from Cooke, a March 2012 Cooke progress report, and an October 2010 report of the results of social language testing (Tr. pp. 52, 54, 72; Dist. Exs. 4; 6; Parent Ex. I).[8]

First, the May 2012 CSE reviewed the transition goals report developed by Cooke staff (Dist. Ex. I). This report contained annual goals and short-term objectives related to transition, information regarding the student's transition needs, and a list of transition activities related to community services, related services, employment, and ADL skills (id. at pp. 1-3).

[8] The school psychologist testified that prior to the CSE meeting she reviewed the student's file, which included the student's 2011-12 IEP (Tr. pp. 97-98).

In addition, the May 2012 CSE considered the report of an October 2010 administration of the Social Language Developmental Test-Adolescent, in which a Cooke speech-language pathologist described the student's ability to communicate and verbally engage with others (Dist. Ex. 6 at pp. 1-2). Administration of the test to the student yielded a total test standard score below 60, which fell in the severely deficient range (id. at p. 1). The test measured the student's abilities in the areas of making inferences, interpreting social language, problem solving, social interaction, and interpreting ironic statements (id.). The report indicated the student exhibited significant difficulty with following instructions and exhibited limited vocabulary related to social language (id. at p. 2). The student's responses to test questions indicated that the student's understanding of social situations was limited and he would benefit from direct social language training in a supportive environment (id.). The evaluator also recommended that the student's instruction address identification of nonverbal cues, expressive vocabulary, perspective taking, comprehension of figurative language, and opportunities to use social language skills in a natural setting (id.).

The May 2012 CSE also reviewed a March 2012 Cooke progress report which provided information regarding the student's academic functioning and related needs (Dist. Ex. 4 at p. 1). With respect to English language arts (ELA), the student engaged in learning and was motivated, as well as being an active participant who modeled positive social interactions (id. at pp. 2-3). The student's ELA instructors noted the student improved in the area of writing and continued to work on editing his written work (id. at p. 3). The report indicated the student read text aloud and identified and expressed feelings (id.). Regarding his mathematics class, the student's instructors noted the student's math skills improved as his attendance improved (id. at p. 4). Additionally, the student's instructors noted that the student completed "good work" but struggled with explaining problem solving strategies and the thought processes behind his work (id.). With respect to history class, the student's instructors noted that the student showed partial understanding of maps, tables, graphs, and charts to interpret non-fiction information (id. at p. 6). In science class, the student's instructors indicated that overall, the student demonstrated progress showing a deepening understanding of the material and was an "excellent collaborator" (id. at p. 7). The student's travel training instructor described the student as an active participant who was working on traveling a fixed route independently (id. at pp. 10-11). The student's life skills instructors indicated that the student was engaged and attentive in class and required minimal prompts to interact with peers and to participate in activities (id. at p. 12). In social skills class, the instructor indicated the student began to develop an increased understanding of his strengths and weaknesses related to academic problem-solving (id. at p. 16). In language skills class, the student's instructor reported that overall, the student demonstrated a partial understanding with respect to the use of social language (id. at p. 17). Overall, the report indicated the student usually or always worked collaboratively, participated in discussions and activities, organized and managed materials, and followed the directions and rules in all of his classes (id. at pp. 3, 5-6, 8-10, 12, 14, 16, 18).

In addition to the evaluative documents considered by the May 2012 CSE, the school psychologist testified that the Group Mathematics Assessment and Diagnostic Evaluation (GMADE), Group Reading Assessment and Diagnostic Evaluation (GRADE), Basic Reading Inventory (BRI), and STAR Math results served as additional assessments of the student (Tr. p. 115; see Parent Ex. D at p. 1). Additionally, the May 2012 CSE relied heavily on the input of a

consulting teacher from Cooke during the CSE meeting to develop the student's May 2012 IEP (compare Parent Ex. J at pp. 1-5, and Dist. Exs. 7-8 at pp. 1-2, with Parent Ex. D at pp. 1-16).[9]

Based on the above, the hearing record supports the IHO's finding that the May 2012 CSE had sufficient evaluative information available to it in order to develop an appropriate IEP for the student. With respect to the parent's argument that the district failed to conduct a comprehensive triennial reevaluation of the student, including a classroom observation and a social history of the student, even assuming that the district was required to conduct a classroom observation and a social history of the student as part of the student's triennial reevaluation, as set forth above, the May 2012 CSE reviewed several evaluative reports that assessed the student in the areas of academics, language, transition, ADL skills, and social/emotional functioning (Dist. Exs. 4; 6; Parent Exs. I; J). Thus, in this instance, the lack of a classroom observation and social history as part of the student's triennial reevaluation did not result in a failure to offer the student a FAPE.

Turning to the April 2012 psychoeducational evaluation, the hearing record supports the parent's contention that the CSE's failure to review the results of the April 2012 psychoeducational evaluation constituted a procedural violation that rose to the level of a denial of a FAPE. 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]). For the reasons set forth below, I find that the failure to review the April 2012 psychoeducational evaluation during the May 2012 CSE meeting or thereafter reconvene the CSE to consider the results of the evaluation significantly impeded the parent's opportunity to participate in the development of the student's IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

In the instant case, the district requested consent from the parent for a triennial reevaluation of the student by letter dated October 12, 2011 (see Parent Ex. B). The parent signed the consent form on October 20, 2011 (Tr. pp. 104-105; see Parent Ex. B). After the district did not conduct any new assessments in response to the parent's October 2011 consent, the parent provided the district with an additional signed consent form dated April 17, 2012 (see Parent Ex. C). The district thereafter arranged for a psychoeducational evaluation of the student to be conducted (Parent Ex. M). The school psychologist testified that the district contracted with an outside agency to conduct the April 2012 psychoeducational evaluation, but the results of the evaluation were not received prior to the May 2012 CSE meeting (Tr. pp. 106-07). Thus, the May 2012 CSE and the parent were unable to consider the results of the April 2012 psychoeducational evaluation at the May 2012 CSE meeting (Tr. p. 106). Consequently, the parent was deprived of information regarding the student's needs and, as a result, was significantly impeded from participating in the May 2012 CSE meeting. Additionally, without the results of the April 2012 psychoeducational evaluation available to the parent, she was not afforded the opportunity to request an independent educational

[9] The consulting teacher from Cooke read from annual review discussion documents in the areas of ELA, math, speech-language, and counseling during the meeting but did not provide these documents to the May 2012 CSE (Tr. pp. 244-47; see Dist. Exs. 7-8; Parent Ex. J).

evaluation at public expense, as she could not disagree with the district evaluation (8 NYCRR 200.5[g][1]; see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502[b]). Moreover, in this case, the parent's letters' to the district dated June 15, 2012 and August 9, 2012, the parent reiterated her concern that the district had not formally evaluated the student for over three years (Parent Exs. W at p. 3; X at p. 3). Although the school psychologist testified that the May 2012 CSE had sufficient information to make an appropriate recommendation for the student, the hearing record reveals that the district did not provide the parent with notice that additional assessments were not required to develop an appropriate educational program for the student (Tr. pp. 112, 114-115). I caution the district that if it determines that it does not require further evaluative data after obtaining parental consent, it must comply with procedures requiring that it notify the student's parents of that determination, its reasons for making the determination, and the parent's right to request additional assessments (34 CFR 300.305[d][1]; 300.503; 8 NYCRR 200.4[b][5][iv]; 200.5[a][6][i]).

To the extent that the district's failure to obtain the results of the April 2012 psychoeducational evaluation prior to the May 2012 CSE meeting constituted a procedural violation of the IDEA, under the unique circumstances of this case, the parent's inability to discuss the results of the psychoeducational evaluation during the May 2012 CSE meeting, together with the district's apparent failure to provide written notice to the parent that additional assessments were not necessary to develop an appropriate educational program for the student, significantly impeded the parent's opportunity to participate in the development of the student's May 2012 IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]). In this particular instance, any outcome results in a procedural evaluation that impeded the parent's participation in the development of the IEP because either the district failed to complete the mandated triennial reevaluation or, if it can be considered completed as of the time of the CSE meeting, it failed to consider the April 2012 psychoeducational evaluation as the student's most recent evaluation as required by federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]; 34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]). In either case, where, as here, the parent was affirmatively and repeatedly provided written consents and asked to have triennial evaluative information results considered by the CSE, and the CSE failed to address the evaluation concern raised by the parent, it cannot be said in this instance that this did not significantly impede the parent's participation given the magnitude of the concern and the parent's repeated overtures on this point that were contemporaneous with the development of the IEP.[10] These specific concerns were a procedural violation that went unrecognized and unacknowledged by the district. Accordingly, the IHO's finding that the district offered the student a FAPE for the 2012-13 school year must be reversed.[11]

[10] While I find this significantly impeded the parent's participation, I stop well short of a predetermination finding – the district appeared willing to consider parent input and had the requisite open mind, but its actions prevented the parent from offering input in the first place and the parent was specifically raising the evaluation concern both before and after the CSE meeting.

[11] To hold otherwise would be essentially to hold that as long as the district develops a substantively appropriate IEP, parent participation could never be significantly impeded; however, such a rule would be overbroad.

2. Present Levels of Performance

Despite finding that the district failed to offer the student a FAPE for the 2012-13 school year by significantly impeding the parent's ability to participate in the development of the student's educational program, I address the remainder of the parent's claims regarding the adequacy of the offered program, beginning with their assertion that the May 2012 IEP was inadequate with respect to describing the student's present levels of performance and areas of need.

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]).[12] 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]).

A review of the May 2012 IEP in conjunction with the evaluative information available to the May 2012 CSE demonstrates that the May 2012 CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development, and further, that the description of the student's needs was consistent with the evaluative information and input from the consulting teacher from Cooke and the parent at the time of the CSE meeting.

According to the school psychologist, the May 2012 CSE discussed the student's strengths and weaknesses in academics including skills related to reading comprehension, vocabulary, written expression, math concepts, math applications, and problem-solving (Tr. pp. 56-57). The school psychologist further testified that the May 2012 CSE also discussed the student's needs related to language development, social/emotional functioning, and physical development as well as management needs (Tr. pp. 54-55, 57, 61-62). In addition, the consulting teacher from Cooke

[12] 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]).

testified that she provided input to the May 2012 CSE regarding the student's abilities related to ELA, math, speech/language, social/emotional, and post-secondary transition (Tr. p. 243). The school psychologist also testified that the IEP identified the student's cognitive abilities regarding inferential thinking, concept application, and problem-solving (Tr. p. 152).[13]

The May 2012 IEP reflected the input from CSE members including the consulting teacher from Cooke, a May 2012 transition goals report, a March 2012 Cooke progress report, and an October 2010 social language report regarding the student's needs and abilities in academics, language, transition, ADL skills, and social/emotional functioning (compare Parent Ex. D at pp. 1-2, with Dist. Exs. 4 at pp. 1-18, and 6 at pp. 1-2). For example, the May 2012 IEP indicated that the student was engaged and motivated to learn (compare Parent Ex. D at p. 1, with Dist. Ex. 4 at p. 3). Additionally, the May 2012 IEP indicated the student engaged in positive social interactions and participated in class, as reported in the March 2012 Cooke progress report (compare Parent Ex. D at p. 1, with Dist. Ex. 4 at p. 3). With respect to the student's math skills, the IEP reflected input provided by the consulting teacher from Cooke who indicated the student's performance was inconsistent and that the student demonstrated skills in the mid to high-third grade level (compare Parent Ex. D at p. 1, with Parent Ex. J at p. 1). With respect to standardized and informal assessments, the IEP reflected the results of various assessments—provided to the CSE by the consulting teacher from Cooke—in the areas of reading and math (Tr. pp. 47-49, 50; see Parent Ex. D at p. 1). The May 2012 IEP also reflected that the student achieved a standard score of below 60 on social language testing administered to the student (compare Parent Ex. D at p. 1, with Dist. Ex. 6 at p. 1). The May 2012 IEP also provided information regarding the student's social/emotional functioning, indicating the student had several friends and that the student continued to work on social problem solving as indicated by the consulting teacher from Cooke during the CSE meeting (compare Parent Ex. D at p. 2, with Dist. Ex. 8 at p. 1).

As set forth above, the hearing record demonstrates that the evaluative information available to and considered by the May 2012 CSE, along with input from CSE members, was sufficient to develop an appropriate IEP for the student. Moreover, the hearing record shows that the May 2012 IEP adequately and accurately reflected the evaluative information and directly incorporated information from the May 2012 transition goals report, a March 2012 Cooke progress report, and an October 2010 SLDT, as well as the input of CSE participants (compare Parent Ex. D, with Dist. Exs. 4; 6, and Parent Ex. I). Accordingly, the evaluative information that was considered by the May 2012 CSE and the input from the CSE participants during the May 2012 CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his present levels of performance (D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 331-32 [S.D.N.Y. 2013]).

3. Transition Plan

The parent next asserts that the May 2012 IEP was deficient in the area of transition services because the district failed to conduct a vocational assessment that would assist in

[13] The school psychologist testified that the CSE members did not indicate the student exhibited difficulties with attention (Tr. p. 153).

identifying the student's transition needs. The parent also asserts that the district failed to identify the school district or agency responsible for providing the transition activities in the May 2012 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., 2013 WL 1314992, at *6, *9, 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 hearing record reflects that the Cooke teacher provided the May 2012 CSE with a May 2012 transition goals report, which contained information regarding the student's post-secondary goals, transition needs, and transition activities (Tr. p. 72; Parent Ex. I at pp. 1-3). While the May 2012 CSE meeting notes prepared by the Cooke teacher indicated that post-secondary goals were not discussed at the meeting, the meeting summary notes prepared by the district special education teacher indicate that the May 2012 CSE discussed transition goals during the CSE meeting with the parent (Parent Ex. G at p. 6).[14] Additionally, the Cooke teacher provided the district with the May 2012 transition goals report prepared by Cooke during the CSE meeting (Tr. p. 72; Parent Ex. I at pp. 1-3). Moreover, the school psychologist testified that the May 2012 CSE developed the post-secondary transition plan from the input of the consulting teacher from Cooke (Tr. pp. 137, 165).

Upon review of the May 2012 IEP coordinated set of transition activities, the IEP incorporates the required areas including a section for postsecondary transition services that identified long-term adult outcomes and transitional services with respect to the student's instructional activities, related services, community integration, development of employment and post-high school activities, and acquisition of daily living skills (Parent Ex. D at pp. 3, 12). Specifically, the IEP indicated that the student would participate in activities related to work-study as well as receive instruction in ADL skills and travel readiness skills within the community (id. at p. 12). The IEP also indicated that the student would participate in small group activities to develop self-awareness related to work life (id.). Regarding related services, the student would practice social interactions with unfamiliar adults (id.). Additionally, the IEP provided that the student would practice money handling and budgeting skills, personal finance skills, and

[14] The school psychologist testified that the student's interests of art and music were not included in the transition goals because this information was not shared at the May 2012 CSE meeting (Tr. pp. 170-71).

participate in small group vocational activities as well as a work study program to develop job work skills (id.). The May 2012 IEP also included measurable postsecondary goals related to education/training, employment, and independent living skills (id. at p. 3). Specifically, the student would participate in a basic course of his choosing within two years of graduation, engage in a part-time job, and access relevant community services after graduating from high school (id.). As a supplement to the transition plan, the May 2012 IEP also included annual goals related to transition (id. at pp. 4, 8-10).

In this case, although the May 2012 CSE failed to obtain a vocational assessment for the student when developing the student's May 2012 IEP, the lack of a vocational assessment does not make the May 2012 IEP deficient in the area of transition services. However, as stated above, the district is reminded that that it must provide the parent with prior written notice—consistent with State and federal regulations—if the district did not require further evaluative assessments, including a vocational assessment for the student. In addition, the parent is correct that the May 2012 IEP failed to identify the school district or agency responsible for providing the services recommended (Parent Ex. D at p. 11; 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 alone, the district is hereby reminded of its obligation to conform to the requirements of the statute and regulations (see M.Z., 2013 WL 1314992, at * 9 [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]).[15]

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 May 2012 IEP, State regulations provide that a 12:1+1 special class placement is designed for 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 was not appropriate because it would not provide enough support for the student. The parent further asserts that in order for the student to make progress, the student needed a small class setting to address his disabilities. The hearing record reflects that at the time of impartial hearing, the student was attending Cooke where he was enrolled in a math class with a 9:1+1 ratio and an ELA class with a 12:1+1 ratio (Tr. pp. 46-47; Parent Ex. D at p. 1). Regarding the 12:1+1 placement recommendation, the parent testified that she disagreed with the district's placement recommendation and that the student required a

[15] The school psychologist testified that district did not indicate the responsible party for implementing each aspect of the transition plan in the IEP because the district was responsible for IEP implementation (Tr. pp. 75, 172).

"safe" and "hands-on" school experience (Tr. pp. 471-72). The consulting teacher from Cooke objected to the recommendation because the student required a program that addressed academic and social deficits and provided community experiences (Tr. pp. 77-78; Parent Ex. H at p. 4).

While the minutes of the May 2012 CSE meeting as recorded by both the district special education teacher and the consulting teacher from Cooke did not reflect objections regarding the student's present levels of performance, management needs, annual goals, and related services the notes reflected the parent and Cooke teacher comments regarding the placement recommendation (Parent Exs. G at pp. 1-7; H at pp. 1-5). Moreover, the parent indicated the student lacked friends in the district and the Cooke teacher indicated the placement lacked support and a balanced approach to academic and vocational pursuits (Parent Exs. G at p. 7; H at p. 4). However, the student did not present with management needs that could not be met in a 12:1+1 special class (Parent Ex. D at p. 2). For example, the accommodations and strategies to address the student's management needs, as delineated in the May 2012 IEP, included visual cues, verbal cues, preferential seating, directions presented in clear simple language, use of graphic organizers, editing templates, checklists, multisensory instruction/delivery, staff monitoring and review, repetition and review of information, learning breaks, use of calculator, pencil, and paper, opportunities for generalization, ample clear independent work to practice skills, social scripts, positive encouragement, and opportunities to explore a wide range of emotions and experiences (id.).[16]

The school psychologist testified that the program and placement recommendations were appropriate for the student (Tr. p. 179). The school psychologist and consulting teacher from Cooke testified that at the time of the CSE meeting, the consulting teacher from Cooke informed the CSE that one teacher and one teacher assistant taught the student's classes at Cooke (Tr. pp. 184, 253). According to the school psychologist, the May 2012 CSE believed the student could function in a 12:1+1 based on the fact that he performed well in a 12:1+1 ELA class and a 9:1+1 math class at Cooke (Tr. p. 79). The school psychologist further testified that the CSE members did not indicate the student could not function within a 12:1+1 special class (Tr. p. 79).

To address the student's deficits in ELA, math, writing, language, and social/emotional functioning, the school psychologist testified that the May 2012 CSE recommended several accommodations, annual goals and short-term objectives, and related services of counseling and speech-language therapy (Tr. pp. 58-59, 62-67, 79-80, 85-86). Based on the student's learning style, abilities, and needs, as stated above, the CSE recommended several accommodations and strategies (Tr. pp. 62-67; Parent Ex. D at p. 2). Regarding the annual goals, the school psychologist testified that Cooke provided the goals to the CSE that served as draft goals from which to develop the IEP annual goals (Tr. p. 70). Moreover, the school psychologist testified that she asked the parent and CSE members to modify the goals as needed and then incorporated the agreed upon annual goals into the IEP (Tr. p. 70). The school psychologist testified that the counseling and speech-language therapy services addressed the student's social skills (Tr. pp. 78-79). The school psychologist testified that the May 2012 CSE recommended a 12-month program for the student

[16] The school psychologist testified that the specialized school would provide "a more therapeutic type of setting" than a community school (Tr. p. 132).

because the teacher reported the student might regress in that he required consistent repetition to develop and increase skills (Tr. p. 77).

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 within a special class setting and therefore it was reasonable for the May 2012 CSE to conclude that the student was likely to make progress in that setting. The May 2012 CSE's recommendation of a 12:1+1 special class in a specialized school, together with appropriate related services, was reasonably calculated to address the student's needs.

Turning to the parent's contention that the May 2012 IEP did not contain a "balanced" approach to the student's academic and vocational needs, the consulting teacher from Cooke testified that the 12:1+1 special class placement did not adequately balance academic and vocational components and did not offer same level of instructional support that Cooke offered (Tr. p. 268). The consulting teacher from Cooke further testified that the student's needs were such that he required hands-on instruction (Tr. p. 262). The consulting teacher from Cooke also testified that the CSE did not discuss the student's post-secondary goals (Tr. p. 256). Additionally, the consulting teacher from Cooke testified that the 12:1+1 special class in a specialized school placement did not offer outings in the community, specialized internships, and the ability to move around the building with different students (Tr. pp. 271-72).

Contrary to the testimony of the Cooke consulting teacher, the May 2012 IEP contained both academic and post-secondary transition components. Specifically, the IEP identified the student's academic and vocational needs, contained academic supports, post-secondary transition based goals, and transition services, as well as indicating the student would participate in a work-study program (see Parent Ex. D at pp. 1-10, 12). The school psychologist testified that the CSE developed the transition plan including the post-secondary goals based on input from the parent and consulting teacher from Cooke (Tr. p. 68).[17]

The school psychologist also testified that the May 2012 IEP provided for a balanced approach to academics and vocational pursuits (Tr. pp. 78-79). The school psychologist stated that the recommended program would provide the student with both academic and vocational instruction (Tr. p. 76). In addition, the school psychologist testified that the district based the post-secondary transition plan within the IEP on the student's academic and vocational needs (Tr. pp. 73-74). Moreover, the school psychologist stated that the student's academic skills were "very low" and he would therefore benefit from "hands on" instruction with a "balanced approach" to academic and vocational instruction and developed the IEP accordingly (see Tr. p. 73). According to the school psychologist, based on the student's second grade level academic skills, the May 2012 CSE believed that the student's IEP should pair vocational and academic instruction to prepare the student for post-secondary transition (Tr. p. 77). The school psychologist also testified that the student's instruction would take place in the classroom as well as the community to prepare the student for the "transition into adulthood" (Tr. pp. 73-74). According to the school psychologist, the life skills the student required—such as travel training and budgeting—all had a corresponding

[17] The consulting teacher from Cooke testified that she discussed the student's post-secondary needs including transition services and needs, travel training, and ADL skills (Tr. p. 254).

goal (id.; see Parent Ex. D at pp. 4, 8-10). Additionally, the school psychologist testified that Cooke drafted the transition goals, which the CSE discussed and then adopted (Tr. p. 177).[18]

Lastly, the May 2012 CSE developed the coordinated set of transition activities from the input provided by the consulting teacher from Cooke during the CSE and modified it based on input from CSE participants (Tr. p. 72). According to the school psychologist, the parent informed the CSE of the student's interests and vocational interests as well as stated the student was continuing to develop awareness regarding his vocational pursuits (Tr. pp. 68-69). When developing the transition plan, the school psychologist stated that the May 2012 CSE provided the student with a flexible transition plan to allow for the student's developing vocational interests (id.). Accordingly, the hearing record indicates that the May 2012 IEP provided for a balanced approach to academics and vocational pursuits.

B. Assigned Public School Site

The parent contends that the IHO erred in finding that the parent's claims with respect to the assigned public school site were speculative. The parent further contends that the district was required to demonstrate that the assigned public school site was appropriate for the student. 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 [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, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; 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]).

[18] In addition, the hearing record indicates the student's related service providers would assist the teacher in addressing the student's annual goals related to social skills, self-care skills, and household skills (Tr. p. 74).

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 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]), 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., 526 Fed. App'x 135, 141 [2d Cir. 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]).[19]

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, 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.

[19] 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 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.

Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City 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 is "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 cannot prevail on their claims that the district would have failed to implement the May 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. X at pp. 3-7; Z at pp. 1-2; AA at pp. 1-2).). 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 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 claims that the assigned public school site would not have properly implemented the May 2012 IEP.

However, under the facts presented in this case, the district is confined to defending the IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parents to challenge the May 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 May 2012 IEP at the assigned public school site when the parents rejected it and unilaterally placed the student (see, e.g., B.K., 2014 WL 1330891, at *21; R.B., 2013 WL 5438605, at *17).

C. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, the next issue to address is whether the parent's unilateral placement of the student at Cooke was appropriate. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S., 231 F.3d at 104). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The hearing record reflects that Cooke is a school designed for students with disabilities whose primary deficits are in the areas of learning, speech and language, cognition, and social skills (Tr. pp. 404, 408). The assistant head of Cooke testified that the design of Cooke promotes a student's independence in academics, vocational skills, and life skills and provides a balance between academic and vocational instruction as well as integrated related services (Tr. pp. 404, 407-08). During the 2012-13 school year, the student attended the eleventh grade in the Access to Independence program at Cooke (Tr. pp. 405, 415).[20] The assistant head of Cooke testified that the Access to Independence program consisted of approximately 95 students (Tr. p. 406). The assistant head of Cooke also testified that the Access to Independence program is a modified high school program that offers academic instruction in English, math, science, social studies, a career seminar, an internship, art, music, language skills, gym, and technology as well as social/emotional support and life skills classes to increase efficacy with ADL skills and overall independence (Tr. pp. 406, 415-16, 420).

With respect to the student's needs, testimony of the coordinator and head teacher of ELA and social studies from Cooke (coordinator) and assistant head of Cooke demonstrated that Cooke staff were aware of and identified the student's needs (Tr. pp. 369, 411-413).[21] The coordinator testified that the student's needs included deficits in processing, memory, sequencing, following directions, and social/emotional skills (Tr. p. 369). Additionally, the assistant head of Cooke testified that the student tended to become anxious in new settings but when Cooke provided the student with a supportive environment, he was eager to participate and motivated to learn (Tr. p. 411). The assistant head of Cooke testified the student required repetition and scaffolding to learn new material (id.). The assistant head of Cooke further testified that the student's social/emotional needs related to anxiety manifested in the classroom by the student withdrawing from the group (Tr. pp. 412-413).

To address the student's academic and social/emotional needs, the assistant head of Cooke testified that the student attended ELA, science, and social studies classes with a 12:1+1 ratio and a math class with an 8:1+1 ratio (see Tr. p. 416). Additionally, the student received related services of one 45-minute session per week of individual counseling and three 45-minute sessions per week of speech-language therapy in a group (3:1) (Dist. Ex. 4 at p. 1). Further, both the coordinator and assistant head of Cooke testified as to the ways in which Cooke addressed the student's academic and social/emotional needs (Tr. pp. 370, 413-14, 423-24). The coordinator provided the student with multisensory instruction, visual cues, a structured setting, checklists, graphic organizers, small group instruction, and extended time (Tr. p. 370). The assistant head of Cooke testified that Cooke addressed the student's academic and social/emotional needs through grouping the student with students with similar learning profiles and social needs (Tr. pp. 413-14).[22] Academic

[20] The student first enrolled in Cooke for his ninth grade year (2010-11 school year) (Tr. p. 409; Parent Ex. A at p. 3).

[21] The coordinator taught the student during the 2012-13 school year in ELA and social studies (Tr. p. 368).

[22] The assistant head of Cooke testified that Cooke placed the student in a math group with students with similar functional math skills (Tr. p. 415).

instructional levels of the students in the student's classes ranged from first to third grade, which was in alignment with the student's second to third grade academic skills (see Tr. p. 423). Students in the program presented with similar deficits in social skills and communication (Tr. pp. 423-424). The assistant head of Cooke testified that the student's functional grouping was appropriate because all of the students had similar goals (id.).[23]

The assistant head of Cooke testified that Cooke based the curriculum upon a developmental approach to learning and the teacher provided modified instruction to the student at his functional level (Tr. p. 414).[24] Cooke developed a schedule for the student that provided him with academic supports together with vocational and life skills instruction along with his related services (Tr. p. 414). The assistant head of Cooke testified that Cooke provided the student with a therapeutic and structured setting together with supports such as a counselor assigned as a case manager as well as classes in art therapy, social skills, and self-advocacy built in throughout his schedule (Tr. p. 415).

The coordinator testified that the student's ELA and social studies classes addressed his academic and social/emotional needs and that the student demonstrated progress in ELA and social studies (Tr. pp. 383-84, 393-95). The assistant head of Cooke testified the student demonstrated progress in reading and math (Tr. pp. 411-12). According to the assistant head of Cooke, the student not only demonstrated progress in academics but also social/emotional functioning (Tr. pp. 440-41). According to school-based assessments, during the 2012-13 school year, the student progressed from a mid-second grade in reading and math to a third grade level in reading and math (Tr. p. 444). According to the assistant head of Cooke, Cooke was an appropriate placement for the student based on the supportive setting and balance between academic and vocational components as well as integrated related services (Tr. pp. 445-46).

The assistant head of Cooke, who also supervised the summer 2012 program, testified the student attended the Cooke 2012 summer program (Tr. p. 425).[25] According to the assistant head of Cooke, Cooke designed the summer program to reinforce academic skills and provide consistent opportunities for academic instruction, related services, and recreational activities (Tr. p. 425). During summer 2012, the student attended ELA, math, science and social studies classes as well as technology, arts and movement, and community trips (Tr. p. 429). The student's summer 2012 report card indicated the student did "great work" and overall performed well in literacy, thematic work, math, and problem solving (Parent Ex. V at pp. 1-2). In summer 2012, the student received

[23] The hearing record reveals that due to health concerns, the student was absent 33 days from September 2012 through June 2013 (Tr. p. 448; Dist. Ex. 3 at pp. 1-2).

[24] The hearing record shows the student's teachers in ELA and math both had Master's level degrees (Tr. p. 419). The assistant head of Cooke testified the teacher assistant from Cooke had a bachelor's degree and experience in the field of education and/or working with students with special needs (Tr. p. 416). The assistant head of Cooke testified that the teacher assistants received professional development while at Cooke and worked under the supervision of the teacher while providing instruction to the students (Tr. pp. 417-18).

[25] The hearing record indicates the student attended the second session only of the Cooke summer program (Tr. 447; see Parent Ex. V at pp. 1-2).

related services of one 30-minute session per week of speech-language therapy in a group (3:1) and one 30-minute session per week of counseling in a group (3:1) (Tr. p. 449; Parent Ex. V at p. 2). According to the assistant head of Cooke, the student's summer program was beneficial in that he retained his academic skills and Cooke provided the student with social supports and opportunities for community experiences to prevent regression for when he returned to school in September (Tr. p. 427).

Based on the foregoing, the hearing record demonstrates that Cooke offered specially designed instruction that was reasonably calculated to confer educational benefits on the student, and therefore, constituted an appropriate unilateral placement for the student. The district's contentions to the contrary must be rejected.

D. Equitable Considerations

Having determined that Cooke was an appropriate placement for the student for the 2012-13 school year, the next issue to consider is whether equitable considerations support the parent's request for reimbursement of the student's tuition costs. The district argues that equitable considerations militate against an award of tuition reimbursement because the parents had no intention of considering a public school site.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also 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]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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]).

Contrary to the district's allegation that equitable considerations should preclude relief in this particular instance because the parent had no intention of enrolling the student in a public school, a review of the hearing record reveals otherwise. Initially, there is nothing in the hearing record to show that the parent engaged in conduct to obstruct the CSE process or its ability to provide the student with a FAPE (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010]). While the parent did not include a specific request to reconvene the CSE in her June 15, 2012 and August 9, 2012 letters, the parent was not required to do so and it does not weigh against the parent. In addition, the district did little, equitably speaking, to better its position, such as by voluntarily holding an additional CSE meeting (or offering to modify the IEP without a meeting) to increase the chances of satisfactorily addressing the parent's concerns with the IEP.[26] Had the district done so and the parents then refused appropriate corrections to the IEP, the district's argument that the parents did not intend to enroll the student in a public school might have been more convincing. Furthermore, although the district cites to district court decisions that looked to whether parents intended to accept a public school placement when fashioning awards, the Second Circuit has recently opined upon this issue, holding that where 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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Therefore, equitable considerations weigh in favor of the parent overall and justify an award of tuition reimbursement under the circumstances of this case (see B.R., 910 F. Supp. 2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]).

E. Relief

Finally, the district alleges that the parent was not entitled to direct funding of the costs of the student's tuition at Cooke for the 2012-13 school year because she failed to establish that she lacked the financial resources to pay the student's tuition. A careful review of the evidence supports the district's assertion.

With regard to fashioning equitable relief, in a case of first impression, one court has recently addressed whether it has the authority under the IDEA to grant relief it deems appropriate, including ordering a school district to make retroactive tuition payment directly to a private school

[26] To be clear, a CSE is not required to reconvene simply because a parent provides 10-day notice identifying concerns with an offered program; however, when a parent has provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure deficiencies in the IEP—and the district makes no attempt at all to do so, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[27] Since the parent has selected Cooke as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Cooke and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, it is undisputed that the parent entered into an enrollment agreement for the Cooke summer 2012 program, as well as the remainder of the 2012-13 school year (Tr. pp. 478-79; Parent Exs. Z; AA). Under the terms of each enrollment contract and by signing each agreement, the parent acknowledged her financial obligation for payment of the student's tuition (see Parent Exs. Z at p. 1; AA at p. 1). In addition, the parent testified that in the event she was unsuccessful at the impartial hearing, she understood that she was still obligated to pay the full amount of the tuition costs under the enrollment contracts and would pay Cooke "little by little" (Tr. pp. 479-80). Based upon the foregoing, the evidence sufficiently supports the conclusion that the parent remained "legally obligated" to pay the student's tuition at Cooke (Mr. and Mrs. A., 769 F. Supp. at 406).

Next, however, a review of the hearing record indicates that the parent did not provide sufficient evidence regarding whether, due to a lack of financial resources, she was financially unable to front the costs of the tuition at Cooke for the 2012-13 school year. First, the parent submitted a letter regarding a recertification appointment for the Supplemental Nutrition Assistance Program (SNAP) (Parent Ex. HH at p. 1). This letter is unclear as it does not contain any information as to whether the parent remains eligible for and continues to receive SNAP benefits. Second, the parent submitted a letter from the Internal Revenue Service dated April 26,

[27] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

2012, which states that the parent did not file federal taxes in 2011 (id. at p 3). This evidence is immaterial as it does not pertain to the relevant time period. Moreover, the record is devoid of any evidence as to whether the parent filed any taxes in 2012 or 2013. The parent also submitted a letter from the Social Security Administration that states that the parent received Supplemental Security Income (SSI) payments on behalf of the student in the amount of $733 per month (id. at p. 2). Other than the parent's testimony that she received "public assistance" and SSI to support two people, and that she did not own any real estate, bank accounts, luxury items or expensive jewelry, there is little other evidence in the hearing record regarding the parent's financial situation, and, in particular, no further elaboration as to other sources of income (Tr. pp. 479-80). Also relevant in this instance is that the hearing record reveals that the student had regular contact with his father since he was three years old (Parent Ex. N at p. 2). Similarly, the hearing record does not offer any information regarding the father's income, financial resources or whether the parent receives child support payments from the father. In short, when a single parent seeks direct funding due to a lack of financial resources, there should be some evidence showing why the other parent's financial resources, or lack thereof, should or should not be considered before determining that the student's placement should be directly funded at public expense due to the parents' financial circumstances. Under these circumstances, I am constrained to agree with the district that the parent has not met her burden to establish that there were insufficient financial resources to "front" the student's tuition costs for the 2012-13 school year (Mr. and Mrs. A, 2011 WL 321137, at *22). Accordingly, I will direct relief in the form of reimbursement upon proof of payment; however, if the parent can easily provide further information to the district or the district is already in possession of information relevant to the father's financial resources and circumstances surrounding the father's involvement with the student or otherwise has reason to believe that he is incapable of contributing in any meaningful way to the costs of the student's education, I strongly suggest that the parties further investigate whether they can reach an agreement regarding direct funding. Further litigation over such basic facts seems ill-advised.

VII. Conclusion

Based on the foregoing, the IHO correctly determined all of the substantive issues relevant to a FAPE; however, the evidence in the hearing record supports the conclusion that the procedural deficiencies nevertheless resulted in a denial of a FAPE during the 2012-13 school year, that Cooke was an appropriate placement for the student, and that equitable considerations weighed in favor of the parent's request for reimbursement for the costs of the student's tuition at Cooke for the 2012-13 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 9, 2014 is modified, by reversing those portions which found that the district offered the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall reimburse the parent for the costs of the student's tuition at Cooke for the 2012-13 school year upon the submission of proof of payment to the district.

Dated: **Albany, New York**
April 23, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER