The University of the State of New York

The State Education Department
State Review Officer
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No. 12-192

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

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Cooke Academy School (Cooke) for the 2011-12 school year. The parents cross-appeal from the IHO's failure to address issues raised in their due process complaint notice. The appeal must be dismissed. 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

Pursuant to recommendation by the CSE, the student attended a State approved non-public school for approximately two years, as he completed the equivalent of fourth and fifth grades (see Tr. p. 467; Parent Ex. I at p. 9). In anticipation of the student's transition to middle school, the parents sought placement for the student at State approved nonpublic schools, without success (Tr. p. 467). In September 2008, the parents enrolled the student at Cooke, where he attended through and including the relevant 2011-12 school year (id.; Parent Ex. I at p. 5).

The CSE convened on February 17, 2011 to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 9 at pp. 1-2). Finding the student eligible for special education as a student with autism, the February 2011 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school (Dist. Ex. 9 at pp. 1-2, 11).[1] The February 2011 CSE also recommended that the student receive related services consisting of individual and group sessions of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling, as well as a full time 1:1 registered nurse (id. at pp. 13-14). The February 2011 IEP also included approximately 8 annual goals, with approximately 42 corresponding short-term objectives addressing the areas of mathematics, English language arts (ELA), PT, OT, speech-language, transition, counseling, and the nurse's monitoring of the student's blood sugar levels (id. at pp. 6-10). The February 2011 CSE recommended multiple academic management strategies including small group instruction, teacher cues and redirection to task, graphic organizers, editing, and proofreading checklists, direct teacher modeling, visual and auditory aids, manipulatives, multisensory approach, scaffolding, and directions presented in clear simple manner with repetition, rephrasing, and review (id. at p. 3). Recommended social/emotional management strategies on the IEP included teacher modeling and prompting of appropriate social interaction, preview of schedule, explicit schedule, informal counseling, and prompting around changes (id. at p. 4). Recommended strategies to address health/physical management needs included the 1:1 nursing services throughout the day to help student manage diabetes (id. at p. 5). The February 2011 CSE recommended on the IEP that the student participate in the New York State alternate assessment and that additional forms of assessment be utilized, including use of a student portfolio and teacher assessments and observations (id. at p. 13). In addition, the February 2011 IEP included a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (id. at p. 15).

By correspondence to the district dated February 18, 2011, the parents provided signed consent for the student to receive special education services during July and August 2011 (Parent Ex. E at p. 4). On a "Notice of Recommended Deferred Placement" form, by which the district suggested that the parents consider deferring the student's placement in the February 2011 IEP until July 1, 2011, as the February 2011 IEP was developed for the 2011-12 school year, the parents indicated by handwritten notation that they did not "have enough information about the recommended placement or program" to make any determination about its appropriateness for the student at that time (id. at p. 6). While not apparently in agreement with the content of the IEP, the parents nevertheless did agree that placement should be deferred until the first day of the 2011-12 school year, but they did not "agree to wa[it] until July [2011] to receive a placement offer," and requested that the district make a placement "offer . . . early enough to enable [them] to investigate and determine the appropriateness of the offer" (id.).

On March 14, 2011, the parents signed an enrollment contract with Cooke for the student's attendance during the 2011-12 academic year (Parent Ex. Q at pp. 1-2). Subsequently, on May 24,

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

2011, the parents signed an enrollment contract with Cooke for the student's attendance for the summer term of the 2011-12 academic year (Parent Ex. P at pp. 1-2).

By letter dated June 9, 2011 the parents notified the district that they had not yet received a placement offer for the student for the 2011-12 school year (Parent Ex. D at p. 1).[2] The parents indicated they were "willing to consider any appropriate program/school offered by the district," but that "in the interim," they intended to place the student at Cooke and seek public funding for the costs of the student's tuition (id.).

By final notice of recommendation (FNR) dated June 13, 2011, the district summarized the 6:1+1 special class and related services recommended by the February 2011 CSE and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 22).

In a June 15, 2011 letter to the district, the parents acknowledged their receipt of the June 13, 2011 FNR and indicated their interest in visiting the assigned public school site to determine its appropriateness for the student (Parent Ex. C at p. 1). The parent's reiterated their intention to place the student at Cooke at public expense "until such time that [they] determine[d] the program offered by the [district was] appropriate" (id.).

On July 8, 2012, the parents visited the assigned public school site and, by letter dated July 11, 2011, the parents rejected the public school site as not appropriate for the student, stated the reasons for their objections (Parent Ex. B at pp. 1-2). The parents indicated that, if the school site they visited was not the site the district intended to offer the student for "the Fall and Spring semesters," they requested information, including a class profile, and an opportunity to visit such other school site (id. at p. 2). The parents also informed the district that they remained "willing to consider any appropriate program" but that, "[i]n the interim," they intended to continue the student's placement at Cooke at public expense (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated February 12, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see generally Parent Ex. A). The parents asserted that the February 2011 CSE was invalidly composed, as no regular education teacher or additional parent member attended, and further, the CSE never informed the parents that they could have requested that these members participate (id. at p. 2). The parents also asserted that, despite the members of the CSE never having worked with or evaluated the student, they ignored the student's then-current special education teacher's objection to the proposed 6:1+1 special class placement (id.).

Next, the parents asserted that the February 2011 IEP did not fully or accurately reflect the student's present levels of performance and needs (Parent Ex. A at p. 2). The parents asserted that

[2] The hearing record contains duplicative exhibits. The difference between the district's and the parents' versions of the duplicative exhibits appears to be inclusion of additional pages in the exhibits to show facsimile transmission and/or receipt. Although the dates of receipt of the correspondences included in the exhibits are not at issue, this decision will cite to the corresponding parent exhibits.

the February 2011 IEP failed to contain any reference to or results from privately obtained evaluations or progress reports, including an updated neuropsychological evaluation and an updated speech-language progress report (id. at pp. 2-3). The parents also asserted that the February 2011 CSE failed to reflect the student's management needs despite having documentation describing the student's needs in this respect, including his need for positive reinforcement, frequent breaks, pre-reading discussions, and access to information about the events and plans for each day (id. at p. 3). The parents also asserted that the February 2011 IEP did not reflect recommendations found in the privately obtained evaluations and progress reports and, further, that the IEP, as a whole, failed address the student's needs (id.). The parents also asserted that the February 2011 IEP contained an insufficient number of appropriate, objectively measurable goals to address the student's needs and with which to measure his progress throughout the school year (id.). Finally, the parents asserted that the February 2011 IEP lacked promotional criterion and that the transition plan was insufficient to address the student's needs and was vague, generic, and failed to specify what parties would be responsible for implementing the transition services (id.).

With respect to the assigned public school site, the parents asserted that, after visiting the school and classroom, they determined the district's site to be inappropriate (Parent Ex. A at p. 3). Specifically, the parents asserted that the student would not have been appropriate grouped with the other students in the classroom they observed (id.). They also asserted that, given the student's academic and social needs, the classroom would not have allowed the student to receive the level of individual academic, social, and language support he required (id.). The parents also noted that the assigned public school site did not offer a life skills or a study skills program, and offered "little to no community inclusion beyond the vocational program" (id. at p. 4). The parents also asserted that the public school site did not offer a travel training program that and they were informed that the district-wide travel training program had a wait list, with priority given to students ages 19 to 21 (id.). The parents also asserted that no student in the school's 6:1+1 special class program was able to travel independently and, as such, it was "unclear" whether the student would have received travel training (id.). With respect to the assigned public school site's ability to implement the student's related services mandates, the parents asserted that the school did not offer OT and PT during the months of July and August, which would have caused the student to regress, and that, although his IEP mandated group counseling, he was the only student in the school's 6:1+1 special classes mandated to receive counseling (Parent Ex. A at p. 4). The parents also asserted that the assigned public school site did not offer a social skills program (id.). Finally, the parents, citing to district surveys and service delivery reports, asserted that the assigned public school site was unsafe, lacked the overall ability to provide related services, particularly OT, and had too large of a student population (including students classified as emotionally disturbed), which was not appropriate for the student who exhibited "significant anxiety" (id.).

In addition, the parents alleged that the student's unilateral placement at Cooke was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 5). As relief, the parents sought the costs of the student's tuition at Cooke for the 2011-12 school year, as well as related services, "including speech[-]language therapy outside of school . . . to allow for carryover and generalization of skills across settings" (id.). The parents also requests the provision or costs of transportation (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 9, 2012, and concluded on June 15, 2012 after four days of proceedings (Tr. pp. 1-547). In a decision dated August 28, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, Cooke was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 9-20). Consequently, the IHO ordered the district to fund the student's tuition at Cooke for the 2011-12 school year (id. at p. 21).

With respect to the student's present levels of performance, the IHO determined that the February 2011 CSE failed to fully consider the non-district evaluations (see IHO Decision at pp. 10-12). Specifically, the IHO found that there was "no indication" that an October 2010 neuropsychological evaluation was reviewed or considered by the February 2011 CSE and, further, cited testimony that the CSE did not discuss evaluations or progress reports but, rather, relied exclusively on the information from the student's teachers provided during the meeting (id. at p. 10). The IHO also found that the February 2011 IEP failed to fully describe or address the student's present levels of academic performance, his social and emotional behaviors and needs, orhis moderate to severe delays in language and auditory processing skills and expressive and pragmatic language skills (id. at pp. 12-13). Next, the IHO determined that the annual goals included in the February 2011 IEP were vague, not measurable, and "failed to provide meaningful guidance to assist the student in making progress" (id. at p. 13). Specifically, the IHO cited testimony from the student's teachers that particular goals or short-term objectives targeted too many skills, failed to indicate the level to which the student was supposed to be working, or were unrealistic given the student's present level of performance (id.). The IHO noted that it was "possible" but "unlikely" that "the recommended program and related services may have enabled the student to make appropriate academic and social progress" (id.). However, the IHO determined that "in general" the 6:1+1 special class was "very restrictive" and that "it [was] more than likely that the student would be under served" (id.).

With respect to the assigned public school site, the IHO determined that the district failed to prove that it could have properly implemented the student's IEP (IHO Decision at p. 13). Specifically, the IHO determined that the district failed to establish that the student would have been appropriately grouped with similarly functioning students or that the school site could have implemented support for the student's management needs (id. at p. 15). The IHO also noted "contradictory evidence" with regard to both the travel-training program available and the provision of related services at the assigned public school site (id. at p. 16).

The IHO also determined that the parents satisfied their burden to establish that Cooke was an appropriate unilateral placement, noting evidence and testimony in the hearing record that the student progressed academically in, received multi-sensory instruction and the staff utilized strategies to address the student's management needs, was functionally grouped with the other students; was provided opportunities in the community to utilize his mathematics and activities of daily living (ADL) skills, and was provided with related services inside and outside of the classroom (IHO Decision at pp. 17-19). The IHO also concluded that she was "not persuaded" that Cooke was inappropriate because it did not provide the student with a 1:1 nurse, noting testimony that if a 1:1 nurse was not provided to the student pursuant to the February 2011 IEP, "Cooke [would be] able to provide that service 'virtually immediately'" (id. at p. 19).

Lastly, the IHO addressed equitable considerations and found that the parents: fully cooperated with the February 2011 CSE; would have considered an appropriate district placement; provided the CSE with evaluations; attended the CSE meeting; visited the assigned public school site; and provided timely notice to the district of their intent to unilaterally place the student at Cooke (IHO Decision at p. 20).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief.

Specifically, the district asserts that the IHO erred in determining that the February 2011 CSE failed to consider appropriate evaluations and that the IEP failed to accurately describe or address the student's present levels of academic performance or social/emotional and behavioral needs. The district asserts that, to the extent that the IHO found that the February 2011 CSE failed to consider the privately obtained neuropsychological evaluation, certain CSE members had access to and became familiar with the evaluation prior to the CSE meeting and, further, that "certain recommendations from the [private evaluation] were incorporated in the February 2011 IEP." In the alternative, the district alleges that, even if the February 2011 CSE did not consider the private evaluation, such failure did not rise to the level of a denial of a FAPE. The district also asserts that, in addition to the private evaluation and a classroom observation, the February 2011 CSE utilized input from Cooke staff and progress reports when it determined the student's present levels of performance and that, the IEP accurately reflected the student's present levels of performance. The district alternatively asserts that, if the IEP failed to accurately report the student's functional levels, such an inaccuracy does not render the whole IEP deficient. In addition, the district asserts that the February 2011 IEP listed appropriate strategies to manage the student's academic, and social/emotional management needs. The district also asserts that the IHO erred in finding the annual goals included in the February 2011 IEP to be vague and immeasurable and argues, instead, that the CSE developed specific and measurable annual goals based on input from the parents and Cooke staff, as well as Cooke progress reports, including related service provider reports. In addition, the district argues that it would have been up to the teachers to determine the best way to interpret the annual goals "in a way that made sense," including by gauging the student's capabilities and modifying the goals as necessary. With respect to the IHO's determination that the 6:1+1 special class placement was very restrictive and that the student would likely have been underserved, the district first asserts that the IHO erred in reaching the issue because the parents did not assert in their due process complaint notice that the recommended 6:1+1 special class placement was not the student's least restrictive environment (LRE) and the district did not agree to expand the scope of the impartial hearing. Alternatively, the district asserts that the parents do not contest that the student should not be in a general education setting (noting that Cooke was not a general education setting) and that, in combination with the community integration services and supports built into the IEP, the recommended special class constituted the student's LRE. The district also points out that, although the recommended 6:1+1 special class offered a smaller ratio than the special class the student attended at Cooke, the programs offered similar opportunities to interact with non-disabled students and that the student would receive more support in the program described in the February 2011 IEP.

With respect to the IHO's determinations relating to the district's ability to implement the student's IEP at the assigned public school site, the district asserts that the parents' allegations were speculative in nature, as the student did not attend the school. In the alternative, the district asserts that it assigned the student to a specific public school site that conformed to the IEP and that, had the student attended the assigned public school site, he would have received all of his mandated related services, either directly or through related service authorizations (RSAs), and the school site would additionally have provided parent counseling and training, work student, life skills training, study skills training, and travel training. The district also asserts that the assigned public school site would have been able to implement the transition plan and the management strategies listed on the February 2011 IEP, noting that the management strategies were commonly used by special education teachers. In any event, the district argues that failure to implement all of the strategies would not amount to a material failure to implement the IEP. The district also asserts that it does not have to demonstrate that the student would have been functionally group but that, in any event, if the student had attended the assigned school, he would have been appropriately grouped, regardless of in which of the nine possible 6:1+1 special classes he was placed.

Next, the district asserts that the IHO erred in her determination that Cooke was an appropriate unilateral placement for the student. Specifically, the district argues that Cooke did not offer instruction specially designed to meet the student's unique needs, in that, although testimony revealed that the student benefited from small group instruction, most of the student's classes at Cooke had staffing ratios of 12:1+1. The district also asserts that the smaller 8:1+1 mathematics classes offered at Cooke originated from a school wide programmatic decision, rather than as a response to the student's unique needs. The district also asserts that the student did not make much academic progress at Cooke during the 2011-12 school year. Finally, the district asserts that both parties agreed that the district, not Cooke, provided the student's nursing services and, as such, the provision of such services should not calculate into the determination of whether the parents' met their burden to establish that Cooke was an appropriate unilateral placement.[3]

With respect to equitable considerations, the district asserts that the parents had no intention of enrolling the student in a public school placement, as evidenced by the parents' failure to inform the district as to what size class ratio they believed appropriate for the student, including the 12:1+1 and 12:1+4 special classes considered but rejected by the February 2011 CSE, , thus suggesting that the parents would also not have accepted a class ratio similar to the student's classes at Cooke. The district also asserts that the parents failed to give timely notice to the district of their unilateral placement of the student and signed an enrollment contract prior to the "completion of the CSE process." As to the parent's request for direct funding of the student's tuition, the district asserts that the parents did not demonstrate that they lacked the financial means to "front" the cost of tuition. Consequently, the district seeks an order reversing the IHO's decision in its entirety.

In an answer and cross-appeal, the parents respond to the district's petition by denying the material allegations raised and assert that the IHO correctly found that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief.

[3] Parents' counsel stipulated on the record that the district paid for the student's nursing services at Cooke during the 2011-12 school year (Tr. p. 529).

With respect to the district's assertion that the IHO erred in addressing the issue of the student's LRE as outside the scope of the impartial hearing, the parents asserts that, "[w]hile not explicitly plead," the claim that the 6:1+1 special class was overly restrictive "c[ould] be gleaned from a fair reading of the [due process complaint notice] in its articulation of" the parents' other claims relating to the 6:1+1 special class, the student's opportunities for community inclusion, and peer grouping. Further, the parents argue that the district opened the door to the issue by introducing and attempting to address the issue of the appropriateness of the 6:1+1 special class "due to its small size".

The parents also interpose a cross-appeal, asserting that the IHO failed to fully address all of issues raised by the parents in their due process complaint notice. Specifically, the parents assert that the IHO should have considered their claim that the district CSE failed to afford the parents an opportunity to participate in the development of the student's IEP. In addition, although the IHO made certain findings with respect to the February 2011 CSE's failure to consider the privately obtained evaluation and the accuracy of the student's present levels of performance in the IEP, the parents assert that the IHO failed to address the February 2011 CSE's failure to discuss or review a classroom observation, social history, medical report, or speech-language, OT and PT evaluations and the failure of the IEP to accurately reflect the student's writing or listening comprehension levels. The parents also argue that the IHO should have addressed the parents' claim that the IEP failed to include an appropriate transition plan to address the student's needs. With respect to the assigned public school site, the parents argue that the IHO should have also found that the district failed to establish what particular classroom it assigned the student to attend. Moreover, the parents assert that the IHO should have considered those claims regarding the safety of the assigned public school site, which arose from the parents' "reasonabl[e] reli[ance]" on the school survey report.

In its answer to the parents' cross-appeal, the district denies the material allegations raised in the parents' cross-appeal and reiterates that it offered the student a FAPE for the 2011-12 school year, that Cooke was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parents' request for relief.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the

way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. Parental Participation

In their cross-appeal, the parents assert that the district failed to afford them an opportunity to participate in the decision-making process regarding the creation of the student's IEP, in that the CSE failed to provide documents allegedly considered to Cooke staff who participated by telephone, the CSE failed to adequately consider the opinions of the parents and the Cooke staff with regard to the appropriateness of the 6:1+1 special class, and much of the IEP was developed after the February 2011 CSE meeting. Also relevant to the claim of parental participation, the district asserts in its appeal that the IHO erred in finding that the February 2011 CSE failed to consider the privately obtained neuropsychological evaluation, noting that the February 2011 CSE utilized input from Cooke staff and progress reports.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

A review of the hearing record shows that attendees at the February 2011 annual review CSE consisted of a district school psychologist, a district special education teacher (who also served as the district representative), both parents, and four participants from Cooke, including a student support services representative and, by telephone, the assistant head of the high school and the student's mathematics and ELA teachers (Dist. Exs. 9 at p. 2; 10 at p. 1; see Tr. p. 38).

Initially, with regard to the February 2011 CSE's review of the evaluative material provided by the parents, a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). While a CSE must consider parents' suggestions or input offered from privately retained experts, a CSE is not required to merely adopt such recommendations for different programming (see, e.g., J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013], aff'd, 2014 WL 519641 [2d Cir. Feb. 11, 2014]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F.Supp.2d 554, 571 [S.D.N.Y. 2013]; Dirocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd, 487 Fed. App'x 619, 2012 WL 2615366 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]).

According to testimony by the district special education teacher, she and the district school psychologist reviewed the student's file prior to the February 2011 CSE meeting (Tr. pp. 56, 58). Specifically, the district special education teacher testified that she reviewed the student's IEP from the prior school year, progress reports from Cooke, and a neuropsychological report and speech-

language report that the parents sent to the district (Tr. p. 57).[4] The district special education teacher indicated that she prepared a draft IEP for her use during the February 2011 CSE meeting but did not provide a copy to the other participants (Tr. pp. 59-60). She testified that she referred to the student's IEP from the prior school year during the February 2011 CSE meeting in order to determine where the student's performance was in the prior school year as compared his performance at the time of the CSE meeting (Tr. p. 59).[5]

With respect to the parents' access to the evaluative information, the district special education teacher testified that "[t]he parents would have had a copy of the progress report from [Cooke]" and, since they provided a copy of the neuropsychological report to the district, "they would have [had] a copy" of that document as well (Tr. p. 59). She further noted that she asked the parents during the CSE meeting if they had seen the Cooke progress report (Tr. p. 60). As to the Cooke staff, the district special education teacher testified that she did not provide copies of documents to the Cooke staff participating by telephone because the source of the document was Cooke staff who provided it to the district in the first instance and, however, she had assumed the parents provided a copy of the neuropsychological evaluation report to Cooke but did not recall checking to see if everyone had a copy of that report (Tr. pp. 60-61).

The February 2011 CSE meeting minutes indicate that "materials were reviewed by the [CSE]" and specifically references that the CSE received "nursing, speech, [and] updated math program report[s]" but does not otherwise identify specific evaluative documentation available to the CSE (Dist. Ex. 10 at p. 1). The district special education teacher testified that she did not review or discuss the student's social history and did not recall reviewing the February 2011 speech-language progress report provided by the parents during the CSE meeting (Tr. pp. 61-62; see generally Dist. Ex. 19). Testimony by the Cooke assistant head of the high school, who attended the February 2011 CSE, indicated that, in preparation for said CSE meeting, he was not provided with a social history, classroom observation, psychoeducational evaluation, medical report, speech-language assessment, or an evaluation or progress report from the student's after-school speech-language pathologist, or a PT or OT assessment (Tr. pp. 224-25). In addition, the Cooke assistant head of the high school indicated that the February 2011 CSE did not discuss any of the aforementioned documents (Tr. p. 225). Although the February 2011 CSE did not provide him with a copy of the student's IEP from the 2010-11 school year or the draft IEP for 2011-12 school year, the Cooke assistant head of the high school indicated that the CSE discussed whether the goals included in the 2010-11 IEP were still appropriate for the student (Tr. pp. 227-28).

[4] The hearing record includes a letter to the district dated January 12, 2011, by which the parents provided the district with a copy of the October 2010 neuropsychological evaluation update report (Parent Ex. I at p. 1).

[5] Districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (DiRocco, 2013 WL 25959, at *18, quoting M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco, 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506).

Notwithstanding the foregoing, the evidence shows that some members reviewed the evaluative information provided by the parents.[6]

As to the parents' assertion that the February 2011 CSE disregarded the opinions of the parents and the Cooke staff, the hearing record shows that the CSE sought the input of Cooke staff during the review and development of the student's annual goals and, further, that the CSE changed the student's related services mandates based on input from the Cooke staff (Tr. pp. 51-52; Dist. Ex. 10 at p. 2). The hearing record also shows that the district continued the services of a full-time 1:1 nurse based upon a letter provided by the parents, which recommended the service (Tr. pp. 52-53; Dist. Ex. 10 at p. 2). With respect to the 6:1+1 special class, the district special education teacher testified that everyone at the February 2011 CSE meeting discussed the recommendation and the Cooke staff expressed their objections thereto (Tr. pp. 87-88). Thus, in this regard, the hearing record shows that the Cooke staff participated, in part, by virtue of expressing their disagreement, and the fact that the CSE did not adopt those recommendations does not amount to a denial of meaningful participation (see P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7).

Finally, there is no support for the parents' proposition that, by drafting portions of the February 2011 IEP after the CSE meeting, the CSE deprived the parents an opportunity to participate in the development of the IEP (cf. E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]). Instead, the case cited by the parents supports an opposite conclusion, stating that "the relevant inquiry is whether there was a full discussion with the [p]arents regarding the content of the IEP before the IEP was finalized" (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *15 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd R.E., 694 F.3d 167). As described above, the parents had this opportunity and they do not allege that any of the content of the final February 2011 IEP was contrary to the discussions held at the CSE meeting. Moreover, the district special education teacher testified that the IEP was "typed up after the meeting" based on the information collected from the parents and the school during the CSE meeting (Tr. pp. 82-83).

Based on the foregoing, while the parents may disagree with the level of attention devoted to the content of the private evaluations or reports and with the recommended 6:1+1 special class

[6] I note that State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]). Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129). In determining whether there has been a denial of a FAPE due to a procedural violation, every member of a body such as a CSE need not read a document in order for the body to collectively consider the document (T.S. v. Board of Educ. of Town of Ridgefield, 10 F.3d 87, 89 [2d Cir. 1993]); however, I remind the district that it should ensure that all members of the CSE have access to the documents discussed at a CSE meeting.

placement, such disagreements alone do not support a finding that the district deprived the parents an opportunity to meaningfully participate in the development of the student's February 2011 IEP.

B. February 2011 IEP

1. Present Levels of Performance

The district asserts that, in addition to input from the parents and Cooke staff, the February 2011 CSE considered sufficient evaluative information and the IEP accurately described and addressed the student's present levels of academic performance and social/emotional and behavioral needs. In addition to the issue of the February 2011 CSE's consideration of the privately obtained evaluation and report, set forth above, the parents assert that the IHO should also have considered the sufficiency of the remaining evaluative information available to the CSE. Moreover, while the parents assert that the IHO correctly determined that the February 2011 IEP failed to accurately describe the student's needs, they argue that the IHO failed to specifically consider whether the IEP accurately described the student's needs in the student's writing or listening comprehension levels.

An 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]; 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 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 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]; 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 agree otherwise (34 CFR 300.303[b][1]; 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]).

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

factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 329-30 [S.D.N.Y. 2013]).

The hearing record shows that members of the February 2011 CSE considered the student's June 2010 IEP, the October 2010 neuropsychological evaluation, a February 2011 Cooke mathematics report of the student's current levels of performance, a February 2011 Cooke related service change form, and a February 2011 speech-language progress report from the student's after-school speech-language pathologist (see Tr. pp. 57, 59; see Dist. Ex. 10 at p. 1; see generally Dist. Exs. 13; 18; 19; 20; Parent Exs. I).[7] Additionally, the district special education teacher testified that she conducted a classroom observation of the student (Tr. pp. 46, 61-62; see generally Dist. Ex. 3); however, the extent to which the February 2011 CSE relied on this document is unclear. Moreover, as discussed in detail above, Cooke staff reported to the CSE regarding the student's present levels of performance (see Tr. p. 42, 81-82).

The October 2010 neuropsychological evaluation update report indicated that, consistent with a previous neuropsychological evaluation in 2007, the student demonstrated low-average to average intelligence, a marked communication disorder, and mild features of pervasive developmental disorder of unknown origin (PDD-NOS), with certain characteristics typical of Asperger's disorder (Parent Ex. I at pp. 5, 17-18). The evaluator indicated that, with intervention, the student demonstrated improvement in the area of higher order language processing, and was "far more effective than in the past" in his ability to comprehend ambiguous language and draw inferences from spoken language (id. at p. 18). However, the evaluator reported that following a series of lengthy directions, interpreting figurative language, building a more complex narrative, and using language to negotiate social situations remained challenging for the student (id. at pp. 16, 18).

With respect to reading, the October 2010 neuropsychological evaluation update report indicated that, academically, the student made gains of several years in the area of decoding and exhibited progress in the areas of reading comprehension and written expression at the sentence level, through consistent intervention, repetition, and practice with successively more challenging concepts introduced very slowly (Parent Ex. I at pp. 13, 18). The evaluation report noted that the student could "decode phonetically regular non-words above grade level" and that his comprehension extended to an early sixth grade level (Parent Ex. I at p. 14). Consistent with this, the February 2011 IEP indicated that the student had a strong vocabulary, decoding, and comprehension skills (Dist. Ex. 9 at p. 3). Further, consistent with the October 2010 neuropsychological evaluation update report, the February 2011 IEP indicated that the student needed to improve his ability to make inferences (compare Dist. Ex. 9 at p. 3, with Parent Ex. I at pp. 13-14). The February 2011 IEP listed "instructional levels" that were determined from the group reading assessment and diagnostic evaluation ("GRADE"), an assessment conducted by

[7] It appears from the face of the document that the student's prior IEP was originally dated April 26, 2010 but that handwritten changes were included on May 14, 2010 and June 18, 2010 (see Dist. Ex. 20 at p. 1). For the purposes of this decision, the student's prior IEP will be referred to as the "June 2010 IEP."

Cooke, which levels were fourth grade for both decoding and reading comprehension (Dist. Ex. 9 at p. 3; see Tr. p. 274). The student's present levels of academic performance also indicated that the student read books in school at the sixth grade level and, consistent with a December 2010 Cooke progress report, noted that the student had a strong interest in non-fiction (Dist. Exs. 9 at p. 3; 14 at p. 6). The IEP noted that, according to the student's ELA teacher, "he performs at a higher level in class than testing indicates" (Dist. Ex. 9 at p. 3). While there is variation in reports of the student's instructional levels, such variations could be attributable to variations in the measures utilized and the skills described and, as such, it does not appear that the February 2011 IEP is inaccurate in this respect (Dist. Ex. 9 at p. 3). Thus, the hearing record shows that the student's reading and ELA needs, as described on the February 2011 IEP, were consistent with the evaluative information before the CSE.[8]

Turning to the student's skills in writing, the October 2010 neuropsychological evaluation update report indicated that, although spelling remained a challenge for the student, his writing skills strengthened at the sentence level and extended to an early seventh grade level (Parent Ex. E at p. 14). Furthermore, the evaluator noted that the student was effective in combining simple ideas into a more complex, grammatically correct sentences using conjunctions and that he could write a correctly written and punctuated paragraph that contained simple topic and concluding sentences (id. at pp. 14-15). While not offering great detail, consistent with the description of the student's abilities in the October 2010 neuropsychological, the February 2011 IEP noted that, in written expression, the student was working on writing five paragraph reports (Dist. Ex. 9 at p. 3).

With regard to the mathematics, the October 2010 neuropsychological evaluation update report indicated that the student demonstrated mid-fifth to mid-sixth grade level mathematics skills (Parent Ex. I at p. 14). The evaluator noted that the student experienced difficulty with word problems, as the student was "easily thrown" by the wording and confused by the multiple steps required to solve the word problem (id.). The report stated that the student knew many multiplication facts but struggled with long division (id.). Consistent with the February 2011 Cooke mathematics current levels of performance report, the February 2011 IEP indicated that the group mathematics assessment and diagnostic evaluation ("GMADE") assessment in September 2010 revealed the student's instructional level was at a 4.5 grade equivalent and the STAR Math assessment revealed that his instructional level was at a 3.9 grade equivalent (compare Dist. Ex. 9 at p. 3, with Dist. Ex. 13 at p. 1; see Tr. p. 274). However, although not delineated this way on the Cooke report, the February 2011 IEP designated the former to represent the student's level in "computation" and the latter in "problem-solving" (see Dist. Exs. 9 at p. 3, 13 at p. 1). According to testimony offered by the student's mathematics teacher at Cooke, who participated in the February 2011 CSE meeting, results of standardized tests administered as noted in the IEP were inaccurate on this basis, since both of the assessments have a computation and a problem solving component (Tr. pp. 338-39, 350; see Dist. Ex. 9 at p. 3). Consistent with the February 2011 Cooke progress report for mathematics and the teacher's estimate of the student's mathematics levels

[8] The IHO relied on the testimony taken during the impartial hearing from the student's Cooke ELA teacher for the 2011-12 school year to conclude that the February 2011 IEP failed to note the variation in the student's reading level based on whether the material was nonfiction or fiction (see IHO Decision at p. 11; see also Tr. pp. 409, 426). However, there is nothing in the hearing record to indicate that this information was presented to the February 2011 CSE, it appears that the IHO improperly relied on retrospective evidence on this point (see R.E., 694 F.3d at 185-88).

reportedly provided during the February 2011 CSE, the Cooke mathematics teacher testified that the student's computational skills were at a beginning fifth grade level and his problem solving skills were on a mid-fourth grade level (Tr. pp. 351-52; see Dist. Ex. 13 at p. 1). The IEP did not clearly indicate the student's deficit areas related to mathematics but did note that, at the time of the February 2011 CSE, he was working on solving two-step math problems, solving applied problems using money, and personal banking (Dist. Ex. 9 at p. 3). Therefore, once again there is variation in the reports of the student's grade level; however, such variation does not itself support a finding that the February 2011 CSE's failed to conduct or consider sufficient evaluative information about the student. It shows that there was a variety of assessment tools used, and that there was some variation in the results.

However, in regard to the student's social/emotional present levels of performance, review of the February 2011 IEP reveals that the CSE does not appear to have considered the deficits described the October 2010 neuropsychological evaluation update report (compare Dist. Ex. 9 at p. 4, with Parent Ex. I at pp. 15-17). The October 2010 neuropsychological evaluation indicated that the student was interested in others and was eager to please, polite, and thoughtful (Parent Ex. I at p. 15). The evaluator noted that student experienced continued challenges in his understanding of how to use language and non-verbal cues to initiate and maintain mutually enjoyable conversations (id.). The evaluator indicated that, while the student consistently initiated interaction, he continued to struggle with generating age appropriate questions, was preoccupied with topics of personal interest (i.e. trains and elevators), and misread verbal and visual social cues (id.). The evaluator further noted that, in addition to demonstrating a pragmatic communication disorder, the student displayed a "concomitant heightened anxiety level" (id.). Formal testing revealed that the student was able to perceive the perspective of another person but that his difficulties with linguistic processing hampered his ability to understand social language (id.). The evaluator further noted that the student tended to experience difficulty with affect recognition in the presence of nonverbal cues, both in an out of context (id. at p. 16). In regards to the student's anxiety, the evaluator indicated the student reported that he experienced autonomic symptoms of anxiety (i.e., he felt "shy," "jittery," "heart can skip a beat," hands are often "cold and sweaty") (id. at p. 17). The report indicated that the student worried about how he was perceived by others and experienced "marked levels" of separation anxiety (id.). The evaluator noted that the student was fearful of approaching his peers and worried about being called on in class, being laughed at by others, and about the well-being of his parents and being separated from them (id.). To contain his anxiety, the evaluator indicated that the student tried hard to "ask permission, "do everything right," and "do what other people like" (id.). According to the report, the student worried most about a "volcano erupting" or possible injury to people he loves (id.). The evaluator further noted that the student's difficulties with attention were complicated by his (language) processing and anxiety modulation challenges, for which he needed considerable repetition and reassurance to understand less explicitly stated demands, process complex language, and to understand which information required his focus (id.). The report indicated that, when he understood task demands and his processing skills were not overly taxed, the student was able to sustain adequate attention (on medication) (id.). The report noted that the student was least anxious when he was provided with a solid explanation of his schedule and a clear explanation of what was expected of him (id.).

The IEP offered to the student for the previous school year, the June 2010 IEP, included some information about the student's social/emotional performance that was in line with the information in the psychoeducational evaluation (see Dist. Ex. 20 at p. 4; Parent Ex. I at pp. 15-

16). The June 2010 IEP indicated that, along with delays in both non-verbal and verbal communication, the student demonstrated "qualitative differences" in social interaction (Dist. Ex. 20 at p. 4). The June 2010 IEP indicated the student exhibited a "high degree of anxiety," particularly related to peer social interaction (id.). The June 2010 IEP also noted the student was reported to exhibit features of "ADD inattentive type" (id.).

In contrast to the explicit information about the student's social/emotional functioning and the relationship between his social/emotional and language processing difficulties included in the neuropsychological evaluation update report and to some extent the student's June 2010 IEP, the February 2011 IEP described student's behavior in school as "fine" (Dist. Ex. 9 at p. 4). Despite the specificity of the neuropsychological evaluation update report, the February 2011 IEP only noted the student had "social communication issues" (id.). The February 2011 IEP indicated the student was easily distracted and he tended to read "what he likes" (id.). In addition, as carried over from the June 2010 IEP, the February 2011 IEP noted that the student had a strong preference for sameness and routine but noted that improvement had been observed in the student's acceptance of change and that he worked on strategies to help him cope with changes in his schedule (compare Dist. Ex. 9 at p. 4, with Dist. Ex. 20 at p. 4). The Cooke assistant head of the high school, who attended the February 2011 CSE meeting, opined that the student's difficulties with anxiety, perseveration with topics of personal interest, and receptive/expressive language, and communication were significant enough to be included in the February 2011 IEP (Tr. pp. 229-30; see Dist. Ex. 9 at p. 2). Moreover, the district's own special education teacher admitted that the significance of the student's difficulties in these areas was not included in the February 2011 IEP (Tr. pp. 69-75).[9]

With regard to the student's health status/physical development, the February 2011 IEP indicated the student's hearing was within normal limits, he wore glasses for board work, he received medication at home specific to attention and focusing concerns, and he received therapy for speech-language delays and "fine motor control issues" (Dist. Ex. 9 at p. 5). The February 2011 IEP did not describe the student's fine motor difficulties or mention what he worked on in PT; however, the IEP did recommended the student receive related services of PT and OT and included annual goals associated with these related services (Tr. p. 84; Dist. Ex. 9 at pp. 2, 7, 13-14).

The February 2011 IEP indicated the student had diabetes for which he was insulin dependent and wore an insulin pump (Dist. Ex. 9 at p. 5). The February 2011 IEP indicated that due to his "cognitive limitations," the student required a full time 1:1 nurse at school for constant supervision of his diabetes and the functioning of his insulin pump (id.). The purpose of the nurse's 1:1 availability in school was to provide the student with intervention as necessary and prevent a serious sequence of (medical) events from occurring (id.). Review of the February 2011 IEP reflects that this portion of the IEP contained the only mention that the student had "cognitive limitations" (id.). Review of the October 2010 neuropsychological evaluation update report indicated the student's cognitive functioning was in the low average to average range (Parent Ex.

[9] The district special education teacher testified that the student's special education classification of autism incorporated his language processing and communication difficulties (Tr. p. 73). She affirmed that the February 2011 IEP neglected to include anything about the student's language functioning as reflected in the neuropsychological evaluation report update (Tr. p. 75; see Parent Ex. I at p. 13).

I at pp. 3, 11, 17). The February 2011 CSE did not describe the student's cognitive levels, abilities and "limitations" in the IEP (see Dist. Ex. 9). A January 31, 2011 letter from the student's diabetes nurse specialist indicated the student had difficulty with abstract thinking and problem solving, and was not mature enough to always intervene on his own behalf if his blood sugar was low, or if his insulin pump malfunctioned and his blood sugar was too high (Parent Ex. Z). The February 2011 IEP indicated that the student should monitor his own glucose levels during the day and adjust his insulin pump accordingly and noted that the student unable to engage in this task independently, but the IEP did not otherwise provide for developing skills in order to become self-directed in monitoring his diabetes and insulin pump (see Tr. pp. 504-08; see Dist. Ex. 9 at pp. 1, 5; Parent Ex. I at pp. 6, 17-18).[10]

Because of the failure of the February IEP to accurately describe the student's individualized needs compared to the totality of evaluative information available to the CSE, the evidence in the hearing record supports the IHO's conclusion that these deficiencies constituted a procedural violation of the IDEA, the effect of which on a determination as to whether or not the district offered the student a FAPE is discussed further below.

2. Annual Goals

The district asserts that the annual goals included in the February 2011 IEP were specific and measurable, based on input from the parents and Cooke staff, as well as Cooke progress reports, including related service provider reports. In addition, the district argues that it would have been up to the teachers to determine the best way to interpret the 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]).

The February 2011 IEP included seven annual goals in the areas of mathematics, ELA, PT, OT, speech-language, transition, and counseling that were not specific or measurable (Dist. Ex. 9 at pp. 6-10). However, the IEP contained multiple short-term objectives, some of which clarified the associated annual goals and were specific and measurable (see id.; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013] [finding that, although the goals were vague, they were modified by more specific objectives that could be implemented]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19,

[10] See generally "Clarification on Insulin Pumps" [NYSED Mem. Mar. 2012], available at http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/insulinpump.pdf.

2013]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *8 [S.D.N.Y. Sept. 22, 2011]). Others, however, failed to adequately cure the deficiencies in the annual goals.

For example, approximately seven of the ten short-term objectives related to an annual goal that addressed transition were either immeasurable or lacked a quantifiable measurement by which to track progress (Dist. Ex. 9 at p. 8). Short-term objectives related to a counseling goal were did not specify the expected behaviors that would constitute progress (id. at p. 9). Moreover, the counseling goal and its associated short-term objectives did not address the student's difficulties with anxiety and/or the relationship between the student's language needs and his ability to deal with anxiety, discussed in detail above (id. at p. 9).

An annual goal addressing the role and responsibilities of the 1:1 nurse did not provide for the student's progress toward any skill and was also not measurable and had no associated short-term objectives involved (Dist. Ex. 9 at p. 10). Moreover, despite the district's assignment of a 1:1 nurse, the February 2011 IEP included no indication of any health management need the student had or any annual goal specific to diabetes education and self-management of the disease (see id. at pp. 6-10).

Furthermore, testimony from Cooke staff who attended the February 2011 CSE emphasized the failure to align the annual goals and short-term objectives included in the IEP with the student's needs (see Tr. pp. 223, 231-32; see also Dist. Ex. 9 at p. 2). The Cooke assistant head of the high school testified that the content of the annual goals did not sufficiently address the student's perseveration, anxiety, misreading of verbal and visual cues, levels of receptive, expressive, or pragmatic language (Tr. pp. 223, 231-32). The IEP goal addressing mathematics identified multiple skillsets in the same goal (Dist. Ex. 9 at p. 6). The mathematics teacher from Cooke testified that, as a result, it was unclear to him how a teacher would report on the student's progress towards achieving the actual annual goal (Tr. pp. 337-38). For reasons discussed herein, while the short-term objectives to some extent cure the deficiencies in the annual goals, the effect of the procedural violation arising from the insufficiencies in the annual goals in the first instance is disused below.

3. Least Restrictive Environment

The IHO found that the 6:1+1 special class placement in a special school was "very restrictive" and the student was likely to be underserved. The district asserts that the IHO exceeded the scope of the impartial hearing, in that the parents did not challenge the restrictiveness of the recommended 6:1+1 special class placement in a specialized school in their due process complaint notice and that it did not agree to expand the scope of the impartial hearing. As such, the district asserts that the IHO exceeded the scope of the impartial hearing.

The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508 [d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; J.C.S., 2013 WL 3975942, at *8-

*9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd 2014 WL 322294 [2d Cir. Jan. 30, 2014]; DiRocco, 2013 WL 25959, at *23; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D., 2011 WL 4914722, at *13; M.P.G., 2010 WL 3398256, at *8).

In this case, the parents' due process complaint notice cannot be reasonably read to include a challenge that the 6:1+1 special class setting was overly restrictive (see Parent Ex. A at pp. 2, 3). The parents' suggested reading of allegations that the transition plan did not provide for and the assigned public school site did not offer opportunities for community inclusion and that student would have been higher functioning than the other students in the classroom at the assigned public school site is overly broad (see Dist. Parent Ex. A at pp. 3-4). Where, as here, the due process complaint notice is silent as to this issue and the district did not agree to expand the scope of the impartial hearing (and the parent did not request permission from the IHO to file an amended due process complaint notice), the parents cannot pursue this claim on appeal. Moreover, contrary to the parents' argument and, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 283-84 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), review of the hearing shows that the district did not open the door to the issue (see generally, Tr. pp. 1-547). Furthermore, to the extent that the parents assert that the district "opened the door" to the LRE issue by defending the small "size" of the 6:1+1 special class, this argument, once again, misreads the LRE principle.

More specifically, both the IHO's finding and the parents' assertions must be rejected because the restrictiveness or LRE aspects of an educational placement do not refer to the student-to-adult ratio in the particular classroom or the functioning levels of other disabled students in a classroom. In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has

mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]).

In this case, neither of the parties present an argument related to the first Newington prong— in other words that the student should be educated in a general education setting. Moreover, the parties also do not make representations related to the second Newington prong by arguing that the district should have offered the student a community school or some other setting with greater access to non-disabled peers. It is on this second Newington prong that the parents' arguments and the IHO's conclusions are revealed as unrelated to an LRE claim. The student's access to "community inclusion," as advanced by the parents on appeal, opportunities does not appear to argue that the student should have been offered greater access to nondisabled peers in the public school setting. Moreover, considerations, such as the student's similarity in functioning to other disabled students and the size of a special class that is composed of only disabled students, also do not implicate access to nondisabled peers. As such, both the IHO's reasoning and the parents' arguments related to the LRE principle is unavailing.

4. Transition Plan

On cross-appeal, the parents assert that the transition plan developed during the February 2011 CSE was inadequate. The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z., 2013 WL 1314992, at *6, *9, citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

In this case, the long-term adult outcomes outlined in the transition plan included in the February 2011 IEP provided that the student would integrate into the community with supports, attend a post-secondary program, live independently with supports, and be employed with supports (Dist. Ex. 9 at p. 15). The transition plan identified the student's diploma objective as an "IEP

Diploma" (id.).[11] The student's transition plan also indicated that the student's instructional activities included participation in an instructional program that supported long-term adult outcomes (id.). In the area of community integration, the transition plan indicated that the student would learn about community agencies and their functions and that he would participate in school sponsored internships (id.). Post-high school service needs for the student included that the student would research post-secondary programs that supported his interests and ability level (id.). Within the domain of independent living, the student's transition service needs included learning about personal banking and household budgeting (id.). Finally, in the area of daily living skills, the transition plan specified the student's need to apply learned coping skills and strategies to positively integrate within the community (id.). Given the foregoing, the transition plan adequately set forth the student's transition needs and goals consistent with the federal and State regulations. However, the section of the transition plan regarding the respective parties who would be responsible for implementing the services in the student's transition plan was not filled out by the February 2011 CSE (Tr. p. 93; Dist. Ex. 9 at p. 15). The district special education teacher testified that she "forgot to check the boxes" that indicated the responsible party options (parent, school, student, agency) (Tr. p. 93).

To the extent that the February 2011 CSE's failure to identify the party responsible for the transition services constitutes a procedural violation, in isolation it does not rise to level of a denial of a FAPE; however, the effect of such violation when considered cumulative with other deficiencies in the IEP will be addressed below.

C. Cumulative Impact

Assuming for the sake of argument that, individually, none of the district's procedural and substantive deficiencies rose to the level of a denial of FAPE, under the circumstances of this case, I find it appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156, at *19 [2d Cir. Apr. 2, 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Under the circumstances of this case, I find that, had no

[11] Beginning with the 2013-14 school year, the New York State IEP diploma was replaced by the "Skills and Achievement Commencement Credential" for students with severe disabilities who are eligible to take the New York State alternate assessment (Skills and Achievement Commencement Credential for Students with Severe Disabilities, Office of Special Education, Special Education Field Advisory [April 2012], available at http://www.p12.nysed.gov/specialed/publications/SACCmemo.htm). In the instant case, as the February IEP was for the 2011-12 school year, this change does not apply.

single procedural violation directly resulted in a denial of FAPE, the cumulative effect of all of the procedural defects did (T.M., 2014 WL 1303156, at *19; R.E., 694 F.3d at 191).

The hearing record demonstrates that despite having sufficient evaluative information available to it, the CSE failed to adequately describe and/or understand the student's level of functioning, which, in turn, led to the creation of inadequate goals and a failure to address the student's need, as referenced in the IEP, to continue to learn how to address his diabetes, become self-directed/monitored, and modify his own insulin administration. Under the circumstances of this case, these violations support a finding that the cumulative effect of the violations tilted the calculus in favor of the parents insofar as the IEP, viewed as a whole, was not reasonably calculated to enable the student to receive educational benefits and resulted in a denial of a FAPE to the student for the 2011-12 school year (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 190-91; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

D. Unilateral Placement

Turning now to the issue of whether Cooke was an appropriate unilateral placement for the student, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. Specially Designed Instruction

The crux of the district's argument on appeal is that the parents failed to establish that Cooke offered the student specially designed instruction to address the student's unique needs.

State regulation defines specially designed instruction as "adapting, as appropriate, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

The student attended the Cooke high school program during the 12-month 2011-12 school year from July 1, 2011 through June 30, 2012 (Tr. p. 256-57; Parent Ex. O at p. 1). The Cooke assistant head of the high school at testified that the student's program at Cooke was a modified high school program, whereby its students' day was built around academics, presented in accordance with students' functioning levels, with additional classes that focused on social/emotional and behavioral skills (Tr. pp. 257-58). The assistant head of the high school indicated the high school program offered a well-balanced program of academics, social/emotional development, and adaptive daily life skills (Tr. p. 258). He noted the high school at Cooke was "right along par with…typical high school," where approximately 100 students in the building attended 45-minute periods (Tr. p. 259).

The hearing record shows that the student, whom the Cooke assistant head of high school described as "typical in so many ways," had multiple teachers for academic subjects that met in multiple classrooms (Tr. pp. 301, 303, 331-332). Accordingly, there were many transitions in the student's day as he moved between classes (Tr. p. 257). The student remained with his same cohort for three to four hours per day; he had class with more than 11 or 12 students during the school day; and during lunchtime and social times, he interacted and mixed with everybody (Tr. pp. 301-

02).[12] The hearing record reflects that, except for a grouping of eight students in the mathematics class,[13,14] the other academic classes at Cooke were generally 12:1+1 classes, exposing the student to a variety of students during the day (Tr. pp. 234, 257, 286, 288, 302, 361-362, 364).[15] According to the Cooke assistant head of the high school, the student's class for the 2011-12 school year was filled to capacity with 12 students (Tr. p. 289).

According to the Cooke assistant head of the high school, the student's cohort at Cooke handled academics that were consistent with State common core standards and content and that were "intensely" modified to ensure that all language and materials used were on an appropriate level for the students (Tr. p. 258). He noted Cooke had "a lot of integration" between speech-language and classroom subjects, whereupon the speech-language staff came into classrooms to work with classroom teachers, for purposes of modifying (instructional) presentations to best suit the particular group (id.). Further, the students' counselors also collaborated with the classroom teachers and speech-language staff (id.). He also testified that the curricula modifications addressed input and integration of information, maximizing memory, output of information, and metacognitive concerns (Tr. pp. 258-59, 261).

The Cooke assistant head of the high school also testified that the other students in the student's classes for 2011-12 school year had similar academic levels and, "more importantly," social/emotional levels (Tr. p. 259). The assigned head of the high school testified that the student's cohort had "very socially appropriate peer models" (Tr. pp. 259-60). He also indicated there was diversity in the group, but that the student's class was a strong group, able to "socialize and handle things on an independent level" (Tr. p. 260).

With regard to the student's non-academic classes, the Cooke assistant head of the high school testified that, in addition to the student's "clinical groups," which occurred in mandated small groups of five, the student attended regularly scheduled classes called language skills, self-

[12] According to the Cooke assistant head of high school, the student benefitted from exposure to a variety of students because, without an appropriate peer group, group dynamics, collaborative work, scaffolding, modeling, and social interactions within appropriate academic challenges would not occur (Tr. p. 303).

[13] According to testimony by the student's Cooke mathematics teacher, the student had attended a 12:1+1 mathematics class at Cooke during the previous school year and "did fine" (Tr. p. 365). Cooke's decision to create the 8:1+1 mathematics classes for ninth and tenth grade students had "nothing to do with [the student] and . . . everything to do with a programmatic decision" (id.). All mathematics class groupings at Cooke were "carefully crafted" to ensure the students possessed common characteristics relating independent and instructional levels of performance, as well as speech-language and social needs (Tr. pp. 363, 366-67). In the student's case, Cooke considered placing the student in an environment where he would feel safe and comfortable, in order to reduce his anxiety so he could focus on mathematics (Tr. p. 367).

[14] Specific to mathematics class, the Cooke assistant head of the high school testified that students participated in applied mathematics work on their functional levels that included use of money in the community and banking transactions (Tr. p. 287).

[15] The Cooke assistant head of the high school testified that gym class consisted of 18 to 24 students, a gym teacher, and an occupational therapist and a physical therapist (Tr. p. 289). Clinical groups consisted of groups of five per mandates (id.).

advocacy, life skills, forum, travel training, internship, and advisory (Tr. pp. 260-265; Parent Ex. L).[16, 17]

2. Student Progress at Cooke during 2011-12

Next, the district asserts that the hearing record does not support a finding that the student made progress at Cooke during the 2011-12 school year. A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491-92 [S.D.N.Y. 2013]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364). A finding of progress is nevertheless a relevant factor to be considered in determining whether the unilateral placement is appropriate for the student (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In this case, the hearing record demonstrates that the student made progress at Cooke during the 2011-12 school year. Cooke progress reports reflect that the student's overall proficiency levels improved over the course of the 2011-12 school year (Parent Exs. J, K, Z). The December 2011, March 2012, and June 2012 progress reports reflected the student's increase from receiving levels of two ("shows partial understanding expected at his instructional level") at the end of the first trimester, to levels of three at the end of the third trimester ("shows an understanding at his or her instructional level with support") (Parent Ex. Z at pp. 2). The student also increased from level three to level four ("shows independent understanding expected at his instructional level") (Parent Exs. J at pp. 2-6, 9, 11-13; K at pp. 2-6,10, 1216; Z at pp. 2, 5, 7, 9, 12, 14-15, 17,

[16] Although the Cooke assistant head of the high school's testimony was unclear as to what was meant by "clinical groups," additional testimony, specific to his familiarity with the student's related services, indicated he communicated with the student's speech-language, OT, PT, and counseling providers to "maintain the clinical elements of the program" (Tr. pp. 267, 289).

[17] The Cooke assistant head of the high school testified that the language skills class addressed pragmatic language skill development (social language and appropriate interactions with others) (Tr. p. 260). The self-advocacy class addressed students' understanding of their specific disability, metacognitive strategies to compensate (for their disability), and executive functioning tasks (Tr. p. 261). Life skills (double period) addressed independent living and social skills (id.). Forum class was a men's group that specifically explored social-emotional development topics related to puberty, sexuality, and appropriate interpersonal skills (Tr. pp. 261-62). As the student already traveled independently on the subway, the travel training class addressed maintaining the student's safety when traveling on the subway (Tr. pp. 262-63). He worked on body and spatial awareness, problem solving, and trouble shooting, in the event that situational problems (i.e., train break down) arose during his travels (Tr. p. 263). Internship involved the student working at a job site with a job coach to learn the "soft" (i.e., what clothes to wear, how to address boss, understanding structure of a command, understanding job tasks, asking for help when confused) and "hard" (i.e., specific job performance tasks) skills of work (Tr. pp. 263-65). Advisory class occurred in the morning and in the afternoon, and addressed the students' executive functioning, organization, social skills, and sharing of information (Tr. pp.261-62; Parent Ex. L).

19). The student also progressed from "sometimes" or ""usually" to "usually" or "always" for skills that targeted his ability to work collaboratively with peers, participate in class discussions and activities, complete homework in a timely fashion, show he was organized and could manage materials necessary for class, and follow directions and rules (Parent Ex. Z at pp. 4, 8, 10, 13, 16, 20).

With regard to ELA, teacher comments included in the June 2012 progress report indicated the student had shown tremendous growth academically and socially (Parent Ex. Z at p. 3). The student required minimal directions to begin and maintain tasks and was attempting to expand his work independently (id. at p. 4). Although reminders for self-editing and review of work continued to be useful for the student, he required less teacher support at the end of the third trimester (id.). The student demonstrated greater understanding of socially appropriate comments and conversations and improved in his ability to work in small groups as a leader and group member (id.). In writing, the student was successful in writing two or more paragraphs on a topic, and worked on taking greater independence in revising his work by adding more detail to support his statements and by incorporating more complex vocabulary and sentence structures (id.). A checklist and teacher prompting were useful tools for the student in this area (id.). In reading, the student showed greater interest in and chose a wider variety of texts at higher reading levels (id.). He continued to apply reading strategies and increased his ability to cite evidence from the text to support his ideas (id.).

With regard to mathematics, teacher comments in the June 2012 progress report reflected that the student made progress in fluency with multiplication facts by applying his knowledge of multiplication fact families when performing the multi-digit multiplication problems (Parent Ex. Z at p. 5). The student performed best with computational work but was working towards improving his ability to apply such skills on a consistent basis to problems presented in writing or within real-life settings (id.). The student consistently contributed to class discussions and activities and was a valued member of the learning community (id.). The student continued to work with his teachers on decreasing his distractibility and increasing his ability in accurately interpreting non-verbal communications (id.). Strategies and accommodations used in mathematics class to facilitate the student's continued progress included small group instruction in groups of up to four for new concepts and skills; multi-sensory instruction and delivery of materials; direct instructional modeling to introduce, demonstrate and reinforce key concepts; use of graphic organizers, checklists for instruction and individual task completion; use of manipulatives (e.g., coins, counters, models) for individualized instruction; directions read and re-read aloud; and repetition of instruction using multiple modalities (id.).

With regard to American history, teacher comments indicated the student easily used his personal experiences and background knowledge of historical information to integrate new social studies content (Parent Ex. Z at p. 7). Teacher comments also indicated that vocabulary and his ability to retain factual information continued to be strengths for the student (id.). The student was able to use non-fiction resources such as maps, timelines, and charts to identify relevant information (id.). Further, the student was able to independently identify important ideas and main ideas in non-fiction content text, and was able to identify causes and effects related to a unit on immigration (id.).

Additional teacher comments included in the June 2012 progress report noted that in science, the student thoughtfully and carefully completed written and graphic work, often with little prompting or guidance from his teachers; the student stuck with tasks in the garden for longer periods of time, asked questions that linked experience to classroom study; and he was able to internalize concepts from discussion, reading, and film (Parent Ex. Z at p. 10). Teacher comments specific to the student's internship in the community noted the student's work performance improved significantly, in that he was able to demonstrate leadership qualities while helping other interns with their work (id. at p. 14). The teacher also noticed an increase in the student's focus throughout the internship, whereby at the beginning of the internship the student asked many questions, sometimes interrupting the instructor (id.). By the end of the third trimester, through use of social scripts, the student started to ask questions only at the appropriate time (id.).

The June 2012 progress report indicated the student was a willing and active member of his language skills group (Parent Ex. Z at pp. 1, 20). The student's ability to read novel passages accurately improved, as he was able to decode words independently in a novel passage, and he requested assistance defining novel words (id.). The student independently demonstrated adequate control of his speed and vocal volume, and his ability to read with intended mood of the text improved throughout the year (id.). The June 2012 progress report noted the student made significant improvement in the quality of the answers that the he provided when asked comprehension questions (id.). The student was also able to provide alternate answers to complex "wh"-questions that required critical thinking and reasoning (id.). The student also demonstrated significant improvement in his social use of language (id.). Initially, the student introduced conversational topics that were of narrow interest and were unfamiliar to peers (id.). With the provision of prompting and social scripting, the student initiated conversation by discussing a range of topics that were mutually interesting to his conversation counterparts (id.).

While the district's argument encompasses just the student's academic progress, the hearing record also support a finding that the student made progress in skills targeted by his related services (see Tr. pp. 267-70, 272; Parent Ex. Z at pp. 1, 21-24).

Accordingly, for the reasons discussed above, I find that the hearing record contains sufficient evidence to conclude that the parents have met their burden to show that Cooke was an appropriate unilateral placement for the student for the 2011-12 school year. In reaching this conclusion, I have considered the "totality of the circumstances" (see Frank G., 459 F.3d at 364) and have determined that the evidence shows that the parents' unilateral placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the student's unique needs, supported by such services as are necessary to permit the student to benefit from instruction (id. at 364-65).

E. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2011-12 school year and that Cooke constituted an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000];

see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

The district asserts that equitable considerations do not weigh in favor of the parents' request for relief because they had no intention of enrolling the student in a district program. In so asserting, the district notes that, although the parents asserted that they objected to the 6:1+1 special class, they could not say what type of program would be more appropriate than the one offered by the district.

The district also asserts that the parents' 10-day notice was untimely, as they did not advise the district of their rejection of the offered program until July 11, which was 11 days after the 12-month school year began. Finally, the district asserts that even if the 10-day notice was valid, the parents should not be entitled to reimbursement because they unilaterally enrolled the student at Cooke prior to completion of the CSE process. Contrary to the district's argument, the June 15, 2011 letter timely placed the district on notice of the parents' intent to unilaterally withdraw the

student from the public schools and seek reimbursement for Cooke (Parent Ex. C).[18] As to the timing of the parent's enrollment of the student at Cooke relative to the CSE process, the hearing record shows that, per the terms of the Cooke enrollment contracts, the parents would be released from their payment obligations if they accepted a district public school placement for the student (Tr. p. 490-91; Parent Exs. P; Q). The parents also testified that they were willing to forfeit tuition for the summer term had the student been offered an appropriate placement for the summer 2011 (Tr. pp. 490-91). The parents also testified they signed the Cooke enrollment contract in order to ensure a spot for the student and because the parents would be able to get their money back, if they accepted an appropriate public school placement for the student (id.). Moreover, it appears that the parents acted reasonably under the circumstances of this case (see, e.g., C.L., 744 F.3d at 840; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *9-*10 [S.D.N.Y. Sept. 23, 2013]; R.K., 2011 WL 1131492, at *28-*30; C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *9 [S.D.N.Y. Jan. 3, 2013], aff'd, 2014 WL 278405 [2d Cir. Jan. 27, 2014], as amended [Feb. 3, 2014]).

Based upon the evidence contained in the hearing record, the parents provided the district with updated evaluations, cooperated with the district in good faith to develop an appropriate IEP for the student, and cooperated with the district in good faith to develop the student's IEP. In any event, I decline to exercise my discretion to reduce the amount of reimbursement on equitable grounds in this instance.

F. Relief

The IHO ordered the district to "fund the student's tuition for Cooke" upon acceptable proof of attendance. The district asserts that the parents have not demonstrated a lack of financial ability to warrant an award of direct payment of tuition and as such, the IHO's order to fund the student's costs at Cooke was improper. With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R., 2013 WL 5312537, at *11). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that

[18] The district did not challenge the sufficiency of either the June 14, 2011 or the July 11, 2011 letters with respect to the specificity of the parents' concerns, only that their rejection of the offered program and placement was untimely (Pet. ¶ 48).

in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[19] Since the parents have selected Cooke as the unilateral placement and their financial status is at issue, I assign to the parents the burden of production and persuasion with respect to whether the parents have the financial resources to "front" the costs of Cooke and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).[20]

The hearing record shows that, at the time of the impartial hearing, the parents had made payments to Cooke as per the schedules outlined in the contracts (see Parent Exs. P, Q, T). The district correctly argues that, as to any unpaid balance of tuition due, the parents did not demonstrate that they lack the financial means to "front" the remaining tuition costs at Cooke. As such, to the extent that the ordered the district to directly fund the remaining unpaid balance of the student's tuition at Cooke, such relief was contrary to the evidence in the hearing record.

VII. Conclusion

Base on the above, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year; that Cooke was an appropriate unilateral placement; and that equitable considerations weighed in favor of the parents' requested relief. However, to the extent that the IHO ordered the district to directly fund the student's tuition, such order be modified to the extent that the district is ordered to reimburse the parents, upon proof of payment, for the costs of the student's tuition at Cooke for the 12-month, 2011-12 school year.

I have considered the parties' remaining contentions and find that I need not address them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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[19] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 557 U.S. at 243-44 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

[20] Although unnecessary to my determination in this case, the court Mr. and Mrs. A. did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F. Supp. 2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 28, 2012 is hereby annulled to the extent that the IHO ordered the district to directly fund the student's tuition costs at Cooke for the 2011-12 school year; and,

IT IS FURTHER ORDERED that, upon submission of proof of payment, the district shall reimburse the parents for the costs of tuition at Cooke for the student's 2011-12 school year at Cooke.

Dated: **Albany, New York**
June 5, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER