The University of the State of New York

The State Education Department
State Review Officer
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No. 12-116

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondent, Jamie Chlupsa, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

With respect to the student's educational history, the hearing record indicates that the student initially attended an inclusion program at the age of three, transitioned to a private school at the age of five where she remained until age ten, and was then placed by the district in a State-approved nonpublic school until she "aged out" of that program at the age of 15 (see Tr. pp. 208-09, 234-35). For the 2009-10 school year, the student began attending Cooke (Tr. p. 209).[1] The

[1] 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).

hearing record reflects that the student has a history of significant deficits in the areas of academics, memory, attention skills, language skills, and self-confidence related to her academic performance (see Dist. Exs. 1 at pp. 3-6; 3 at pp. 1-5; 4; 5 at pp. 1-2; 7 at pp. 2-10).

On June 7, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Dist. Exs. 1 at pp. 1-2; 2). Finding the student eligible for special education as a student with a learning disability, the June 2011 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school (id. at pp. 1, 13).[2] In addition the June 2011 CSE recommended related services consisting of two 45-minute sessions per week of speech-language therapy in a group of five and one 45-minute session per week of individual counseling (id. at pp. 2, 15). The June 2011 CSE also recommended support for the student's management needs, as well as a transition plan and six annual goals with corresponding short-term objectives to address the student's areas of need in English language arts (ELA), written expression, mathematics, speech-language, transition, and social/emotional functioning (id. at pp. 3, 5, 7, 9-12, 16).

On June 9, 2011, the parent signed an enrollment contract with Cooke for the student's attendance during the 2011-12 school year (see Parent Ex. H at pp. 1-2).

By final notice of recommendation (FNR) dated June 14, 2011, the district summarized the 12:1+1 special class and related services recommended by the June 2011 CSE and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 6).

On July 27, 2011, the parent visited the assigned public school site (Tr. 239-40, 242; see also Parent Ex. A at p. 2). By letter dated August 24, 2011, the parent notified the district of his intention to place the student at Cooke for the 2011-12 school year and to seek funding from the district for the costs of the student's tuition if the district did "not remedy the procedural and substantive errors in the development of [the student's] IEP and offer [her] an appropriate program" (Parent Ex. A at pp. 1, 2). Specifically, the parent indicated that the June 2011 CSE recommended "the same program that, year after year, has been found to be inappropriate," specifically citing the 12-month school year program in a 12:1+1 special class in a specialized school (id. at p. 2). The parent also asserted that none of the members of the June 2011 CSE had information regarding or experience teaching "this type of class" (id.). In addition, the parent argued that the June 2011 CSE did not have current evaluations and, as a consequence, the recommendations in the IEP were not aligned with the student's needs (id.). Moreover, the parent asserted that annual goals and the transition plan included on the June 2011 IEP were inadequate (id.). With respect to the assigned public school site, the parent expressed concerns based on his visit, including that the population at the school was "far lower functioning than [the student]" and the school did not offer the "highly individualized education" that the student required (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 4, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) on both substantive and

[2] The student's eligibility for special education programs and related services as a student with an learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

procedural grounds, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (see Dist. Ex. 8 at pp. 1-3).

Specifically, the parent first challenged the composition of the June 2011 CSE, claiming that the CSE lacked a member who had experience teaching the recommended special class or who was able to provide a profile of the other students in the proposed classroom at the assigned public school site (Dist. Ex. 8 at p. 2). Next, the parent alleged that they were denied an opportunity to meaningfully participate in the development of the student's IEP, in that the CSE dismissed the parent's concerns raised at the CSE meeting (id.).

In addition, the parent claimed that the June 2011 CSE did not take into account current evaluations and, as a consequence, the recommendations included in the IEP were "made without sufficient knowledge" of the student or her needs (Dist. Ex. 8 at p. 2). Next, the parent alleged that the recommendation in the June 2011 IEP for a 12-month school year program in a 12:1+1 special class in a specialized school was not appropriate for the student (id.). The parent also challenged the adequacy of the transition plan included in the June 2012 IEP, noting, for example, that the "diploma objective [wa]s left blank" (id.). Finally, the parent asserted that the assigned public school site was "wholly inappropriate for the student because "the population served [wa]s far lower functioning than [the student] and would not [have] provide[d] her with a suitable and functional peer group" (id.). The parent also alleged that the "'work-study' program" at the assigned public school site was not appropriate and that the student required "a highly individualized education," which the school did not offer (id. at pp. 2-3). Further, the parents stated that, following their visit to the assigned school, the district failed to respond to the parent's telephone calls and correspondence (id. at p. 3).

The parent also alleged that the unilateral placement of the student at Cooke was "reasonably calculated to confer a benefit" to the student and that equitable considerations weighed in favor of his request for relief because he he "always fully cooperated with the CSE process" (Dist. Ex. 8 at p. 3). For relief, the parents requested that the IHO order the district to reimburse him for the costs of the student's tuition at Cooke for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

On January 20, 2012, an impartial hearing convened in this matter and concluded on March 7, 2012, after three days of proceedings (Tr. pp. 1-257). By decision dated April 24, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 9-19).

The IHO first found that, with regard to the composition of the June 2011 CSE, although the district special education teacher had no experience teaching the program recommended by the CSE and, thus, did not meet regulatory criteria, this procedural defect did not rise to the level of denying the student a FAPE (IHO Decision at pp. 10-11). In addition, the IHO found that the district special education teacher, who also served as the district representative at the June 2011 CSE meeting, was "qualified to teach special education," was "knowledgeable about the general education curriculum and availability of resources," and thus met the regulatory criteria for serving as district representative (id.).

Next, the IHO determined that the June 2011 CSE had "sufficient knowledge" of the student, her functional levels, and her needs because the CSE considered, among other evaluative reports and assessments, a psycho-educational report completed less than three months prior to the CSE meeting, as well as information offered by members of the CSE knowledgeable about the student's needs (IHO Decision at p. 12). In addition, the IHO found that the student's transition plan included in the June 2011 IEP was "more than sufficient" because, among other things, it addressed the student's integration into the community, participation in a vocational training program, contained an annual goal, and recommended instruction for the acquisition of long-term life skills (id. at pp. 12-13). The IHO also noted that the transition plan set forth the student's diploma objective as an IEP diploma (id. at p. 13).

However, the IHO found that the June 2011 CSE's recommendation for a 12:1+1 special class in a specialized school was not appropriate to meet student's educational needs (IHO Decision at p. 15). Specifically, the IHO found that, although the student "ha[d] significant need for individualized specialized instruction," there was nothing in the record to indicate that she had discipline or behavior problems and, therefore, nothing to suggest that her "management needs" would "interfere in the instructional process" requiring a placement in a special 12:1+1 special class pursuant to State regulations (id. at p. 14-15). The IHO further noted that "it would be inappropriate to place [the] [s]tudent in such an educational environment, considering her significant academic deficits, with other students whose behavior interfered with the instructional process—and with [s]tudent's instruction" (id. at p. 15).

With regard to the parents' unilateral placement of the student at Cooke, the IHO determined from an overall evaluation of the program—based, in part, upon the testimony of Cooke's head of school and of the student's classroom head teacher—that Cooke was "educationally appropriate" for the student and was capable of meeting her special education needs (see IHO Decision at pp. 15-18). Specifically, the IHO noted testimony regarding: the provision of remedial work to the student and the use of supports in the student's reading program, such as graphic organizers and mnemonic devices (id. at p. 16). Although the IHO noted that the student's classroom head teacher was not a certified special education teacher, he further indicated that the teacher's certification was pending and he had substantial experience in special education (id. at pp. 16-17). Further, the IHO noted a discrepancy in the functioning levels of the other students in the student's classroom but cited testimony that the student received instruction in smaller groups or with individual instruction (id. at p. 17). The IHO also noted testimony that, although the student had not made progress in terms of numerical grades, she had "matured emotionally" and applied increased effort to aspects of her educational program (id.). Further, the IHO observed that the student showed progress on a number of projected goals (id. at pp. 17-18).

As to equitable considerations, the IHO found that, the parent cooperated with the CSE process (IHO Decision at p. 18). In addition, the IHO found that, although the parent signed an enrollment contract with Cooke only two days after the June 2011 CSE meeting and before he received the FNR, such fact did not "constitute a bar" to parents' recovery of tuition paid to Cooke (id. at pp. 18-19). The IHO reasoned that the parent, "being sure of the needs of the [s]tudent and of the inappropriateness of the program offered" by the CSE, had no reason not to immediately make arrangements for her attendance at Cooke (id. at p. 19). Accordingly, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Cooke for the 2011-12 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district did not offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief.

Initially, the district argues that the IHO erred in addressing the issue of the recommended educational placement because, according to the district, the parent failed to allege in his due process complaint notice a factual basis for why the 12-month program in a 12:1+1 special class was not appropriate for the student. In the alternative, the district argues that the IHO erred in finding the 12:1+1 special class not appropriate because the IHO misinterpreted "management needs" within the State regulations to mean or include only behavioral "management needs." The district claims, instead, that the recommended 12:1+1 special class was appropriate because the student exhibited "management needs" that related to her academic achievement, functional performance and learning and required significant supports such as 1:1 attention, prompting and refocusing, and directions reread. Further, the district asserts that the parent's argument that the recommended 12:1+1 special class was not appropriate was disingenuous, since Cooke offered a similar student-to-teacher ratio. The district also argues that the IHO's finding that it would be inappropriate to place the student in an educational environment with students whose behaviors interfered with instruction was "unwarranted and speculative." Noting that such an analysis related to the functional grouping of the proposed classroom—a matter relevant to the implementation of the IEP—the district asserts that there could be no finding of a denial of a FAPE on this basis, since it was clear that the student would not be educated under the proposed IEP. In any event, the district argues that there was no evidence in the hearing record that the student would be inappropriately grouped in the proposed classroom.

Next, the district argues that the parent did not meet his burden of establishing the appropriateness of the educational program at Cooke. The district argues that: Cooke did not provide the student with a 12-month program; that the functional grouping of the student's classroom as Cooke was "far too disparate" for the student to receive meaningful educational benefits; and that the student "ha[d] made very little academic progress" in terms of objective academic measurements. The district also asserts that the IHO erred in finding that equitable considerations weighed in favor of tuition reimbursement because the parents had no intention of placing the student in a public school, as evidenced by the fact that the student had never attended a public school and that the parent signed the enrollment contract with Cooke just two days after the June 2011 CSE meeting. Further, the district asserts that the parent visited the assigned public school site after he signed the enrollment contract at Cooke, only because he perceived an obligation to do so. Moreover, the district notes that the parent's August 24, 2011 notice of unilateral placement was untimely because the letter and notice were sent almost one month after the parent visited the school and two months after he signed the enrollment contract with Cooke.

In an answer and cross-appeal, the parent responds to the district's petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parent the costs of the student's tuition. In response to the district's claim that the parent did not properly raise the issue of the student's placement in the due process complaint

notice, the parent asserts that the due process complaint notice challenged the recommended 12-month program in a 12:1+1 special class placement in a specialized school and, more specifically, set forth that such placement was inappropriate because the student did not require a 12-month school year, the population of students in a 12:1+1 special class were "far lower functioning and d[id] not resemble" the student, and that the program was not otherwise reasonably calculated to confer a benefit to the student. The parent also asserts that the IHO correctly determined that the 12:1+1 special class placement was not appropriate for the student because she had no discipline problems or management needs that would interfere with the instructional process.

The parent also interposes a cross-appeal, asserting that the IHO erred in his determinations which were adverse to the parent. Specifically, the parent alleges that the IHO erred in finding that the district representative met regulatory criteria because she had no knowledge about the general education curriculum and availability of resources within the district. In addition, the parent argues that the IHO erred in determining that the student's transition plan was appropriate because the plan, according to the parent, was vague and generic. The parent also asserts, relative to the development of the transition plan, that the district violated State regulations when it failed to invite the student and agency representatives responsible for providing transition services to attend the CSE meeting. Next, the parent argues that the IHO erred in failing to address the district's lack of testimony regarding the adequacy of the assigned public school site and the profile of students in the proposed classroom. Specifically, the parent asserts that there was no evidence that the assigned public school site could implement the student's June 2011 IEP or offer the required services and that the student would not be grouped with similar peers in the assigned classroom because the population of students in the district's 12:1+1 special classes were far lower functioning than the student. The parent also argues that the student was "way beyond the menial work-study program" offered at the assigned public school site.

In an answer to the parents' cross-appeal, the district argues, among other things, that: the district representative met regulatory criteria; that the IHO correctly found that the transition plan was more than sufficient to address the student's transition needs; that, under State regulations, participating service providers are only required to attend the CSE meeting "[t]o the extent appropriate," which would not have been the case here; and that it was not required to establish the appropriateness of the assigned public school site, including whether the student would have been functionally grouped in the assigned classroom.

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. June 2011 CSE Composition

The parent argues that the IHO erred in determining that the district representative, who attended the June 2011 CSE meeting, met the regulatory criteria and qualifications to serve in that role. Specifically, the parents argue that the district representative did not have knowledge of the recommended program and had only taught in in an elementary specialized school and observed a 12:1+1 special class, over 12 years prior.

State and federal law requires the attendance of a district representative at the CSE meeting (see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]; 8 NYCRR 200.3[a][1][v]). Such a member of the CSE is described as a representative of the district who "(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of the resources of the local educational agency" (20 U.S.C.

§ 1414[d][1][B][iv]; 34 C.F.R. 300.321[a][4]; see 8 NYCRR 200.3[a][1][v]). Moreover, as is the case here, State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist, provided that such individual meets the above statutory qualifications (8 NYCRR 200.3[a][1][v]).

The evidence in the hearing record shows that attendees at the June 2011 CSE meeting included a district special education teacher (who also served as the district representative), a district school psychologist, the parent, an additional parent member, and, by telephone, the assistant had of school from Cooke (see Dist. Ex. 1 at p. 2; see also Tr. pp. 40, 42; Dist. Ex. 2 at p. 1).

Consistent with the IDEA and federal and State regulations, the hearing record shows that the district representative was qualified to provide or supervise special education (20 U.S.C. § 1414[d][1][B][iv][I]; 34 C.F.R. 300.321[a][4][i]; 8 NYCRR 200.3[a][1][v]). The hearing record indicates that the district representative was a certified special education teacher and, although she had not personally taught in or observed in a 12:1+1 special class at the high school level, she had taught in a school that offered 12:1+1 special class programs and had observed 12:1+1 special classes at the elementary school level (Tr. pp. 37, 74). She testified that she had been responsible for conducting annual reviews for students and was familiar with a variety of programs, including special class programs in district specialized schools (Tr. pp. 37-38, 85, 89-93). The district representative's qualifications are sufficient in this regard and there is no requirement in the IDEA or federal or State regulations that the district representative have specific experience through personal participation in each program on the continuum, but only that he or she is familiar with the program options (20 U.S.C. § 1414[d][1][B][iv]; 34 C.F.R. 300.321[a][4]; 8 NYCRR 200.3[a][1][v]).

In addition, the hearing record demonstrates that the district representative was knowledgeable about both the curriculum and availability of resources of the district (20 U.S.C. § 1414[d][1][B][iv][II], [III]; 34 C.F.R. 300.321[a][4][ii], [iii]; see 8 NYCRR 200.3[a][1][v]). For example, the district representative testified at the impartial hearing that it was her responsibility as the district representative at the CSE meeting to, among other things, explain the continuum of services to the parents and to have knowledge of the various programs (Tr. pp. 40-41, 73). She testified that, during the June 2011 CSE meeting, she reviewed the different programs that were available and also discussed why the team felt the 12:1+1 special class placement was the most appropriate program for the student (Tr. pp. 50-51). The district representative testified that a special class included a small number of students and a teacher trained in special education and that a district specialized school offered a more intensive, 12-month school year program for students who exhibited significant delays, academically or cognitively (Tr. p. 49). She added that such district specialized schools could be implemented in separate schools or within buildings that also housed regular education students (Tr. pp. 49-50). Accordingly, there is no evidence in the hearing record that indicates that the district representative in any way lacked knowledge regarding the special education program options for the student and availability of resources in the district.

Moreover, even if I were to accept the parents' argument that the district representative was not qualified to serve in that role, the hearing record demonstrates that the June 2011 CSE discussed and considered other program options for the student and that there was at least one other CSE member, the district school psychologist, who was aware of the special education program options for the student (see Tr. pp. 101-04; Dist. Ex. 2 at p. 1; cf. A.H., 394 Fed. App'x

at 720 [holding that a student was not denied a FAPE where the CSE did not have the student's actual special education teacher but where another special education teacher was present who had knowledge of the special education program options]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646 [S.D.N.Y. 2011] [finding that the absence of a special education teacher or provider was a procedural violation of the IDEA but that the student was not denied a FAPE because "[s]everal of the CSE members had extensive backgrounds and relevant certifications in special education"]).

B. June 2011 IEP

1. 12:1+1 Special Class

Initially, the district argues that the parent failed to allege in the due process complaint notice the basis for the claim that the recommended 12-month program in a 12:1+1 special class in a specialized school was not appropriate for the student. In the due process complaint notice, the parent alleged that the recommended placement was inappropriate for the student, as it was made without sufficient knowledge of the student's needs (Dist. Ex. 8 at p. 2). The parent also maintained that the student required a more restrictive and "highly individualized" class setting and opined that the student did not require a 12-month school year program, since the student held a part-time job and spent time with family and friends during the summer (id. at pp. 2, 3). Based on these allegations, the due process complaint notice was sufficient to put the district on notice "of the nature of the problem" relative to the placement recommendation in the June 2011 IEP, "including facts relating to such problem" (see Dist. Ex. 9 at pp. 1-3; see also 20 U.S.C. § 1415[b][7][A][ii][III]; see 34 CFR 300.508[b][5]; 8 NYCRR 200.5[i][1][iv]). Moreover, at the impartial hearing, the district moved to limit the scope of the hearing to the issue of whether the 12:1+1 special class placement, as included on the June 2011 IEP, was appropriate, as opposed the appropriateness of the proposed classroom at the assigned public school site, thereby demonstrating the district's understanding that the placement on the IEP was at issue (see Tr. pp. 13-22; cf. M.H., 685 F.3d at 250-51 [holding that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice]). Accordingly, the district had sufficient notice and was aware of the parents' challenge to the educational placement.

The district also argues that the IHO's interpretation of "management needs" under the State regulations was incorrect because management needs refer to more than behavioral needs and includes academic deficits that interfere with the instructional process. The district claims that the student exhibited significant academic deficits that interfered with the instructional process and required a significant amount of prompting and refocusing and that, consequently, the 12:1+1 special class was appropriate for the student. The parent argues that the IHO's determination was correct and, also, that the student did not require a 12-month school year program.

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]). In turn, "management needs" 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 related to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (see 8 NYCRR 200.1[ww][3][i][a]-[d]).

Although the IHO correctly found that the hearing record demonstrates that the student "ha[d] significant need for individualized specialized instruction to address her significant academic deficits," the hearing record does not support the IHO's finding that, because the student did not have any behavioral needs, there was nothing to indicate that her management needs would interfere with the instructional process (see IHO Decision at p. 15). In so doing, the IHO interpreted "management needs" too narrowly. As detailed above, "management needs" also include academic factors and needs, which are present in this case (see 8 NYCRR 200.1[ww][3][i][a], [d]). As described below, the hearing record demonstrates that the student's academic management needs interfered with the instructional process to the extent that an additional adult was needed within the classroom (see 8 NYCRR 200.6[h][4][i]).

The district representative testified that the June 2011 CSE based their recommendation for a 12:1+1 special class on information that the student's achievement was significantly below grade level and she exhibited deficits in attention and concentration (Tr. pp. 48-50). In addition, the district representative testified that the CSE discussed how the student needed the support of the paraprofessional in the class to serve as an "extra pair of hands to keep her focused" (Tr. p. 50).

Consistent with the testimony of the district representative, a March 8, 2011 psychoeducational evaluation report completed by the district and reviewed by the June 2011 CSE reflected that, in March 2011 of her tenth grade year, the student's performance on the administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) ranged from a grade equivalent of 1.8 in reading comprehension and 2.1 in spelling, to 2.0 in math problem solving and 2.4 in numerical operations (Dist. Ex. 3 at p. 4; see Dist. Ex. 1 at p. 5). Testing completed by Cooke on May 4, 2011 yielded somewhat higher results on the administration of the Group Reading Assessment and Diagnostic Evaluation (GRADE) and somewhat lower results on the Group Mathematics Assessment and Diagnostic Evaluation (GMADE) (see Dist. Ex. 1 at p. 3). Specifically, the student performed at a grade equivalent of 3.7 in vocabulary, 4.9 in reading comprehension, and 1.7 in computation and problem solving (id.). The hearing record shows that discussion at the June 2011 CSE meeting regarding the student's present levels of performance reflected that the student was able to perform somewhat higher in the classroom setting with teacher supports and indicated that the student read independently at a beginning fifth grade level and exhibited listening comprehension at a sixth grade level (Tr. p. 43; see Dist. Ex. 1 at p. 3). The student was also described in the June 2011 IEP as having difficulty retaining information such as basic mathematics facts, comprehending longer passages, understanding inferences, remembering how to use a calculator, and solving word problems with regard to both processes and applications (Dist. Ex. 1 at pp. 3-4). According to a February 24, 2011 social history interview, the parent also indicated that the student's reading skills were approximately at a third grade level and that her mathematics skills were weaker (Dist. Ex. 5 at p. 2).

Minutes of the June 2011 CSE meeting reflected that the CSE also reviewed the student's academic management needs (Dist. Ex. 2 at p. 1). Accordingly, the June 2011 IEP recommended support for academic management needs, including: small group instruction; directions reread and rephrased, as needed; scaffolding; visual and auditory cues; charts, graphs, and note-taking

strategies; use of a calculator; redirection to tasks; teacher modeling and prompts; use of a multisensory teaching approach; preferential seating; and the use of organizers and planners (Dist. Ex. 1 at pp. 3, 5).[3] Furthermore, to address the student's social/emotional management needs, the June 2011 IEP recommended redirection to task, as needed, and positive reinforcement for on task behavior (id. at p. 7). Teacher comments reflected in the October 2010 classroom observation report indicated that the day of the observation was a "good day" for the student but that, generally, she was much more distracted and had a difficult time focusing on lessons, including "the read-alouds" (Dist. Ex. 4).

The student's level of need was also reflected in information provided by the student's then-current teachers in a June 2011 Cooke progress report, which was available to the June 2011 CSE (see Tr. p. 43; see generally Dist. Ex. 7). In that report, the student's ELA teacher indicated that the student continued to benefit from provision of frequent prompting to stay focused and on task, directions retold, and 1:1 support from the assistant teacher during class (Dist. Ex. 7 at pp. 2-3). The ELA teacher also indicated that the student really struggled with the figurative language and abstract concepts presented in a novel the class read and that she responded to this by shutting down, becoming a distraction to other classmates or by sketching in a notebook instead of attempting to follow along or listen to the reading (id. at p. 3). Similarly, the student's earth science teacher indicated that the student demonstrated major difficulties comprehending the depth of the concepts and contents presented in class and struggled with the reading material, homework, and tests, regardless of all of the existing modifications and scaffolding provided (id. at p. 8).[4] The teacher also stated that the student would benefit from a class that matched her learning pace (id.).[5]

Finally, with regard to the parents' objection to the CSE's recommendation that the student be placed in a 12-month school year program, which the IHO did not address, the IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR

[3] Although the director of Cooke testified that he opposed the 12:1+1 recommendation because the student required a much smaller instructional group than 12 students, one teacher, and a paraprofessional, the academic management needs section of the IEP also recommended provision of small group instruction (Tr. pp. 129-30; Dist. Ex. 1 at p. 3).

[4] The June 2011 progress report reflected that during the first trimester the student had been provided with mnemonic devices, visual reinforcements, repeated reviews, and tests using word banks and vocabulary words grouped together within a matching format (Dist. Ex. 7 at p. 8).

[5] While it is not clear whether or not the June 2011 CSE had such additional information about the student before it, the student's ELA/social studies teacher, who taught the student during both the 2010-11 and 2011-12 school years, also testified regarding the student's academic management needs and the additional supports she required, including 1:1 support to help the student to focus and to assist with difficult material (Tr. pp. 165, 172-73, 187, 193-94). He also testified that he believed that a class with 12 students and two adults in the room was appropriate for the student (Tr. pp. 194-95).

200.1[aaa]; see 34 CFR 300.106).[6] In this case, the district representative testified that the June 2011 CSE recommended a 12-month program for the student "because she would be reinforced academically over the summer" (Tr. p. 50). However, there is not clear evidence in the hearing record that the student exhibited regression, thereby warranting a 12-month school year program (see Tr. pp. 66-67). The hearing record does reveal, however, that the 12-month program was "not mandatory" and that the parents could "opt out of it for the summer" (Tr. pp. 65-66). Thus, the inclusion of such a recommendation in the student's IEP does not rise to the level of a denial of a FAPE in this instance.

Based on the foregoing, the evidence contained in the hearing record establishes that the district's recommended 12:1+1 special class in a specialized school was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year. Consequently, I find that the IHO erred in this respect.

2. Transition Plan

The parent claims that the transition plan included in the student's June 2011 IEP failed to include annual goals for the transitional services and was generic and vague. The district argues that the IHO correctly determined that that the transition plan recommended by the CSE was "more than sufficient" because the plan addressed the student's transition needs (see IHO Decision at p. 13).

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). Accordingly, pursuant to federal law and federal 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.). 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]). At least one district court has noted that "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL

[6] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum which states that, generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

Initially, the parent argues for the first time on appeal that the CSE failed to invite the student and any agency representatives responsible for providing the student's transition services to the June 2011 CSE meeting. While review of the parent's due process complaint notice shows that this issue was not s sufficiently raised (20 U.S.C. § 1415 [f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d at 188-89 & n.4; see also 20 U.S.C. § 1415[c][2][E][i]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; M.H., 685 F.3d at 249-50), nevertheless, the hearing record shows that, in accordance with the applicable State regulation, the district invited the student, via the parents' letter of invitation, to participate in the June 2011 CSE (Tr. p. 69; see 8 NYCRR 200.4[d][4][c]). Moreover, although the student did not attend the June 2011 CSE meeting, the hearing record reflects that, also consistent with State regulations, her preferences and interests were considered at the meeting (Tr. pp. 62-63; see 8 NYCRR 200.4[d][4][c]). As to the parents' contention that the district made no attempt to invite a representative from agencies likely to be responsible for providing or paying for the student's transition services, the relevant State regulation sets forth that such invitation shall be made "[t]o the extent appropriate" (8 NYCRR 200.4[d][4][c]) and, for the reasons discussed herein, there is no indication in the hearing record that the absence of a representative of any such participating agency resulted in a denial of a FAPE to the student.

As to the June 2011 CSE's considerations of the student's preferences and interests, the IEP indicates, for example, that the student was interested in the arts and that she had participated in a community internship at a theater and had also worked with the lighting for the school show (Dist. Exs. 1 at p. 6; 2 at p. 2; see Tr. pp. 62-63, 226; Dist. Ex. 5 at p. 1).

Review of the transition plan included in the student's June 2011 IEP reveals that it included long-term adult outcomes for the student that targeted the student's integration into the community, participation in a vocational training program, independent living, and competitive employment, all with supports (Dist. Ex. 1 at p. 16). The transition plan also indicated the objective that the student receive an IEP diploma (id.).[7] The June 2011 IEP also listed transition services in the areas of: (1) instructional activities, which indicated that the student would be provided with academic instruction to support long-term academic and long-term life goals; (2) community integration, which indicated the student would learn about community agencies and their functions and participate in school sponsored internships to learn workplace skills; (3) post high school, which indicated that the student would research vocational programs that matched her academic capabilities and personal interests; and (4) independent living, which indicated that the student would learn about personal finance including the use of an ATM and budgeting skills, as well as household management/safety and independent travel skills (id.; see Tr. p. 80). Relative to the specific transition services, although required by State regulations, the transition plan neglected to designate the party responsible for implementing each transition service and the applicable time

[7] While the parent originally argued in the due process complaint notice that the transition plan included in the student's June 2011 IEP failed to specify a diploma objective, it does appear that the parent continues to assert such argument on appeal (see Dist. Ex. 8 at p. 2). In any event, as noted above the transition plan included the objective that the students obtain an IEP diploma (Dist. Exs. 1 at p. 16; 2 at p. 2; see Tr. pp. 64-65).

frame for such implementation (i.e., whether the service would be provided in the fall, spring, or summer) (see 8 NYCRR 200.4[d][2][ix][e]).

Contrary to the parent's argument, the June 2011 IEP appropriately included an annual goal for the student to participate in a transition program that incorporated academics with life skills in preparation for post-secondary education (Dist. Ex. 1 at p. 11). The June 2011 IEP also included short-term objectives that corresponded to the student's transition plan, which focused on reading and following various routes on a simple map; identifying north, south, east, and west on a map; understanding and applying personal money management skills such as using an ATM and making deposits and withdrawals; and demonstrating an understanding of money values when shopping or eating in a restaurant (id.). While the parents alleged that the postsecondary goal was generic and broad, these short-term objectives adequately focused on the specific transitional needs of the student (id.).

Based on the foregoing, the transition plan developed by the June 2011 CSE contains certain deficiencies, which constitute technical defects that do not render the transition plan or the June 2011 IEP, as a whole, inappropriate such that it denied the student a FAPE. Therefore, the hearing record establishes that the IHO did not err in finding the transition plan sufficiently specific and relevant to the student's post-secondary needs and goals.

C. Challenges to the Assigned Public School Site

The parent argues that there was no evidence in the hearing record demonstrating that the assigned public school site could have implemented the student's June 2011 IEP or offered the student all of her required services. The district argues that it was not required to establish that the assigned public school site could implement the student's IEP because any such claims advanced by the parents are speculative and pre-mature because the student was not educated under the IEP and did not attend the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; 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]; 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]).

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, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is

into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). 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]).[8]

When the Second Circuit spoke 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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the June 2011 IEP because a retrospective analysis of how the district would have implemented the student's 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 student did not attend the district's assigned public school site. Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how

[8] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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., 584 F.3d at 420 [the 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.

the district would have executed the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87).[9]

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 in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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 June 2011 IEP or that the student would not have been functionally grouped in the proposed classroom.[10]

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and

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[9] In this case, because the student's June 2011 IEP recommended a 12-month program and the evidence in the hearing record does not reveal whether or not the parent explicitly opted out of the summer months of such program, it appears that the district was obligated to implement the student's IEP prior to the time that the parent rejected the program (see Parent Exs. A at p. 1; H at pp. 1-2). However, the hearing record does not suggest that the student was ever educated under the June 2011 IEP and the parent does not argue that this was as a result of the district's failure to implement the student's IEP.

[10] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. July 24, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; 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]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist., 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

there is no need to reach the issues of whether Cooke was an appropriate unilateral placement or consider whether equitable factors weigh in favor of an award of tuition reimbursement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]). Any of the parties' remaining contentions not expressly addressed herein have been considered and found to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 24, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and that directed the district to reimburse the parents for the cost of the student's tuition at Cooke.

Dated: **Albany, New York**
August 29, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER