The University of the State of New York

The State Education Department
State Review Officer
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No. 12-129

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, Lisa R. Khandhar, Esq., of counsel

Partnership for Children's Rights, attorneys for respondents, Todd Silverblatt, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents'[1]) daughter and granddaughter and ordered it to pay the student's tuition costs at the Cooke Center for Learning and Development and the Cooke Center Academy (collectively, Cooke) for the 2011-12 school year. The parents cross-appeal from the IHO's decision to the extent that it did not address certain of their challenges to the school to which the district assigned the student. 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

[1] The due process complaint notice states that it was brought on behalf of the student's mother and grandmother (Parent Ex. I at p. 1; see Tr. pp. 185-86); collectively referred to here as the parents.

psychologist, and a school district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has a history of speech-language and cognitive delays, as well as social/ emotional difficulties, and has been diagnosed as having a mild intellectual disability/mental retardation and attention deficit hyperactivity disorder (ADHD) (Tr. p. 340; Parent Ex. M).

Academically, the student struggles with reading, including word reading and vocabulary; math, including her ability to perform calculations; writing, including punctuation and her ability to express herself clearly using complete thoughts; and spelling (Dist. Ex. 3; Parent Ex. A at pp. 3-4). Socially, the student at times becomes frustrated with peers who do not work at her pace (Parent Ex. A at pp. 3, 5). According to the parents, the student was classified as a student with a disability who was eligible for special education and related services upon aging out of preschool, and she attended a 12:1+1 special class in the district's public schools through the 2005-2006 school year (Parent Ex. I at p. 2; see Tr. p. 187). The parents enrolled the student at Cooke for the 2006-07 school year and the student has remained at the school since that time. (Parent Exs. I at p. 2; M).[2]

On March 24, 2011, the parents signed a contract re-enrolling the student in Cooke for the 2011-12 school year (Parent Ex. G at p. 2).[3] The CSE convened a meeting on June 3, 2011 to conduct the student's annual review and develop the student's IEP for the 2011-2012 school year (Parent Ex. A). In developing the IEP, the CSE relied upon a classroom observation, progress reports and the results of academic testing conducted by the private school, and input from the student's grandmother and Cooke staff (Tr. pp. 22-26, 209-10, 305-06; Dist. Ex. 1 at pp. 2-3). The CSE recommended in the IEP that the student attend a 12:1+1 special class in a specialized school and receive related services of group speech-language therapy twice weekly and individual and group counseling once weekly each (Parent Ex. A at pp. 1, 13). The CSE also recommended in the IEP that the student receive extended school year (ESY or 12-month) services, adapted physical education, and alternate assessment (id.).

By letter dated June 9, 2011, the parents rejected the placement recommended by the June 2011 CSE and advised the district that they would be enrolling the student in a summer program at Cooke (Parent Ex. C at p. 3). The parents asserted that the 12:1+1 special class program offered by the district was not educationally appropriate for the student (id.). The parents further asserted that the student needed a class with two teachers in order to receive the support and small group instruction that she required to progress academically (id.). The parents reported that they had not yet received any offer of a specific "public school placement" for the student for summer 2011 and stated that, unless an appropriate summer placement was offered, they would seek direct payment of the student's tuition for the Cooke summer program from the district (id.).

By final notice of recommendation (FNR) dated June 14, 2011, the district summarized the recommendations made by the June 2011 CSE and notified the parents of the public school site to which the student was assigned and at which her IEP would be implemented for the 2011-2012 school year (the assigned school) (Parent Ex. B at p.1).

On July 5, 2011 the student's mother signed a contract enrolling the student in a six-week summer program at Cooke (Parent Ex. F). Subsequently, in a letter to the district dated July 14, 2011, the parents indicated that they had visited the assigned public school site approximately one

[2] Cooke is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The March 2011 contract appears to be for the 10-month school year beginning in September 2011 (Parent Ex. G at pp. 1-2).

year earlier in June 2010 because the district had previously offered that site to the student and the parents had already concluded that it was not appropriate for the student (Parent Ex. D at p. 3). On the basis of the June 2010 visit, the parents asserted that the program at the assigned school was academically below the student's level and would cause the student to regress (id. at p. 4). The parents also asserted that the transition program offered at the assigned school would not adequately prepare the student to successfully integrate into the community and to obtain meaningful employment (id.). The parents further contended that during a second visit to the assigned school in June 2011, the parent coordinator of the assigned school informed them that the program had not changed in the interim (id.). Moreover, similar to their observations during their prior visit in June 2010, the parents reported that the students at the assigned school appeared to be "more handicapped" than the student and that the school smelled of urine (id. at pp. 3-4). The parents rejected the recommended placement and indicated that they would continue the student's enrollment at Cooke for summer 2011 and seek direct payment from the district (id. at p. 4).

By letter dated August 9, 2011, the parents reiterated the concerns stated in their previous letters to the district and requested direct payment of the student's Cooke tuition for the 2011-12 school year (Parent Ex. E at pp. 3-4).

A. Due Process Complaint Notice

By due process complaint notice dated October 4, 2011, the parents requested an impartial hearing (Parent Ex. I). The parents asserted that, at the time of the June 2011 CSE meeting, the district had not complied with its obligation under the IDEA to evaluate the student at least every three years and the student had not been evaluated since 2005, causing the CSE to have insufficient evaluative data on which to base its recommendation (id. at pp. 1, 3). The parents contended that the resultant IEP was inappropriate because the student required small group instruction to make progress, which could only be provided in a classroom with two teachers (id. at pp. 2-3). Furthermore, the parents asserted that the academic management strategies specified by the June 2011 IEP could not be implemented in a 12:1+1 classroom setting (id. at p. 3).

The parents also raised claims regarding the assigned public school site, based on their visits to the school in June 2010 and June 2011 (Parent Ex. I at pp. 3-4). Specifically, the parents alleged that based on their observations, the students at the assigned school "appeared to be more handicapped" than the student, with disabilities including physical disabilities and emotional disturbances (id.). The parents also contended that the academic program at the assigned school was insufficient to meet the student's needs (id.). Finally, the parents asserted that the transition program available at the assigned school was insufficient to ensure the student's "integrat[ion] into the community and obtain[ment] of meaningful employment" (id. at p. 4).[4]

The parents asserted that Cooke provided the student with the small group instruction and support she required to make educational progress (Parent Ex. I at pp. 2, 4). Additionally, they stated that Cooke met the student's nonacademic needs by providing activities of daily living (ADLs) and vocational training, as well as by integrating community inclusion throughout the

[4] The parents also argued that the assigned school had "a pervasive smell of urine" and that the student "would be completely turned off in such a setting" (Parent Ex. I at p. 3). The IHO rendered no findings with respect to these allegations, and the parents do not cross-appeal his failure to do so.

student's program (id. at p. 5). The parents accordingly requested that the district be required to pay the student's tuition costs at Cooke for both the 2011 summer session and the 2011-12 10-month school year (id.).

In a response to the due process complaint notice dated October 14, 2011, the district asserted that the June 2011 CSE relied on a classroom observation and a March 2011 Cooke progress report in developing the student's IEP, and that Cooke staff participated in the CSE meeting (Dist. Ex. 1 at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on January 26, 2012 and concluded on February 29, 2012 after three hearing dates (Tr. pp. 1-420). In a decision dated May 16, 2012,[5] the IHO determined that the district did not offer the student a free appropriate public education (FAPE) for the 2011-12 school year, Cooke was an appropriate placement for the student, and equitable considerations did not weigh against granting the parents' request for public funding of the student's tuition at Cooke (IHO Decision at pp. 4-11). Specifically, the IHO found that, because the district did not conduct any educational testing of the student in accordance with its obligation to evaluate the student every three years, it had insufficient evaluative data on which to base its recommendation (IHO Decision at pp. 4-6). The IHO also found that the recommended placement would provide insufficient support for the student's needs and that the district failed to establish that the student could make progress in a 12:1+1 classroom (id. at pp. 6-8). The IHO next found that Cooke constituted an appropriate placement for the student because she made academic progress while attending the school and it provided her with the small group and individual instruction she required (id. at pp. 9-10). Finally, the IHO found that equitable considerations supported the parents' claim for the cost of the student's Cooke tuition, as the parents cooperated with the district and gave notice of their intention to seek public payment for the student's Cooke tuition (id. at pp. 10-11).

IV. Appeal for State-Level Review

The district appeals, contending that the IHO erred in finding that it did not offer the student a FAPE and that equitable considerations supported the parents' claim. Specifically, the district argues that it relied on sufficient evaluative information to develop an appropriate IEP for the student, including a classroom observation, Cooke progress reports, and information from the parents and Cooke staff. Accordingly, the district asserts that the June 2011 IEP adequately reflected the student's needs and present levels of performance, including test results from only a few months prior to the CSE meeting. Furthermore, the district contends that the student's performance had been consistent over the past several years, such that no further evaluation was necessary. The district also asserts that none of the CSE members, including Cooke staff members, requested that the district conduct further assessments of the student, and that Cooke staff conceded

[5] The hearing record submitted to the Office of State Review by the district included a "Corrected" IHO decision, dated May 21, 2012 ("Corrected" IHO Decision at p. 11). The latter decision specifies the amount of tuition that the district was ordered to pay (compare IHO Decision at p. 11, with "Corrected" IHO Decision at p. 11). I remind the IHO that, once sent to the parties, his decision is final unless timely appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

that the June 2011 IEP accurately described the student's functional levels. The district argues that while the student's teachers from Cooke testified that a 12:1+1 classroom would not provide the student with sufficient support, the recommended placement provided related services and strategies designed to address the student's academic and social/emotional management needs, including many of the strategies recommended by Cooke staff. With regard to the appropriateness of the assigned school, the district asserts that because the parents rejected the offered placement, it was not required to establish that it could have implemented the student's IEP at the assigned school. In any event, the district asserts that the student would have been appropriately functionally grouped academically and that her transition needs would have been met by services including work training, interaction with non-disabled peers, and community trips. The district next contends that, even if it did not offer the student a FAPE, equitable considerations preclude granting relief to the parents, as the hearing record indicates that they never intended to enroll the student in a public school placement.[6] Finally, the district asserts that, even if it did not offer the student a FAPE and if equitable considerations favor the parents' claim for relief, they are not entitled to direct payment of the student's Cooke tuition, as the parents failed to establish that they were legally obligated to make payments on the tuition contract.

The parents answer the petition, denying the district's assertions and requesting that the IHO's tuition award be upheld, and cross-appeal the IHO's failure to rule on their challenges to the appropriateness of the assigned school. The parents assert that the student would not have been appropriately functionally grouped in the classroom in which she would have been placed had she attended the assigned school, and that the assigned school would not have met the student's transition needs.

The district answers the parents' cross-appeal, denying the parents' assertions for the reasons set forth in its petition.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; 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,

[6] The district does not challenge the IHO's determination that Cooke constituted an appropriate placement for the student.

129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL

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

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

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

VI. Discussion

A. June 2011 IEP

1. Sufficiency of Evaluative Data

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]; see Application of the Dep't of Educ., Appeal No. 07-018).

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]). While permissible, there is no requirement that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing.

The parents assert, and the district concedes, that the district failed to comply with the procedures related to conducting a reevaluation of the student at least every three years. Instead, in developing the June 2011 IEP, the CSE relied upon a classroom observation, a March 2011 Cooke progress report and testing results, and input from the student's grandmother and Cooke staff (Dist. Exs. 1 at pp. 2-3; 3; Tr. pp. 22-26, 209-10, 305-06). Additionally, as noted by the parents, none of the documents relied on by the June 2011 CSE in developing the student's IEP are contained in the hearing record.[7] However, I also note that the parents do not allege that the information reported in the present levels of academic achievement and functional performance in the student's IEP was inaccurate, and the evidence shows that Cooke staff testified that the IEP provided a generally accurate description of the student's academic performance levels (Tr. pp. 274-76, 294, 306, 308).[8] Furthermore, the Cooke student support services staff member (who

[7] It is unclear from the hearing record why the district introduced into evidence a Cooke progress report dated after the date of the June 2011 CSE meeting, rather than the progress report relied on by the June 2011 CSE, and why it chose not to place in evidence a report of the observation it conducted of the student in preparation for the CSE meeting.

[8] However, the student's mathematics teacher at Cooke for the 2011-12 school year considered the IEP's description of the student's levels of academic performance to rely too heavily on standardized assessments (Tr. pp. 369-73).

participated in the June 2011 CSE meeting) stated that she did not consider additional evaluations to be necessary at that time because the required information was available to the CSE in the form of reports from the student's Cooke teachers and service providers (Tr. p. 307).

Accordingly, although I agree with the parents and the IHO that the district improperly disregarded the proper procedures to reevaluate the student under the IDEA and State regulations, I do not find that the district's failure in this regard constituted the denial of a FAPE to the student for any ground alleged in the due process complaint notice. 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]). The parents argue that the district's failure to conduct the required reevaluation deprived the student of educational benefits because it had insufficient information on which to base its recommendation and accordingly recommended a classroom ratio that would not provide the student with adequate support (Parent Ex. I at pp. 1-3).[9] As described above, I have found that the allegation of a lack of sufficient information to formulate an IEP is belied by the evidence offered at the impartial hearing; however, the parents' specific contention related to an appropriate classroom ratio is more fully addressed below. Accordingly, the district's failure to follow the procedures in conducting the required triennial reevaluation did not deny the student a FAPE for the reason asserted by the parents.

2. 12:1+1 Special Class Placement

The parents assert that the district failed to offer the student a FAPE because a 12:1+1 special class would not have met the student's need for intensive in-class small group instruction. The evidence shows that at the time of the impartial hearing, the student was attending Cooke where she was enrolled in special education classes of no more than 10 students, each of which was staffed by a teacher and a teacher assistant (Tr. pp. 237, 319, 324, 343, 361). The assistant head of school at Cooke testified that, based on his knowledge of a "typical" 12:1+1 special class, the student needed much smaller group instruction on an academic level (Tr. pp. 258-59). He also expressed concern about such a class impeding or restricting the student's social emotional development (id.). The assistant head of school opined that a 12:1+1 special class would not be the "most appropriate" placement for the student (Tr. p. 259).

The Cooke student support services staff member testified that the IEP accurately described the student (Tr. p. 306). In describing the student's needs, she testified that the student had deficits in basic academic skills and also needed "a lot" of support with basic learning skills including organization, time management, approaching activities and tasks, and transitional services (Tr. p. 293). The Cooke staff member reported that during the CSE meeting, she was responsible in part for creating the academic management needs listed on the IEP (Tr. pp. 293-94). She recalled that she raised an objection at the CSE meeting to the recommendation for a 12:1+1 special class

[9] Specifically, I note that the parents raised no challenges to the appropriateness of the June 2011 IEP with regard to the student's present levels of academic achievement and functional performance or the annual goals contained therein (Parent Ex. I).

placement (Tr. p. 294). She informed the CSE that in the student's then-present setting at Cooke, the student was in classes that did not exceed ten students (Tr. pp. 294-95). The Cooke staff member indicated that she had concerns about the 12:1+1 being supportive enough for the student because of the student's need for a small, supportive environment (Tr. p. 295). She opined that a number of the student's needs listed in the academic management section of the student's IEP could not be met in a 12:1+1 setting (Tr. pp. 295, 308).[10]

The student's English Language Arts (ELA) and social studies teacher at Cooke testified that the student needed a small group setting where she could receive direction and instructions in both whole group settings and small group, and individual reinforcement (Tr. p. 317). She further stated that the student required 1:1 support in the classroom (Tr. p. 320). The student's mathematics teacher at Cooke testified that, because of the student's attentional issues, after whole group instruction he or his assistant teacher would sit with the student and go through the instructions again to make sure that the student understood the main points and could relate them to the work that was in front of her (Tr. pp. 345-46). He noted that it was very difficult for the student to sustain attention during whole class instruction (Tr. p. 346). The math teacher opined that additional support and 1:1 instruction was essential for the student and that without it she would not be able to connect the knowledge she was getting in the classroom to the "context of her everyday life" (Tr. p. 347). He further opined that this was particularly important because the student was in her senior year and a lot of the work done in math class focused on the student's transitional goals (id.). According to the math teacher, students at Cooke learned from each other during small group instruction (Tr. p. 355). He testified that a 12:1+1 special class was not appropriate for the student based on the fact that there were too many students and not enough educational professionals in the class (Tr. p. 362). He stated that in a class of students with profiles similar to the student there would not be enough time or resources to provide the student with the level of support she needed (Tr. p. 362).

However, personnel from the district had a differing viewpoint, and the district representative from the June 2011 CSE meeting testified that none of the CSE members objected to other elements of the IEP such as the annual goals, academic management needs, transition plan, or recommendation for alternate assessment (Tr. pp. 29-32), and the resultant IEP reflected the discussion that took place at the CSE meeting (compare Parent Ex. A with Dist. Ex. 3). To address the student's academic delays, the CSE recommended that the student be placed in a 12:1+1 special class in a specialized school (Parent Ex. A at p. 1). The CSE also recommended that the student be afforded numerous environmental modifications and human/material resources including small group instruction; directions read, reread and rephrased as needed; graphic organizers/charts/graphs/checklists; manipulative/graph paper; tasks broken down into small sequential steps; visual and auditory cues, reminders to work slowly and carefully; direct teacher modeling; and a multisensory approach (id. at p 3). The district representative testified that these academic management strategies were added to the student's IEP to support her ability to access the curriculum in the classroom (Tr. p. 30). Consistent with the student's identified needs, the CSE

[10] The following environmental modifications and human/material resources were listed in the academic management needs section of the student's June 3, 2011 IEP: small group instruction, directions read, reread and rephrased as needed; graphic organizers/charts/graphs/checklists; manipulative/graph paper; tasks broken down into small sequential steps; visual and auditory cues; reminders to work slowly and carefully; direct teacher modeling, and a multisensory approach (Parent Ex. A at p. 3).

recommended annual goals and short term objectives targeting the student's deficits in math, ELA, and written expression (Parent Ex. A at pp. 7-8). To address the student's language processing difficulties, the CSE recommended that she receive two forty-five minute sessions of speech-language therapy per week (id. at p. 13). In addition, the CSE developed an annual goal designed to improve the student's fluency in receptive and expressive language (id. at p. 9). To address the student's social/emotional needs, the CSE recommended that the student receive one forty-five minute session of individual counseling per week and one forty-five minute session of group counseling per week, and developed an annual goal and short term objectives related to the student's ability to resolve conflicts and participate cooperatively in a small group, among other things (id. at pp. 10, 13).

To explain why a 12:1+1 special class was an appropriate selection on the student's IEP, the district called the special education teacher of the special class at the assigned public school site. The special education teacher testified that the paraprofessionals in a 12:1+1 class served in a support role, running student groups or supporting students individually based on the direction of the special education teacher (Tr. pp. 100-01). She disagreed with the parents' assertion that small group instruction was not available in a 12:1+1 classroom (Tr. p. 104). Having reviewed the student's IEP, the special education teacher testified that certain strategies could be used to instruct her, including explaining the task to be done, modeling the task, and providing the students with a chance to work together in small groups or pairs to perform the assessment task (Tr. pp. 113-14).[11] The special education teacher also disagreed with the parents' claim that a 12:1+1 class staffed by a teacher and paraprofessional would be incapable of providing the academic management resources included in the student's IEP (Tr. pp. 118-19).

With respect to the student-to-staff ratio, the evidence leads me to conclude that, understandably, the parents and staff from Cooke would have optimally preferred the slightly smaller ratio offered at Cooke. However, the evidence does not show that the district's proposed 12:1+1 classroom placement was incapable of providing the small structured setting or appropriate opportunities for individualized support in a special education environment and therefore it was reasonable for the CSE to conclude that the student was likely to progress. "The education provided need only be appropriate,—likely to produce progress, not regression—and not one that provides everything that might be thought desirable by loving parents." (D.D-S. v Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011] [internal quotations omitted] aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; Walczak, 142 F.3d at 132; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 144 [N.D.N.Y. 2004] ["While the IDEA requires districts to provide appropriate education to disabled students, this is not necessarily synonymous with offering disabled students the best educational opportunities available."]). For the reasons set forth above, I find that the district established how the services listed on the IEP would have met each of the student's identified needs and, accordingly, that the hearing record does not support the IHO's conclusion that the student would not have made progress in a 12:1+1 special class with the modifications and academic management strategies specified on her IEP.

[11] Each of these strategies, among others, is included on the June 2011 IEP (Parent Ex. A at p. 3).

B. Assigned School

With regard to the parents' cross-appeal, both of the challenges to the IHO's decision are assertions that the assigned school was not appropriate to meet the student's needs. However, neither of these challenges was raised with regard to the services recommended by the June 2011 IEP. A challenge to the adequacy of an assigned school alone, without a concomitant challenge to the student's IEP, is the equivalent of an assertion that the district cannot adequately implement the student's IEP at the assigned school, and the failure to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be but for the district's delay in implementation (see E.H., 2008 WL 3930028, at *11). As recently held by the Second Circuit, any evaluation of the substantive adequacy of an IEP "must focus on the written plan offered to the parents, [and s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 195 [2d Cir. 2012]). 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 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

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 J.F. v. New York City Dep't of Educ., 2013 WL 1803983, at * 2 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that under factual circumstances similar to those in this case in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dep't of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v New York City Dep't of Educ., 2013 WL 3814669, at *6, quoting R.E., 694 F.3d at 187 [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]).[12] In view of the foregoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site.

Because I have reviewed the entire record, as alternative findings I provide the following discussion of the evidence related to the alleged deficiencies in the implementation at the assigned public school site and find that, had the student attended the public school site, the evidence would not lead to the conclusion that there would be a denial of a FAPE.

1. Functional Grouping

The parents assert that the student would not have been appropriately grouped at the assigned school, noting that the teacher of the assigned classroom reported that all of the students in his class were classified as having an intellectual disability and the student was classified as having a learning disability. Furthermore, the parents assert that there is nothing in the hearing record to suggest that the student had received any diagnosis or exhibited any behavior to satisfy the definition of intellectual disability. In this case, the parents decided to unilaterally place the student at Cooke prior to the time that the district was required to implement the IEP in July 2011. A meaningful analysis of the parents' claims with regard to functional grouping and transition services would require me to determine what might have happened had the district been required to implement the student's IEP. However, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). With regard to functional grouping in the proposed district class, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications,

[12] 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 T.Y., 584 F.3d at 420 [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.

adaptations, and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall . . . provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics . . . in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 11-025).

In any event, even were the district required to establish that the student would have been appropriately functionally grouped at the assigned school, the hearing record indicates that the student had in fact received a diagnosis of a "[m]ild intellectual disability/mental retardation" from the developmental pediatrician who had been treating her since she was one year old (Parent Ex. M at p. 1). Furthermore, regardless of the student's classification, the hearing record show that she would have been grouped with students with similar needs in the assigned school placement.[13] At the time the student's IEP was developed in June 2011, she was 16 years old and functioning academically at a second to third grade level (Dist. Ex. 3; Parent Ex. A at p. 3). According to the district's special education teacher of the 12:1+1 classroom in the assigned school in which the district asserted it would have implemented the student's IEP, the students in the class ranged in age from about 15 to 17 years old and were primarily classified as students with intellectual disabilities (Tr. p. 105).[14] In general, the students' math and ELA skills fell between the first and fifth grade levels (Tr. pp. 106, 128-29). The special education teacher testified that three of the students in the 12:1+1 classroom received speech-language therapy and three students received counseling (Tr. pp. 110-11). He further testified that there were students in his class with characteristics similar to those of the student as described in her IEP and that the goals contained in the student's IEP were similar to the goals of some of his students (Tr. pp. 114-15, 120; see Tr. pp. 126-27). The special education teacher asserted that, notwithstanding the student's classification, she would be an appropriate fit for his classroom (Tr. pp. 135-39; see Tr. pp. 123-24). The assistant principal of the assigned school confirmed that the student population at the assigned school was diverse and included students with a variety of physical and developmental needs (Tr. pp. 75-76). According to the assistant principal, social/emotional needs were also taken into consideration when grouping students (Tr. p. 87). On the basis of this testimony, I find that the hearing record does not support a conclusion that, had the student attended the assigned school,

[13] It is well-established that a student's needs, rather than his or her disability classification, is the driving factor in determining whether the recommended placement offers the student a FAPE (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [holding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]; see also 20 U.S.C. § 1412[a][3][B] ["Nothing in the (IDEA) requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services[,] is regarded as a child with a disability"]; 34 CFR 300.111[d]).

[14] As the parents apparently agree with the district's assertion that the student would have been placed in this specific classroom (see Answer ¶ 48; but c.f. Pet. ¶ 24; Answer ¶ 10), for purposes of making alternative findings on this appeal I assume that testimony regarding the functional grouping in that classroom is relevant to the determination of whether the district offered the student a FAPE (but see R.E., 694 F.3d at 185-88; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 [S.D.N.Y. Oct. 16, 2012]).

the district would have deviated from her IEP in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 822; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).[15]

2. Transition Services

The parents assert that the district offered "scant" testimony regarding specific transition services at the assigned school, failed to provide details describing how the goals and outcomes in the student's IEP would be accomplished, and did not indicate whether the student would qualify for any vocational program within the school. However, the parents do not assert any particular transition needs of the student that would not have been met by the assigned school's available transition services.

Under the IDEA, to the extent appropriate for each individual student, 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]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age 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]). It must also include the transition services needed to assist the student in reaching those goals (id.). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]; see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F. 3d 18, 29-30 [1st Cir. 2008]; Virginia S. v. Dep't of Educ., 2007 WL 80814, at *10 [D. Hawaii Jan. 8, 2007]).[16]

As noted above, the student's transition plan was reviewed at the June 2011 CSE meeting and there was no objection from the parents or Cooke staff (Tr. p. 32). The student's grandmother testified that staff at the assigned school showed her the computer room and explained that they

[15] I note that the allegation with regard to the possible grouping of the student at the assigned school was, at the time the parents filed the due process complaint notice, entirely speculative, as it was based on the parents' observations when they visited the school that the other students in the assigned school "appeared to be more handicapped than" the student (Parent Ex. I at p. 4). Testimony regarding such an observation is insufficient to support a finding of denial of a FAPE (F.L., 2012 WL 4891748, at *14).

[16] In guidance issued to districts in November 2011, the State Education Department noted the following as "key factors to ensure the most successful transition for students with disabilities to adult life" that districts should consider in developing transition plans: (1) "[t]he results of age-appropriate transition assessments provided to the student"; (2) engaging the student's parents "so that the parents' concerns for the education of their child and the student's needs, strengths, preferences and interests are considered and documented"; (3) collaboration with "State and community agencies to provide the student with appropriate services that will assist the student to meet his or her post-school goals"; (4) providing instruction in the areas of career development; and (5) offering career development activities, job training, and career and technical education "in order to enhance employment opportunities and outcomes for the student" ("Transition Planning and Services for Students with Disabilities," Office of Special Educ. Mem. [Nov. 2011], available at http://www.p12.nysed.gov/specialed/publications/transitionplanning-2011.htm; see also Strongsville City Sch. Dist., 59 IDELR 176 [SEA OH 2012]).

teach the students to shop, which she reported the student was already capable of (Tr. p. 198). The student support services staff member from Cooke, who accompanied the grandmother on her visit to the assigned school, reported that the parent coordinator at the school did not provide them with information about transition services that specifically related to the student (Tr. pp. 296-97). The district presented three witnesses whose testimony included information regarding transition services available at the assigned school. The assistant principal indicated that the assigned school was an "occupational training center" that blended functional, standards-based academics with a transition curriculum (Tr. pp. 51, 57-60, 68-69, 72, 78). He testified that the school offered both onsite and community-based vocational experiences (Tr. pp. 58-59). In addition, he reported that staff at the assigned school included a transition coordinator, job developer, guidance counselors, social workers, and a parent coordinator (Tr. pp. 63-64). The assistant principal explained that the students at the school participated in internship programs as part of a group, which helped them to develop their communication and work skills (Tr. p. 73). However, he also noted that the process for placing a student in a specific work site was very individualized and included meetings with the student, parent, and the school's job developer (Tr. pp. 73-74). The assistant principal stated that students new to the school were not typically placed in a full-time work site program because staff wanted to get to know the student and determined the student's needs (Tr. pp. 82-83, 93-94). He noted that there would be community based experiences available to the student that would have been reflected in her schedule (Tr. p. 83). The teacher of the assigned class reported that the school employed a "school-wide", standards-based, special education curriculum that included a high school "band" and a transition "band" (Tr. pp. 102-03). He indicated that each band included a large transitional component and explained that students were taught transitional skills during the school day (Tr. pp. 102-04, 122, 125).

The transition linkage coordinator at the assigned school testified that the assigned school included full-time and part-time work sites, and students were supervised by either teachers, paraprofessionals, or both, depending on the site (Tr. pp. 164-65, 167). In some instances students were supervised by the actual site supervisor (Tr. p. 167). Although the parents assert that the student would not be eligible to participate in the work-study program during her first year in the assigned school, the assistant principal testified that students would not be placed in work site programs full-time during their first year in the school, and generally were not placed at a work site until age 17 or 18 (Tr. pp. 82-83, 93). The transition linkage coordinator similarly testified that some students were permitted to attend work sites on a full-time basis prior to reaching age 18 (Tr. pp. 181-82). Based on the above, I find that the hearing record contains no testimony that, had the student attended the assigned school, the district would have deviated from her IEP regarding transition services in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 822; see A.L. 812 F. Supp. 2d at 503; D.D.-S., 2011 WL 3919040, at *13).[17]

VII. Conclusion

The hearing record does not support the IHO's conclusion that the district denied the student a FAPE for the reasons stated in the parents' due process complaint notice. Accordingly, it is unnecessary to address whether equitable considerations supported the parents' request for

[17] Although not dispositive of my determination of whether the district offered the student a FAPE, I note that Cooke's assistant head of school testified that the internship program at Cooke consisted of approximately ten hours per semester of work experience (Tr. p. 253).

public funding of the student's private placement (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]). Nonetheless, it is within the scope of my authority to direct the district to comply with its procedural obligations (34 CFR 300.513[a][3]), and I hereby order that, if it has not done so already while these proceedings have been pending, the district conduct a reevaluation of the student in accordance with the procedures prescribed by federal and State regulations (34 CFR 300.303-300.311; 8 NYCRR 200.4[b][4]-[6]). However, as the hearing record indicates that Cooke conducted an evaluation of some sort of the student in January 2012 (Tr. pp. 263-64, 267), I will permit the parties to determine amongst themselves what additional assessments are necessary to determine the scope of the student's needs. In the absence of such an agreement between the parties, I order the district to conduct assessments of the student's needs in the areas of cognitive, academic, speech-language, adaptive functioning, and transition skills.

I have considered the parties' remaining contentions and find it to be unnecessary to address them in light of my decision.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 16, 2012 is modified, by reversing those portions which found that the district did not offer the student a FAPE for the 2011-12 school year and ordered the district to pay the student's Cooke tuition costs; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall evaluate the student in accordance with its obligations under the IDEA including, at a minimum, assessments of the student's needs in the areas of cognitive, academic, speech-language, adaptive functioning, and transition skills, to be completed within 45 days of the date of this decision.

Dated: **Albany, New York**
August 9, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER