The University of the State of New York

The State Education Department
State Review Officer
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No. 12-171

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, Gail M. Eckstein, Esq., of counsel

The Law Offices of Lauren A. Baum, PC, attorneys for respondents, Richard A. Liese, 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') son and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2010-11 school year. The parents cross-appeal the IHO's decision. 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

During the 2009-10 school year, the student attended Cooke (see Tr. p. 255; Dist. Ex. 9 at pp. 1-15).[1] On January 28, 2010, the CSE convened to conduct the student's annual review and to develop an IEP for the 2010-11 school year (10th grade) (see Dist. Exs. 3 at pp. 1-2; 4 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student

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

with a speech or language impairment, the January 2010 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school with the following related services: one 45-minute session per week of counseling in a small group, one 45-minute session per week of occupational therapy (OT) in a small group, one 45-minute session per week of individual speech-language therapy, and two 45-minute sessions per week of speech-language therapy in a small group (see Dist. Exs. 3 at pp. 1-2, 15; 4 at p. 2; see also Tr. pp. 205-07, 273-74).[2] The January 2010 CSE developed annual goals with corresponding short-term objectives, and recommended that the student participate in alternate assessments (see Dist. Ex. 3 at pp. 8-12, 15).

By final notice of recommendation (FNR) dated June 10, 2010, the district summarized the special education and related services recommended in the January 2010 IEP, and identified the particular public school site to which the district assigned the student to attend during the 2010-11 school year (see Dist. Ex. 6).

By letter dated June 24, 2010, the parents advised the district that after visiting the assigned public school site, they determined it was not appropriate for the student for the following reasons: the "massive size" of the school would "overwhelm" the student; the student would not receive sufficient individual attention; the "departmentalized structure" was not appropriate; and at that time, no "openings" existed at the assigned public school site (Parent Ex. C at p. 1). Therefore, the parents notified the district that the student would attend Cooke for the 2010-11 school year (id.). On September 6, 2010, the parents executed an enrollment contract with Cooke for the student's attendance during the 2010-11 school year (see Parent Ex. I at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 9, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (see Parent Ex. A at pp. 1-4). As relief, the parents requested reimbursement for the costs of the student's tuition at Cooke for the 2010-11 school year (id. at p. 4).

B. Impartial Hearing Officer Decision

On March 21, 2012, the IHO conducted a prehearing conference, and in an interim order, dated April 1, 2012, the IHO set forth the following issues to be resolved at the impartial hearing: whether the January 2010 CSE failed to evaluate the student in all areas of suspected disability; whether the annual goals and short-term objectives were appropriate; whether the CSE failed to provide "meeting materials" to all of the CSE members; whether the 12:1+1 special class placement was "overly restrictive" for the student; whether the present levels of performance and the academic management needs in the January 2010 IEP were appropriate; whether the January 2010 IEP failed to identify the student's "receptive and expressive language needs, attentional issues, organization issues, [and] fine and gross motor issues;" whether the January 2010 IEP failed to include a "transition plan;" whether the assigned public school site was too large; whether the student would be functionally grouped at the assigned public school site; whether the assigned

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 200.8[11]; 8 NYCRR 200.1[zz][11]).

public school site was "not sufficiently academic;" and whether the assigned public school site had a seat "available" for the student (see IHO Ex. 1 at pp. 1-5).

On April 5, 2012, the parties proceeded to an impartial hearing, which concluded on June 1, 2012 after five days of proceedings (see Tr. pp. 1-511). By decision dated July 26, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2010-11 school year and that Cooke was an appropriate unilateral placement; thus, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2010-11 school year (see IHO Decision at pp. 8-15).

In support of the conclusion that the district failed to offer the student a FAPE for the 2010-11 school year, the IHO indicated that the district did not present any witnesses to testify specifically about the "proposed program" at the assigned public school site, and further, the evidence presented about the assigned public school site was limited to the summer 2010 portion of the school year (see IHO Decision at pp. 8-10). In addition, the IHO noted that the hearing record lacked evidence regarding the availability of a seat for the student at the assigned public school site (id. at pp. 10-11). Next, the IHO found that the January 2010 CSE developed "many" of the annual goals without "adequately calculating whether such teacher reports would be sufficiently current information to form the basis of an IEP," which would be implemented beginning in July 2010 (id. at p. 11). In addition, the IHO found that the speech-language annual goals in the January 2010 IEP were not "sufficient" because four of the five speech-language annual goals addressed articulation needs, which was "not an important area" of need for the student (id. at pp. 11-12). Next, the IHO indicated that the transition plan in the January 2010 IEP—which the IHO described as "vague and generic"—was deficient and only provided for travel training (id. at p. 12).

Next, the IHO concluded that Cooke served as an appropriate unilateral placement for the student during the 2010-11 school year (see IHO Decision at pp. 12-14). The IHO found that the student received special education instruction and related services in accordance with his needs (id. at p. 13). With respect to equitable considerations, the IHO found that the parents acted reasonably "throughout;" thus, equitable considerations weighed in favor of the parents' requested relief (id. at p. 14).

IV. Appeal for State-Level Review

The district appeals and argues the IHO erred in finding that it failed to offer the student a FAPE for the 2010-11 school year, that Cooke was an appropriate unilateral placement, and that the equitable considerations weighed in favor of the parents' request for relief. The district asserts that the annual goals in the January 2010 IEP adequately addressed the student's needs, including those annual goals related to the student's speech-language needs, and that the January 2010 CSE appropriately relied upon the November 2009 Cooke progress report—as well as input from the Cooke attendees about the student's academic and social/emotional functioning—to develop the annual goals. The district also alleges that the evidence in the hearing record does not support the IHO's determination that the transition plan in the January 2010 IEP was vague, generic, and only provided for travel training. Regarding the "proposed program," the district argues that it properly recommended a 12-month school year program and had an IEP in place for the student at the commencement of the school year. With respect to the assigned public school site, the district argues that the IHO's conclusion lacks a basis in the hearing record. The district also asserts that

the student would have been functionally grouped at the assigned public school site. Regarding the unilateral placement at Cooke, the district contends that the hearing record does not indicate that Cooke provided the student with specially designed instruction to meet all of the student's unique needs. Finally, the district argues that if equitable considerations did not otherwise preclude relief in this matter, the evidence did not support the parents' entitlement to direct payment of the costs of the student's tuition to Cooke for the 2010-11 school year.

In an answer and cross-appeal, the parents respond to the district's assertions, and generally argue to uphold the IHO's decision in its entirety.

In an answer to the cross-appeal, the district asserts that although the parents captioned the pleading as a "Verified Answer and Cross-Appeal," the parents failed to articulate the specific issues they challenged. However, to the extent that the parents raised "new arguments in the Cross-Appeal" not previously addressed, the district formulated responses to the same. [3]

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

[3] Consistent with the district's assertion, a review of the parents' "Verified Answer and Cross-Appeal" reveals that the parents do not specify or "clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and orders to which exceptions are taken"—which includes clearly identifying which particular issues that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). As the answer and cross-appeal lack any guidance from the parents' counsel indicating what matters the parents are cross-appealing or at least citations to relevant portions of the hearing record, I will not sift through their due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf and I find the cross-appeal insufficient with respect to those issues (8 NYCRR 279.4[b]; Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

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. January 2010 CSE Process

1. Evaluative Information

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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). 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).

A review of the evidence in the hearing record demonstrates that the January 2010 CSE considered and relied upon the following evaluative information to develop the January 2010 IEP: a February 2008 psychoeducational evaluation, an April 2009 social history update, a November 2009 Cooke progress report, a November 2009 classroom observation, and the student's May 2009 IEP (see Dist. Exs. 7-10; Parent Ex. D; see also Tr. pp. 164-65, 168-70, 192). At the impartial hearing, the district special education teacher testified that the January 2010 CSE also relied upon information provided by the Cooke staff attending the meeting, which provided the CSE with the results of a September 2009 administration of both the "GMADE" and "GRADE" assessments to the student and which were reflected in the January 2010 IEP (see Tr. pp. 167-69, 287-88; Dist. Ex. 3 at p. 3).[4, 5]

As part of the February 2008 psychoeducational evaluation, the evaluator administered the following to the student: the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), the Wechsler Individual Achievement Test, Second Edition (WIAT II), the Bender Visual-Motor Gestalt Test (Bender-Gestalt), the Thematic Apperception Test (TAT), and the House-Tree-Person (HTP) (see Dist. Ex. 7 at p. 1). Results of WISC-IV revealed that the student's full-scale IQ fell within the "[e]xtremely [l]ow/ [i]ntellectually [d]eficient [r]ange" (id. at p. 2). The student's overall performance on the verbal comprehension and perceptual reasoning indices also fell within the "[e]xtremely [l]ow [r]ange," which suggested that the student "may experience great difficulty keeping up with peers in a wide range of situations" and that required "age-appropriate thinking and reasoning skills" (id.). The student also performed in the "[e]xtremely [l]ow [r]ange" in the area of working memory (measured attention, concentration, and mental reasoning), which also required an individual to "hold information in short-term auditory memory and then use the information to perform a specific task" (id.). The student's overall performance on the working memory index suggested a weakness that could "potentially impede the processing of relatively more complex verbally presented information," which could, therefore, "slow down new learning or performance on a variety of academic tasks" (id. [emphasis in original]). The administration of the Bender-Gestalt reflected that the student experienced moderate difficulties with respect to visual-motor integration (id. at p. 3). In addition, the results of the WIAT-II revealed that the student exhibited significant academic delays with extremely low range performance in word

[4] Although not specified in the hearing record, "GMADE" is typically used as an acronym for the Group Mathematics Assessment and Diagnostic Evaluation and "GRADE" is typically used as an acronym for Group Reading Assessment and Diagnostic Evaluation (see, e.g., Application of a Student with a Disability, Appeal No. 14-029; Application of the Dep't of Educ., Appeal No. 13-092).

[5] At the impartial hearing, while the district special education teacher admitted that the January 2010 CSE did not provide the Cooke staff—who attended the CSE meeting via telephone—with copies of the evaluative information during the meeting, she further testified that Cooke staff should have had a copy of the May 2009 IEP, and probably had the results of the February 2008 psychoeducational evaluation and the April 2009 social history report (see Tr. pp. 192-93). The parents testified that the January 2010 CSE did not give them any documentation during the meeting, but they had received a copy of the classroom observation (see Tr. pp. 481-82).

decoding, reading comprehension, numerical calculation, math reasoning, and spelling (id. at pp. 3-5).

According to the April 2009 social history update, the student was "well liked by his teacher and peers" and was "sociable" (see Dist. Ex. 8 at pp. 3-4). However, the student lacked confidence in reading, and although he enjoyed mathematics, the student struggled with abstract concepts (id. at p. 4). As noted in the November 2009 classroom observation, the student was a "cooperative and task oriented student" throughout the observation; however, the student required much assistance with tasks (see Dist. Ex. 10). Consistent with the information presented in the April 2009 social history update, the student related well to his peers and engaged in conversation with his neighbors (id.).

In the November 2009 Cooke progress report, the student's then-current teachers detailed his progress on goals in the areas of English language arts (ELA), American History, mathematics, science, language skills, travel training, health, technology, independent living, art, physical education, and OT (see Dist. Ex. 9 at pp. 1-15). As identified in the November 2009 progress report, the student's ELA goals consisted of identifying basic genres, producing a variety of writing styles, reflecting the steps of the writing process, orally presenting material to a wide audience, adapting writing for a purpose and audience, using descriptive language, details and similes, organizing written ideas in a logical sequence, writing with a central idea, adding personal details and vivid language, and writing with descriptions that defined a problem and solution (id. at p. 2). The student achieved scores of a one or two with respect to each of his ELA goals, which indicated that the student did not demonstrate or demonstrated a partial understanding of the material expected at his instructional level (id.). The student's ELA instructors also noted that he needed to develop more sophisticated ways of expressing himself through the use of details and descriptive language and further suggested that he focus more on the individual steps of the writing process in order to produce a strong piece of writing (id.). The student's math teacher described him as "a pleasure to have in class," and she further stated that although the student struggled with some of the material, the student usually was an active participant in class who always did his best (id. at p. 5). She further commented that the student had been working very hard this trimester and that he worked well with his peers (id.). With respect to his annual goals in math, the student showed "an understanding at his instructional level with support" of communicating his mathematical thinking clearly and coherently to peers; however, he showed "a partial understanding expected at his instructional level" of building new mathematical knowledge through problem solving and solving problems that arose in math and in other contexts (id.).

As indicated in the November 2009 Cooke progress report, the student's language skills class focused on four main language goals: reading comprehension, active listening and attending in the classroom, conversation skills, and a group of students working on overall improvement of speech intelligibility (see Dist. Ex. 9 at p. 7).[6] The student showed a "partial understanding expected at his instructional level" with respect to consistently engaging in active listening in a variety of settings, appropriately initiating, maintaining and terminating a conversation with peers,

[6]Although the student's speech-language provider and occupational therapist did not attend the January 2010 CSE meeting, the district special education teacher testified that both were invited to the meeting; in addition, both the speech-language provider and the occupational therapist provided the January 2010 CSE with progress reports (see Tr. pp. 192-94; Dist. Ex. 9 at pp. 1, 7, 15).

using compensatory strategies to improve his overall speech intelligibility, and regulating and self-monitoring his speech intelligibility in a variety of settings (id.). However, with support, the student demonstrated an understanding expected at his instructional level of identifying and locating articulators and differentiating between intelligible and unintelligible speech (id.). The student's OT provider noted that OT services had yet to begin for the student at that time; however, the student had been assessed and observed in school (id. at p. 15).

In addition to the evaluative information described above, the student's then-current mathematics teacher and Cooke's assistant director (assistant director) attended and participated in the January 2010 CSE meeting, and the CSE relied upon their input as individuals who knew the student "best" and as individuals who would "know what [his] present level of performance was and what [his] objectives and goals would be for the following year" (Tr. pp. 161, 170). Specifically, the student's math teacher provided the January 2010 CSE with the student's current functioning in the area of math computation and problem solving, as assessed using the GMADE (see Tr. pp. 194-96; 469-70). At the time of the January 2010 CSE meeting, the student's math teacher reported that the student functioned at a mid-first grade level in math (Tr. p. 471; see Dist. Ex. 3 at p. 3). The assistant director reported on the student's ELA scores at the January 2010 CSE meeting (see Tr. pp. 171, 196-97). As reflected in the January 2010 IEP, the student functioned at the second grade level in vocabulary and a 1.7 grade level in reading comprehension (see Dist. Ex. 3 at p. 3). Per teacher observation, the student's listening comprehension skills were at a fourth or fifth grade level and his ELA instructors estimated that his writing skills were at the second grade level (id).

Based upon the foregoing, the evidence in the hearing record shows that—contrary to the parents' assertion that the January 2010 CSE relied solely upon the November 2009 Cooke progress report—the January 2010 CSE reviewed a variety of sources to ascertain information about the student's cognitive ability and academic, language, and social skills needs, and formulated the January 2010 IEP based upon this information (see Tr. pp. 161, 171-72, 194-197; 212-13; Dist. Exs. 3 at p. 3; 7-10). Moreover, despite the parents' contention that the January 2010 CSE failed to perform a complete evaluation and assessment of the student's needs, the evidence in the hearing record establishes that the January 2010 CSE had sufficient evaluative information to develop the January 2010 IEP, that the district was not obligated to conduct a triennial reevaluation at the time of the January 2010 CSE meeting, and that neither the parents nor any other CSE member requested additional evaluations of the student during the January 2010 CSE meeting (see Tr. p. 213; 8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

B. January 2010 IEP

1. Present Levels of Performance

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the

student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the January 2010 IEP reflected—consistent with the November 2009 Cooke progress report and "teacher reports"—that the student functioned on a high first grade to low second grade level in math; in addition, the January 2010 IEP reflected that although he demonstrated a strength in solving computation problems, he also exhibited a weakness in solving word problems (see Dist. Exs. 3 at p. 3; 9 at pp. 1, 5). The January 2010 IEP also indicated that consistent with Cooke reports, the student was below grade level in all areas of academic functioning (compare Tr. p. 276, with Dist. Ex. 3 at p. 5). In math, the January 2010 IEP noted that when solving word problems, the student needed to improve his ability to identify relevant information in the problem, and identify the necessary operations to solve the problem and not address extraneous information (see Dist. Ex. 3 at pp. 3-4).[7] According to the January 2010 IEP, the student could add and subtract two-digit numbers both with and without regrouping, and he "was good at single-digit multiplication" (id. at p. 4). Although the January 2010 IEP reflected that the student experienced difficulty creating equations, the student could solve equations that were written out for him (id.). The January 2010 IEP also reflected information derived from the November 2009 Cooke progress report, which indicated that the student demonstrated growth in his ability to communicate his mathematical thinking to peers (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 5). Additionally, the January 2010 IEP noted that consistent with the November 2009 Cooke progress report, the student improved his ability to use graphs to answer simple questions and draw conclusions, and with support, the student could "skip count by 2, 5 and 10" (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 5). In addition, the January 2010 IEP noted that the student also continued to require assistance to read and write whole numbers up to 1,000,000; to identify numerical place value; to demonstrate fluency; and to apply addition and subtraction facts up to and including 10 (id.).

According to the January 2010 IEP, the student functioned at a first grade level in reading comprehension and a second grade level in vocabulary skills; however, he demonstrated a relative strength with respect to listening comprehension (see Dist. Ex. 3 at p. 3). The January 2010 IEP indicated that, consistent with the November 2009 Cooke progress report, the student had needs with respect to reading comprehension and required assistance in the area of written expression, where the student specifically needed to improve his ability to sequence information, write with a central idea, and increase his use of details and descriptive language (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 2). The January 2010 IEP also revealed that the student struggled with passage comprehension (see Dist. Ex. 3 at p. 3). The student did best with short passages, and the January 2010 IEP noted that as the length of the passages increased, the student lost focus and his comprehension (id.). With respect to the student's written expression skills, the January 2010 IEP indicated that the student needed to improve his ability to write sentences with the use of proper syntax, punctuation, and capitalization, as well as his ability to write a simple sentence (id.). At the time the January 2010 CSE developed the IEP, the student was working on stringing together sentences to make simple paragraphs (id.).

[7] The student's math teacher at Cooke who attended the January 2010 CSE meeting testified that she provided the CSE with an accurate description of the student's functioning in math at that time (see Tr. p. 473).

With respect to the student's speech-language needs, in accordance with information presented in the November 2009 Cooke progress report, the January 2010 IEP noted that the student's speech production had improved, particularly with respect to identifying and locating articulators and differentiating between intelligible and unintelligible speech; however, the student continued to exhibit deficits in the areas of social use of language and active listening skills (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 7). The January 2010 IEP further indicated that the student needed to work on his conversation skills and to improve his overall intelligibility (id.). Next, the January 2010 IEP reflected information from the student's travel training instructors, which indicated that while the student needed to work on his understanding of maps, the student had improved his ability to observe safety measures in the community and demonstrated an awareness of his surroundings (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 9). Although the student was not receiving OT at the time that the November 2009 Cooke progress report was generated, the January 2010 IEP noted information that the student's areas of need pertained to navigating the school building, visual-motor skills, and activities of daily living (ADL) skills (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 9 at p. 15).

The January 2010 IEP social/emotional present levels of performance also reflected teacher reports that the student always participated in class discussions, completed his homework, and followed directions and rules (see Tr. pp. 177-78; compare Dist. Ex. 3 at p. 6, with Dist. Ex. 9 at pp. 2, 4-6, 8, 11, 13). Additionally, the January 2010 IEP noted that the student worked hard in school, and although he related well to his peers, the student exhibited continued needs with regard to his conversational speech, particularly his ability to initiate, maintain, and terminate a conversation (compare Dist. Ex. 3 at p. 6, with Tr. pp. 257-58, and Dist. Ex. 9 at p. 7, and Dist. Ex. 10). In the area of health and physical development, the student was reported to be in good health, his hearing was within normal limits, and he wore glasses (compare Dist. Ex. 3 at p. 7, with Dist. Ex. 8 at p. 4).[8]

Based on the foregoing, the evidence in the hearing record demonstrates that the present levels of performance in the January 2010 IEP were created from input by Cooke staff, as well as the evaluative information, such as the February 2008 psychoeducational evaluation, the November 2009 Cooke progress report, and an April 2009 social history update available to the January 2010 CSE (see Tr. p. 172; compare Dist. Ex. 3 at pp. 3-7, with Dist. Ex. 8, and Dist. Ex. 9, and Dist. Ex. 10). Under the circumstances, the evidence in the hearing record demonstrates that the January 2010 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher reports and estimates of the student's current skill levels—at the time of the January 2010 CSE meeting to develop an IEP that accurately identified and reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also DiRocco v. Bd. of Educ. of the Beacon City Sch. Dist., 2013 WL 25959, at *20 [S.D.N.Y. Jan. 2, 2013]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025;

[8] To the extent that the parents assert that the January 2010 IEP did not adequately describe the student's difficulties with organization and attention, the evidence weighs against a finding that any such deficiency alone, when viewed in light of the IEP as a whole, would rise to the level of a denial of a FAPE (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).

Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

2. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes a New York State alternate assessment that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal (8 NYCRR 200.4[d][2][iv]).

Upon a review of the evidence in the hearing record, the annual goals and short-term objectives in the January 2010 were consistent with the student's identified needs in all areas, including academics, speech-language, OT, and social/emotional functioning. In this case, the January 2010 IEP contained approximately nine annual goals with approximately 38 corresponding short-term objectives targeting the student's identified needs in the areas of mathematics, reading, listening, writing, speech-language, transition, OT, and counseling (see Dist. Ex. 3 at pp. 8-12). Notwithstanding the parents' assertion that the January 2010 CSE did not involve them in the development of the student's annual goals, the evidence in the hearing record reveals that the annual goals in the January 2010 IEP were provided to the CSE by Cooke staff (Tr. pp. 173, 201-04, 215).[9] Furthermore, the hearing record reveals that no one at the January 2010 CSE meeting—including the parents—raised any objections to the annual goals (see Tr. pp. 187, 501-02). In addition, at the impartial hearing the parents testified that they did not ask for any additional annual goals that were not included at the time of the CSE meeting (see Tr. pp. 501-02).

Although the IHO concluded that the January 2010 CSE prepared a number of the annual goals without adequately calculating whether such teacher reports would constitute sufficiently current information to form the basis for the January 2010 IEP, the evidence in the hearing record fails to substantiate this finding; rather, the evidence in the hearing record demonstrates that the January 2010 CSE developed the annual goals based on the information reviewed and considered at the time of the meeting, which reflected the student's special education needs, and that the January 2010 IEP was a fluid document that could be modified depending on which annual goals the student may have achieved at the time the January 2010 IEP would be implemented (see IHO Decision at p. 11). According to the district special education teacher, the Cooke staff provided the annual goals to the January 2010 CSE for the upcoming school year (see Tr. pp. 200-04).

[9] The student's math teacher at Cooke who attended the January 2010 CSE meeting testified that she provided the CSE with the annual goals the student was working on during the 2009-10 school year (see Tr. p. 467). She later admitted that she did not advise the January 2010 CSE whether she believed the annual goals she reported to the CSE remained appropriate for the student for the 2010-11 school year (see Tr. pp. 468-69).

While the district special education teacher admitted that it was possible that the student could be working on the same annual goals in November 2009 and in June 2010, she added that the student may need to repeat the annual goals if he had yet to achieve them (see Tr. p. 199). Moreover, the district special education teacher testified that a CSE could reconvene to develop new annual goals in the event that the student had achieved the annual goals in the January 2010 IEP by June 2010 (id.).[10]

Regarding the speech-language annual goals, a review of the January 2010 IEP shows that these annual goals appropriately targeted the student's speech-language needs. Contrary to the IHO's concerns, the evidence shows that the speech-language annual goals corresponded to the student's needs in the areas of pragmatic language, receptive language, reading comprehension, and writing (compare IHO Decision at p. 12, with Dist. Ex. 3 at p. 10). In this case, the January 2010 CSE generated the student's speech-language annual goals based on the November 2009 Cooke progress report and input from the assistant director, who conveyed information from the student's therapists to the January 2010 CSE (see Tr. p. 204). According to the district special education teacher, at the time of the January 2010 CSE the student was working on his receptive and expressive skills, as well as his ability to express himself clearly (see Tr. p. 185; see also Tr. p. 338). The January 2010 IEP included an annual goal designed to improve the student's receptive, expressive, and pragmatic language skills, as well as the student's ability to consistently engage in active listening in a variety of settings (see Dist. Ex. 3 at p. 10). In addition, the short-term objectives targeted the student's ability to appropriately initiate, maintain, and terminate a conversation with peers; identify and locate articulators; differentiate between intelligible and unintelligible speech during formal and informal situations; use compensatory strategies, such as over-articulation, to improve the student's overall speech intelligibility; and regulate and self-monitor his speech intelligibility in a variety of settings (id.). The district special education teacher testified that the student's speech-language annual goal addressed not only his classification as a student with a speech or language impairment, but also the student's overall pragmatic language skills, including his ability to speak clearly and engage in a conversation and dialogue with his peers and adults (see Tr. pp. 185-86). Additionally, given the student's significant pragmatic speech-language needs, the January 2010 CSE modified the recommended speech-language therapy services from one individual and one small group session per week to two sessions per week in a small group (see Tr. pp. 165-66, Dist. Exs. 3 at p. 2; 4 at p. 2). Furthermore, the January 2010 IEP included an annual goal that addressed the student's written expression needs and targeted his ability to clearly express himself in written form through increasing his use of more complex vocabulary and correct sentence structure (see Dist. Ex. 3 at p. 10). Corresponding short-

[10] Regarding the parents' assertion that the district failed to review the student's progress toward his then-current annual goals, the district special education teacher testified that the general practice of the CSE was to look at the annual goals on the prior year's IEP to determine whether the student had met any of the annual goals (see Tr. p. 210). Since the student's prior IEP in this case was generated for eighth grade--and had been created by a "different team" and a "different school"—the district special education teacher stated that the January 2010 CSE relied more on the progress reports and input from the Cooke staff participating in the meeting in order to develop the annual goals at the January 2010 CSE meeting (id.). According to the district special education teacher, the benefit of having the student's then-current teachers participate at the January 2010 CSE meeting was that the teachers knew him best and what his present levels of performance were, and knew what his annual goals and short-term objectives were for the following year (see Tr. p. 161). For example, the district special education teacher explained that the student's math teacher at Cooke was asked about what areas the student was working on in math, which the January 2010 CSE then expanded upon in order to create the annual goals for math (see Tr. p. 182).

term objectives were created to improve the student's skills in this domain, such as writing 10 simple declarative, interrogatory and explanatory sentences using proper noun and verb agreement, syntax, punctuation, and capitalization; and writing a 5 sentence paragraph having an introductory sentence, three supporting detail sentences, and a concluding sentence, using properly written sentences (id.).

Next, despite the IHO suggestion that the annual goals in the IEP should be oriented toward the student's reading comprehension needs, a review of the IEP reflects that the January 2010 CSE added an annual goal designed to improve the student's ability to read passages in literature and in the content areas, with corresponding short-term objectives aimed at skills such as responding to "wh" question based on passages and stories of increasing length, responding to inference and critical thinking questions based on passages and stories of increasing length, demonstrating an increased ability to maintain focus to reading material, and reading independently for increasing lengths of time (compare IHO Decision at p. 12, with Dist. Ex. 3 at p. 9). Finally, the January 2010 IEP included an annual goal to address the student's listening comprehension skills, which was designed to improve the student's ability to understand and respond to material presented to him verbally (id.). Therefore, given that the evidence in the hearing record shows that the annual goals in the January 2010 IEP addressed the student's speech-language needs, as well as his needs pertaining to reading and listening comprehension and written expression, the IHO's findings must be reversed.

3. 12:1+1 Special Class Placement

Next, the evidence in the hearing record demonstrates that the 12:1+1 special class placement at a specialized school was reasonably calculated to enable the student to receive educational benefits. 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]).[11] In reaching the decision to recommend a 12:1+1 special class

[11] To the extent that the parents challenged the management needs in the January 2010 IEP, the district special education teacher testified that she questioned the Cooke staff about the appropriateness of the academic management needs and if they had any suggestions (see Tr. p. 174). The January 2010 CSE recommended the following strategies to address the student's academic management needs: use of graphic organizers and charts and checklists, assistance with tracking and highlighting of key information, teacher guidance through questioning and modeling, visual and verbal prompts, small group instruction, and breaking down tasks into small sequential steps (see Dist. Ex. 3 at pp. 3, 5). The district special education teacher explained that the January 2010 CSE recommended the use of graphic organizers, charts, and checklists because such supports would keep the student focused and allow him to correct his own errors despite his deficits in the areas of organization and attention (see Tr. pp. 174-75). The January 2010 CSE also recommended assistance with tracking and highlighting of key information to "help make things clearer" for the student in light of his difficulties with attention and organization and to help him discern between relevant and irrelevant material while reading (see Tr. p. 175). In addition, the January 2010 CSE recommended teacher guidance through question and modeling because the student required teacher assistance and teacher modeling would help the student see exactly how to complete a task (see Tr. pp. 175-76). Visual and verbal prompts were also recommended because the January 2010 CSE determined that the student benefitted by having information presented to him in more than one modality (see Tr. p. 176). The district special education added that the January 2010 CSE recommended small group instruction because the student benefitted from not being distracted by a larger group and from having access to additional "hands-on" time with the teacher (id.). Based on the evidence in the hearing record, the academic management needs in the January 2010 IEP were sufficient to address the student's special education needs.

placement, the January 2010 CSE considered the student's significantly delayed academics, and determined that the student would benefit from a classroom with 12 students, one teacher, and an additional adult to appropriately support the student (see Tr. p. 164; see also Tr. pp. 190, 208). The January 2010 CSE also considered and rejected other placement options for the student, including a 15:1 special class; however, the January 2010 CSE determined that a 15:1 special class placement was not sufficient to meet the student's needs in light of his significant academic and cognitive delays (see Tr. p. 165; Dist. Exs. 3 at p. 14; 4 at p. 2). The January 2010 CSE also considered and rejected a 15:1 special class placement because it did not have sufficient adult support for the student (see Tr. pp. 189-90). Likewise, the January 2010 CSE considered and rejected a community school because the student required a 12-month school year program, which could only be provided at a specialized school (see Tr. p. 164, 189-90). In addition, the parents testified that they preferred a 12:1+1 special class placement—as opposed to a 15:1 special class placement (see Tr. pp. 500-01). In summary, the evidence in the hearing record supports a finding that the 12:1+1 special class placement at a specialized school was appropriate to meet the student's special education needs.

4. Transition Services

Finally, under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable 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 State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, 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][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]), as well as the transition service needs of the student that focus on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including 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 a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

In this case, the district special education teacher testified that the January 2010 CSE reviewed the student's transition plan with the assistant director and the parents at the meeting (see Tr. p. 205; Dist. Ex. 4 at p. 2). The transition plan in January 2010 IEP included four measurable long-term adult outcomes for the student, including: integrating into the community with support, attending a vocational training program, living independently with moderate support, and being

employed with moderate support (see Dist. Ex. 3 at p. 16). The district special education teacher testified that the above-referenced long-term outcomes or goals were "more general" (Tr. p. 206).

As noted in the transition plan, the January 2010 CSE indicated that the student would pursue an IEP diploma, because his academics were significantly delayed and at the time of CSE meeting, the student was not ready to take Regents Competency Tests (see Tr. pp. 188-89; Dist. Ex. 3 at p. 16). For transition activities, the January 2010 CSE recommended in the transition plan that the student would "participate in instructional activities that will highlight his areas of strength and interest;" the transition plan also reflected that the student would participate in community activities and begin to develop his areas of interest and strengths, but failed to indicate the party responsible for implementing the "community integration" portion of the transition plan (Dist. Ex. 3 at p. 16). Similarly, the post-high school transition services indicated that the student would explore post-secondary programs that focused on his areas of strength and his areas of needs (id.). Next, the transition services linked to independent living provided that the student would create a budget and learn how to manage expenses (through the use of a checkbook, paying bills), develop organizational skills to help manage important papers and continue to work on travel training to help him better navigate urban travel (id. at p. 17). Under the circumstances, the evidence in the hearing record supports the IHO's finding that, generally, the transition plan was "vague and generic" and failed to comply with statutory or regulatory requirements (compare IHO Decision at p. 12, with Dist. Ex. 3 at pp. 16-17).

However, when viewed in the context of the IEP, as a whole, the evidence in the hearing record does not demonstrate that the transition plan—while sparse and technically deficient—impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, which rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4]; see also A.D. v. New York City Dep't. of Educ., 2013 WL 1155570, at *11 [S.D.N.Y, Mar. 13, 2013]; M.Z. v. New York City Dep't. of Educ., 2013 WL 1314992 [S.D.N.Y. Mar. 21, 2013]; Application of the Dep't of Educ., Appeal No. 11-147; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-080; Application of a Child with a Disability, Appeal No. 07-128; Application of a Child with a Disability, Appeal No. 97-70).

C. Challenges to 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 [2d Cir. Jan. 8 2014]; see also K.L., 530 Fed. App'x 81, 87; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 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. 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]).[12] 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 parents cannot prevail on their claims regarding implementation of the January 2010 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 parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the January 2010 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore,

[12] 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 [2d Cir. Mar. 30, 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.

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 January 2010 IEP.[13]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

[13] 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 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 [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., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 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. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 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]).

VII. Conclusion

Having determined that—contrary to the IHO's decision—the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no reason to reach the issues of whether the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations supported the parents' request for relief (Burlington, 470 U.S. at 371; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 26, 2012, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2010-11 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated July 26, 2012, is modified by reversing that portion which directed the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2010-11 school year.

Dated: **Albany, New York**
December 22, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER