



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 12-200

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

Appearances:

Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Richard A. Liese, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2011-12 school year. The 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

The CSE convened on May 5, 2011 to conduct an annual review and develop an IEP for the student (Dist. Ex. 1). At the time, the student was 18 years old and had received a diagnosis of Down's syndrome (id. at pp. 3, 6). The May 2011 CSE found the student was eligible for special education and related services as a student with an intellectual disability, and recommended a 12-month program consisting of a 12:1+1 special class placement in a specialized school and related

services of group speech-language therapy, group occupational therapy (OT), and individual and group counseling (Dist. Ex. 1 at pp. 1, 12, 14).¹

In a final notice of recommendation (FNR) dated June 8, 2011, the district summarized the special education programs and related services recommended by the May 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. 2).

By letter dated July 19, 2011, the parents notified the district that after visiting the assigned school site, they determined that it was not appropriate for the student (Parent Ex. E). The parents indicated that they were willing to consider any alternate public school placement offered by the district, but that "in the interim" they had enrolled the student at Cooke and would seek public funding for the costs of the student's tuition for the 12-month 2011-12 school year (*id.* at pp. 2-3).² On June 16 and July 25, 2011, the parents executed enrollment contracts for the student's attendance at Cooke for the 2011 summer session and the 2011-12 academic school year, respectively (Parent Exs. O; P).

A. Due Process Complaint Notice

In a due process complaint notice dated February 20, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at pp. 2, 5). With respect to the development of the May 2011 IEP, the parents alleged that the CSE was not properly composed, that it failed to consider sufficient, current, and appropriate evaluative information to justify its recommendations, and that the parents and Cooke members of the CSE were not able to fully participate (*id.* at pp. 1-2). The parents further alleged that they were denied a meaningful opportunity to participate in the development of the IEP, in that the CSE did not review the student's progress toward her prior annual goals or consult with the student's providers from Cooke (*id.* at p. 2). With regard to the May 2011 IEP, the parents alleged that student's needs were not accurately stated or addressed, the annual goals were too few in number to address the student's needs (*id.* at pp. 2-3). In addition, the parents asserted that the assigned public school site was not appropriate for the student, that the IEP could not be implemented at the assigned school, and that the classroom into which the district proposed to place the student if she attended would not have grouped the student with functionally similar peers (*id.* at pp. 3-5).

The parents next argued that Cooke offered a program that appropriately addressed the student's needs and enabled her to make adequate and appropriate academic and social progress while avoiding regression (Parent Ex. A at p. 5). The parents also argued that equitable considerations favored their request for relief because they actively and cooperatively participated with the CSE throughout the placement process and complied with notice requirements (*id.*). As relief, the parent requested that the IHO find that the district failed to provide the student a FAPE

¹ The student's eligibility for special education and related services as a student with an intellectual disability is not in dispute in this proceeding (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).

² The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

for the 2011-12 school year, order the district to fund the cost of the student's tuition at Cooke, and fund or provide transportation and related services to the student, all for a 12-month school-year period (id. at p. 5).

B. Impartial Hearing Officer Decision

On April 9, 2012, the parties proceeded to an impartial hearing, which concluded on July 16, 2012, after eight days of proceedings (see Tr. pp. 1-733). In a decision dated September 4, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parent's request for tuition reimbursement (see IHO Decision at p. 43). The IHO found that the May 2011 IEP was both procedurally and substantively adequate and any procedural violations which occurred during the development of the May 2011 IEP did not rise to the level of a denial of FAPE (id.).

IV. Appeal for State-Level Review

The parents appeal, challenging the IHO's finding that the district offered the student a FAPE for the 2011-12 school year. The parents allege that they were denied a meaningful opportunity to participate in the development of the IEP. The parents also claim that the district failed to reevaluate the student, failed to determine the student's needs or develop appropriate goals to meet her needs, and failed to obtain and consider any information relative to the student's OT needs. The parents further claim that the resultant IEP failed to recommend an appropriate program and placement for the student. The parents assert that their unilateral placement of the student at Cooke was appropriate to address the student's needs and that the equitable considerations are in their favor. The parents request that the district be ordered to pay the costs of the student's tuition for the 12-month 2011-12 school year.

In an answer, the district responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the May 2011 IEP and recommended placement in a specialized school were appropriate and that Cooke was not an appropriate unilateral placement for the student. The district also contends that equitable considerations do not favor the parents because the student has been in private school since the first grade and the parents failed to provide timely notice to the district of their unilateral placement of the student and intent to seek public funding of tuition.

V. Applicable Standards

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

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

Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012

WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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]).

VI. Discussion

A. Preliminary Matter—Sufficiency of Petition

As an initial matter, the district asserts that the parents' petition lacks sufficient specificity to provide a legal basis for their challenge to the IHO's decision. I disagree. The parents' petition contains a recitation of the pertinent facts and identifies the conclusions of the IHO with which they disagree and from which they are appealing. In addition, the petition identifies the relief sought and contains appropriate citation to the hearing record and the IHO's decision. In other words, the petition "clearly indicate[s] the reasons for challenging the impartial hearing officer's decision" and properly "identif[ies] the findings, conclusions and orders" to which the parents object (8 NYCRR 279.4[a]). Therefore, the parents' petition complies with the minimal requirements of the practice regulations (Application of the Dep't of Educ., Appeal No. 13-236).

B. May 2011 CSE—Sufficiency of Evaluative Information

Turning to the merits of the appeal, the parents assert that the CSE failed to consider sufficient evaluative and documentary material to justify its recommendations. In this appeal, the

parents claim that the district failed to complete an evaluation and assessment of needs. In addition the parents claim that the district failed to afford them an opportunity to participate in the development of the student's educational program, in that the student's goals were developed without the participation of the student's related service providers and there was no progress report available for OT.

The IHO did not specifically address the claim of whether the district failed to conduct a complete evaluation and assessment of the student's needs as a basis for developing the May 2011 IEP; however, he found that the evaluative information available to the May 2011 CSE—a March 2011 Cooke progress report, a 2006 psychoeducational evaluation, a December 2010 classroom observation, and the discussion during the CSE meeting—was sufficient to develop the IEP (IHO Decision at p. 16). The IHO did find that all of the individuals present at the CSE meeting participated (id. at p. 15). The IHO also noted that the student's mother was a special education teacher who was familiar with the CSE process and was aware that she could invite others to participate in the meeting (id.).

The district asserts that the CSE had sufficient evaluative data before it to assess the student and that further evaluation was not necessary. Moreover, the district asserts that, even if it failed to conduct required evaluations of the student, such an error did not result in a denial of a FAPE, as two of the student's teachers from Cooke participated in the May 2011 CSE and the CSE used progress reports from Cooke when developing the IEP. The district also contends that the parents had a full opportunity to participate in the development of the IEP and that the parents agreed with the recommendation at the meeting.

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]). 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 and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b]; 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]).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

The district representative at the May 2011 CSE meeting, who also participated as the district special education teacher, testified that she believed the CSE had sufficient evaluative information in order to make a program recommendation because the student had not shown much change in academic performance over the years (Tr. pp. 107-08). The district representative also testified that unless the CSE was considering a program or classification change for a student, they would not request a psychoeducational evaluation (Tr. p. 108). Based upon the available information, it appears that the student has not been evaluated since 2006, therefore, the district was required to complete at least one triennial reevaluation of the student prior to the May 2011 CSE meeting (see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]).

As a result, the evidence shows that the May 2011 CSE did not have before it an updated psychoeducational evaluation or social history (Tr. pp. 55-58). Nevertheless, the hearing record does indicate that the CSE had available to it a March 2011 Cooke progress report, a December 2010 classroom observation, and the student's then-current teachers participated and provided objective test scores and current levels of functioning during the meeting (Tr. pp. 62, 73, 85, 88, 95, 110; Dist. Exs. 4; 5; 6). The hearing record further indicates that prior to the May 2011 CSE meeting, the district psychologist and the district representative reviewed the 2010-11 IEP, an October 2006 psychoeducational evaluation, results from the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) administered on October 30, 2006, and the March 2011 Cooke progress reports (Tr. pp. 55-57; Dist. Ex. 6, 7, 8; Parent Ex. G). The district representative indicated that the October 2006 psychoeducational evaluation was read to "get an understanding, a background, of the student" but that it was not used in generating the 2011-12 IEP (Tr. p. 56; Dist. Ex. 7). Additionally, the district representative testified that the December 2010 classroom observation was sent to the parents prior to the CSE meeting, but she did not remember reviewing it during the May 2011 CSE meeting (Tr. p. 58). The district representative further testified that she used the December 2010 classroom observation to understand how the student performed in the classroom, how she related to her peers and the teacher, and how she behaved during lessons (Tr. p. 58).

Consistent with the March 2011 Cooke progress report, the student's present levels of academic performance and learning characteristics as set forth in the May 2011 IEP indicated that the student experienced difficulties in all academic areas (compare Dist. Ex. 6 at pp. 2-15 with Dist. Ex. 1 at p. 3). The student's present levels of performance in the May 2011 IEP also indicated

that the student's decoding skills were stronger than her comprehension skills, and that her distractibility affected her listening comprehension skills (Dist. Ex. 1 at p. 3). With regard to reading comprehension and consistent with the March 2011 Cooke progress report, the May 2011 IEP indicated that the student was working on responding to questions that required making predictions, making inferences and connecting to characters, and she was working to increase her fluency and comprehension (compare Dist. Ex. 6 at p. 1 with Dist. Ex. 1 at p. 3). According to the May 2011 CSE meeting minutes, the student's then-current English language arts (ELA) teacher reported that an assessment from October 2010, placed the student at a 2.2 grade level in reading and another assessment placed the student's decoding skills at the fifth grade level (Tr. p. 66; Dist. Exs. 1 at p. 3; 4 at p. 1). The May 2011 IEP also reflected scores from an October 2010 reading assessment which placed the student's decoding skills at a 2.7 grade level and at a second grade level in reading comprehension (Dist. Ex. 1 at p. 3).

With regard to math, the May 2011 IEP present levels of performance indicated that the student had significant difficulty with math (Dist. Ex. 1 at p. 4). The student was inconsistent when solving basic addition problems to the sum of 10 and required assistance to carry numbers greater than 10 (id.). The May 2011 IEP revealed that the student needed support with subtraction and that she confused operations (id.). In particular, when solving word problems, the student often could complete the computation, but had difficulty identifying the correct operation for the problem (id.). The May 2011 IEP also stated that the student used a "hundred chart" in order to develop an understanding of the concepts "more/less" and to see patterns (id.). The student also used a number grid and concrete aids to understand parts of a whole (id.). The May 2011 IEP reflected that the student was learning how to round up to the next dollar and working on solving real-life situational math problems (id.). The March 2011 Cooke progress report indicated that the student was struggling with the concept of part-whole relationships, and understanding that larger groups are made up of smaller units (Dist. Ex. 6 at p. 3). The goals described in the March 2011 Cooke progress report focused on recognizing times of day and telling time using digital and analog clocks; using a ruler to measure; understanding fractions as parts of a whole; being able to name, discuss and compare attributes such as "longer/shorter than"; use of manipulatives, visual models, and illustrations to represent fractions; understand the meaning of numerator and denominator; to compare capacities and measuring capacities using pints, cups quarts and gallons (id.). The May 2011 CSE meeting minutes indicated that the student's then-current math teacher reported that a math assessment administered in October 2010 placed her math skills below a first grade level (Dist. Ex. 4 at p. 1). Nevertheless, the student's math teacher estimated the student's actual functional level to be at approximately first grade, with a second grade instructional level (Tr. pp. 504, 537).

The student's present levels of social/emotional performance as set forth on the May 2011 IEP indicated that the student demonstrated empathy and compassion, was considerate and cared about others, was well-liked, and had demonstrated improvement in her ability to "share the spotlight" (Dist. Ex. 1 at p. 5). The May 2011 IEP further described the student as being more easily redirected; however, she continued to have difficulty with language and attention, which would further impact on her ability to follow directions (id.). The March 2011 Cooke progress report described the student's ability to identify and share her emotions, preferences and self-expression, and with a moderate level of prompting, the student could identify specific emotions and draw connections to how this impacted her moods or behaviors (Dist. Ex. 6 at p. 15). Additionally, the student was described as demonstrating a high level of confidence in sharing her

art work with the counseling group and the larger school community (*id.*). The March 2011 Cooke progress report also indicated that the student participated in a weekly women's forum group, which was described as a gender-specific group that addressed topics related to women's issues (*id.*). According to the May 2011 CSE meeting minutes, the student was very easily distracted, was very social and would engage and distract her classmates, but maintained a good peer group, (Dist. Ex. 4 at p. 1).

In speech-language skills, consistent with the March 2011 Cooke progress report, the May 2011 IEP indicated that the student had been working on maintaining a topic of conversation and understanding the perspective of the listener (compare Dist. Ex. 6 at p. 11, with Dist. Ex. 1 at p. 5). Additionally, the May 2011 IEP described that the student was making progress maintaining a topic of conversation if the topic was of her own choosing, however she had difficulty if it was a "predetermined topic" and she could persevere on a topic without understanding the audience (Dist. Ex. 1 at p. 5). Information contained in the March 2011 Cooke progress report indicated that the student was sharing personal experiences using detail and expression, but needed prompting to use temporal and sequencing markers, such as using the appropriate verb tense (Dist. Ex. 6 at p. 12). The May 2011 CSE meeting minutes indicated that related services were discussed (Dist. Ex. 4 at p. 1). The district representative testified that speech was one of the student's main deficits and speech-language therapy was recommended on the IEP to work on articulation, pragmatics, conversation skills, taking turns, making eye contact, as well as to support the student in the classroom in listening and reading comprehension skills (Tr. p. 61).

The student's management needs described in the May 2011 IEP recommended accommodations and modifications including small group instruction, directions repeated and rephrased, tasks broken down into small sequential steps, manipulatives and graphs, teacher prompts and cues, graphic organizers/graphs/charts/checklists, multisensory approach, and preferential seating (Dist. Ex. 1 at pp. 3, 5). The May 2011 CSE meeting minutes indicated that the student's management needs were discussed. The district representative testified that the student's management needs would address the student's needs related to attending and distractibility, and help her stay focused (Tr. p. 65).

The district's failure to conduct a triennial reevaluation of the student constitutes a procedural violation. While the student's visual motor, handwriting, and ADL difficulties could have been more clearly identified as areas of need and the May 2011 IEP could have more directly addressed the student's listening comprehension and decoding needs, the record reflects that the May 2011 CSE considered sufficient evaluative information, including the input of the student's then-current teachers, in the development of the May 2011 IEP. Although the March 2011 progress report from Cooke did not contain any information regarding the student's present levels of performance in OT, the goals from the 2010-11 IEP were discussed at the May 2011 CSE meeting (Tr. pp. 91-92; Dist. Ex. 4 at p. 2). The CSE relied on the participation of the Cooke teachers and representative to develop the OT goals for the 2011-12 school year (Tr. pp. 91-92; Dist. Ex. 1 at p. 9). I find that these violations, whether considered individually or collectively, do not rise to the level of a denial of a FAPE. In addition, I find that the record reflects the participation of the parents and the student's then-current teachers at the May 2011 CSE meeting. The parents were given timely notice of the CSE meeting and were aware of their rights as members of the CSE. Based upon the foregoing, I find that the parents were not deprived of meaningful participation in the development of the student's IEP for the 2011-12 school year.

C. May 2011 IEP

The parents claim that the district failed to provide an appropriate IEP, an appropriate placement recommendation, an appropriate transition plan and that the goals developed for the student do not address her needs.

1. 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 May 2011 IEP contains eight annual goals with approximately 43 corresponding short term objectives (Dist. Ex. 1 at pp. 7-11). The goals and objectives addressed the student's identified needs in receptive and expressive language skills, pragmatic language skills, transition skills, counseling, OT, math, written expression, and reading comprehension (Dist. Ex. 1 at pp. 7-11). The hearing record reflects that the annual goals were developed by the student's then-current teachers, the parents, the district school psychologist, the district representative and the liaison from Cooke (Tr. pp. 54, 68-69; 73, 89-93; Dist. Ex. 4 at p. 1). In addition, the record indicates that all of the CSE members were in agreement with the annual goals developed for the May 2011 IEP (Tr. pp. 72, 76, 709). Moreover, each annual goal included criteria for determining achievement, and both a method and schedule for measuring progress (Dist. Ex. 1 at pp. 7-11).

The May 2011 IEP also described the student's present levels of performance, indicating that the student demonstrated needs related to listening comprehension and decoding (Dist. Ex. 1 at pp. 3-4). Although the May 2011 IEP does not contain annual goals to address these specific needs, the record shows that the student had demonstrated through prior assessments that decoding may be a relative strength for her (Tr. pp. 98-99; Dist. Exs. 1 at p. 3; 7 at pp. 2-3, 7-11). The student's goals for speech-language therapy and counseling include several short term objectives that could address the student's listening comprehension needs (Dist. Ex. 1 at pp. 7-8). To address the student's distractibility, which impacts her listening comprehension skills, the May 2011 IEP recommended the use of teacher prompts and cues, graphic organizers and rephrasing directions (id. at p. 3). Thus, overall, the evidence in the hearing record supports a finding that the annual goals and short term objectives set forth in the May 2011 IEP targeted and appropriately addressed the student's identified areas of need (see, e.g., N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

2. Transition Plan

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401 [34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1 [fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401 [34][B]-[C]; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law, 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.).

The hearing record does not support the parent's contention that the May 2011 IEP contained an inadequate transition plan. A review of the May 2011 IEP coordinated set of transition activities shows that the transition plan incorporated the required areas of instruction, community experiences, the development of employment and other post-school adult living objectives, and the acquisition of daily living skills (Dist. Ex. 1 at pp. 15-16). In this case, the long-term adult outcomes outlined in the transition plan provided that the student would integrate into the community with support, attend a vocational training program, live independently with support, and be employed with maximum support (id. at p. 15).

Consistent with regulatory mandates, the student's transition plan also indicated that the student's instructional activities included participating in an instructional program that supported future vocational plans and independent living (Dist. Ex. 1 at p. 15). In the area of community integration, the transition plan indicated that the student would participate in community service activities that would help identify strengths and areas of interest, and that she would learn about community agencies and their functions (id.). Post high school services included exploring vocational training options, take steps needed to apply to a future program with support, to identify jobs that involve working with children such as a teacher's assistant, and identify what she would need to do to achieve that goal (id.). In the area of independent living, the student was to learn about shopping, budgeting and household management, to identify living settings for post high school such as a group facility, learn about SSI and working with a budget, and continue with travel training (id. at p. 16). Additionally, the May 2011 IEP indicated that the parent, the school, and the student would share responsibility for the student meeting her transition services goals and objectives (id. at p. 15-16).

To further support the student's needs in transitioning to post-secondary activities, the May 2011 IEP contained an annual goal designed to improve the student's ability to plan for post-secondary life by learning skills associated with independent living and vocational preparation (Dist. Ex. 1 at p. 8). Specifically, the corresponding short term objectives were developed to help the student learn how to identify individuals engaged in vocational activities in the community; to categorize job titles and associated skill sets into broad vocational clusters; to identify targeted

workplace vocabulary; to utilize a map to develop a better understanding of the geography of the city; to follow multi-step directions to travel to specified destinations in the surrounding community; to develop strategies to improve self-advocacy skills; and to increase recognition, knowledge, and contextual awareness of high frequency vocational terms (e.g., schedule, closed, uptown) (*id.*). Furthermore, a comparison of the short term objectives contained in the May 2011 IEP with the March 2011 Cooke progress report for adaptive skills indicated that several of the short term objectives directly reflect ones the student had been working on during the 2010-11 school year (compare Dist. Ex. 1 at p. 8, with Dist. Ex. 6 at p. 13).

Based upon the foregoing, the transition plan adequately set forth the student's transition needs and goals consistent with federal and State regulations.

3. Assigned Public School Site

The parents claim that the district could not have implemented the student's May 2011 IEP at the assigned public site school. The IHO found that although not required to do so, the district provided extensive proof that the recommendations of the CSE were appropriate (IHO Decision at pp. 19-24, 43). I agree and find that the parents' claims regarding the assigned public school site are speculative in nature and, therefore, must fail.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 7, 9 [2d Cir. 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, at 371-72 [E.D.N.Y. 2014] see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a

denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]). Rather, when parents have claims regarding the appropriateness of an assigned public school placement, "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Even if such an inquiry were appropriate, the hearing record presents no basis for departing from the IHO's conclusion that the district established that, had the student attended the assigned public school site, the district would have implemented her IEP (IHO Decision at pp. 19-24).

VII. Conclusion

Based on the foregoing, I find that the district offered the student a FAPE for the 2011-12 school year. I therefore make no findings as to the appropriateness of the parents' unilateral placement of the student or with respect to equitable considerations. I have considered the parents' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 25, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**