The University of the State of New York

The State Education Department
State Review Officer
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No. 12-213

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:
Lewis Johs Avallone Aviles, LLP, attorneys for petitioners, Jennifer M. Frankola, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 the costs of their daughter's tuition at The Cooke Center (Cooke) for the 2011-12 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that Cooke was an appropriate unilateral placement and that no equitable factors counseled against an award of tuition reimbursement. 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]-[B], [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 279.4[b], 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 record indicates that the student attended a general education nonpublic school from January 2008 through the 2010-11 school year (Tr. pp. 847, 894; Dist. Ex. 8 at p. 2). Between December 2009 and September 2010, the principal from the student's nonpublic school wrote three letters to the district indicating that the student was experiencing difficulties in school and requesting "an immediate special educational evaluation" of the student (Parent Exs. A; B at p. 2;

G).[1] The district did not respond or complete an evaluation of the student in accordance with the principal's referral of the student for special education until the fall of 2010 when it arranged for the evaluation of the student (see generally Dist. Exs. 3, 5, 6, 10).

On February 15, 2011, the CSE convened to conduct the student's initial review and to develop an IEP for the student to be implemented commencing March 8, 2011 (Dist. Ex. 1 at pp. 1-2). Finding the student eligible for special education as a student with a speech or language impairment, the February 2011 CSE recommended a 12:1+1 special class placement in a specialized school with the following individual related services on a pull-out basis: three 30-minute sessions per week of occupational therapy (OT), two 30-minute sessions per week of physical therapy (PT), and three 30-minute sessions per week of speech-language therapy (id. at pp. 1, 18, 20; see Tr. pp. 60-61). The February 2011 CSE also recommended 25 annual goals and modified promotion criteria on the student's IEP (Dist. Ex. 1 at pp. 10-18, 21).

In a final notice of recommendation (FNR) dated March 8, 2011, the district summarized the recommendation to place the student in the 12:1+1 special class and related services recommended in the February 2011 IEP and identified the particular public school site to which the district assigned the student to attend (Parent Ex C at p. 1). By letter dated April 15, 2011, the parents notified the district that they visited the assigned public school site and found it inappropriate for the student (Parent Ex. K). Specifically, the parents expressed concern that the proposed classroom consisted of a "bridge class" of mixed grades, with all male students (id.). Furthermore, the parents indicated that, given the student's "difficult[ies] with transition and attention to tasks," they preferred she receive related push-in services, particularly because the assigned public school site delivered pull-out related services in the school's basement (id.). As a result, the parents rejected the "placement recommendation" and requested "that a new site recommendation be made as soon as possible" (id.).

On May 24, 2011, the parents signed an enrollment contract with Cooke for the student's attendance during the 2011-12 school year (Parent Ex. F at pp. 1-2).

On August 16, 2011, the parents wrote to the district objecting to both the February 2011 IEP and the assigned public school site (Parent Ex. D at pp. 1-2). The parents set forth further objections to the assigned public school site and proposed classroom, asserting that the student would not receive sufficient individualized or multi-sensory instruction (id. at p. 2). Additionally, the parents argued that the proposed classroom exhibited an "[i]nappropriate classroom profile" and did not contain "enough appropriate peers" for the student (id.). The parents also alleged that the assigned public school site offered "[i]nappropriate related services" (id.). The parents requested that the district "cure[ ] the procedural and substantive defects within the IEP" and recommend an "appropriate placement" (id.). Until that time, the parents indicated their intent to enroll the student at Cooke for the 2011-12 school year and to seek public funding for the costs of the student's tuition (id.).

[1] The parents additionally testified that they made several phone calls to the district between March and September 2010 (Tr. pp. 852-53).

A. Due Process Complaint Notice

In an amended due process complaint noticed dated March 27, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 and 2011-12 school years (Dist. Ex. 11 at pp. 1-9). The parents argued that the district's "undue delay" in evaluating the student combined with its failure to develop an IEP or provide special education services for the 2010-11 school year denied the student a FAPE (id. at p. 2).

With respect to the February 2011 CSE meeting, the parents argued that the district failed to meaningfully consider private evaluations obtained by the parents (Dist. Ex. 11 at p. 3). The parents additionally argued that the CSE's recommendation was a result of "impermissible policy" and that the CSE did not based its recommendation on the student's unique needs (id. at p. 6).

Regarding the February 2011 IEP, the parents argued that it "incorrect[ly]" classified the student as a student with a speech or language impairment (Dist. Ex. 11 at p. 5). The parents additionally contended that the district did not develop "critical assessment reports," including OT and PT reports, in order to establish "meaningful base-lin[es]" of the student's functioning (id.). The parents claimed several deficiencies with the February 2011 IEP's present levels of performance section, arguing that it did not address the student's academic, social/emotional, activities of daily living (ADL), physical (including OT and PT), and speech-language needs (id. at pp. 5, 7). The parents also averred that the evaluations utilized by the CSE—in particular, those evaluations conducted by the district, including an October 2010 psychoeducational evaluation—were "inaccurate, inadequate, and insufficient" (id. at pp. 4, 6-7). The parents additionally complained that the February 2011 IEP did not contain "speech results" (id. at p. 7). The parents contended that the IEP's annual goals were inadequate, as they "d[id] not address or meet [the student's] specific individual needs" (id. at p. 6). Also, the parents argued that the annual goals did not contain methods of measurement, employed an "inadequate" method and failed to identify an individual responsible for tracking the student's progress (id.).

The parents further objected to the February 2011 CSE's recommendation of a 12:1+1 special class " setting" as it did not offer "sufficient support to meet [the student's] individual needs" (Dist. Ex. 11 at p. 6). The parents asserted that the February 2011 CSE made this recommendation without considering other "school placement and program options," including a nonpublic school (id.). The parents further alleged that the IEP did not offer "sufficient related services" to the student (id. at pp. 3, 5). The parents further argued that the district failed to recommend counseling or a social skills group, an FM unit, "remedial academic services," or services including "1:1 support during the school day" to address the student's anxiety (id. at pp. 3, 6, 7). Additionally, the parents alleged that the district failed to develop "appropriate promotional criteria" as well as an "appropriate transitional plan" relative to the student's transition from a nonpublic to a public school setting (id. at p. 6).

Next, the parents argued that the March 2011 FNR was not issued in a timely manner (Dist. Ex. 11 at p. 7). With regard to the assigned public school site, the parents alleged that the proposed classroom would not provide sufficient "individualized instruction" to the student (id. at p. 8). The parents further objected to the classroom's alleged lack of multi-sensory instruction (id.). Additionally, the parents alleged that the assigned public school site "did not offer sufficient related

services" or employ "appropriately or adequately trained" staff (id.). Finally, the parents argued that the proposed classroom "did not offer [the student] an appropriate peer group" (id.).

The parents argued that the "evidence w[ould] show" that Cooke was an appropriate unilateral placement for the student (Dist. Ex. 11 at pp. 2, 8). Also, the parents argued that they acted "reasonably and in good faith" by cooperating with the district and providing timely written notice of their intent to enroll the student at Cooke (id. at pp. 2, 4, 8). For relief, the parents sought compensatory additional services in the form of a "bank of hours" to remedy the denial of FAPE for the 2010-11 school year (id. at pp. 8-9). For the 2011-12 school year, the parents sought the costs of the student's education at Cooke as well as special education transportation and related services (id. at p. 8). Finally, the parents sought reimbursement for three privately obtained evaluations (id. at p. 9; see id. at p. 3).

B. Impartial Hearing Officer Decision

On April 19, 2012, the parties proceeded to an impartial hearing, which concluded on June 12, 2012, after six days of proceedings (Tr. pp. 1-949). In a decision dated September 14, 2012, the IHO found that, based on the district's concession, the district failed to offer the student a FAPE during the 2010-11 school year (IHO Decision at p. 19). However, the IHO found that the district offered the student a FAPE by way of the February 2011 IEP (id. at pp. 22-26). In the alternative, the IHO found that Cooke was an appropriate unilateral placement and that no equitable considerations would preclude or reduce an award of tuition reimbursement (id. at pp. 26-27).

First, the IHO found that the due process claim lacked specific details relating to the 2009-10 school year and that there was no "meaningful or substantive" evidence in the hearing record and deemed the matter abandoned (IHO Decision at p. 19, n.1).[2] Next, turning to the 2010-11 school year, the IHO found that the student was entitled to compensatory additional services based upon the district's concession that it did not offer the student a FAPE, as well as the student's need for special education and related services (id. at pp. 19-22). Additionally, the IHO found "no evidence that the parents were uncooperative or in any way hindered the [CSE] process" (id. at p. 22). Since the district did not develop an IEP for the student's 2010-11 school year, in order to formulate an award of additional services, the IHO reviewed the related services included in the student's February 2011 IEP, as well as the services the student received at Cooke during the 2011-12 school year (id. at p. 21). Acknowledging the concern that an award of additional services, in combination with the student's current services, could become excessive, but noting the lack of evidence in the record concerning the student's educational placement during the 2012-13 school year, the IHO found it "reasonable to conclude that the student . . . receiv[ed] the same or similar services" during the 2012-13 school year (id.). Accordingly, the IHO ordered the district to provide related service authorizations (RSAs) to the parent permitting her to obtain one hour per week of OT, PT, and speech-language therapy services, to be delivered "outside of the school setting" for five months, resulting in a total award of 60 hours (id. at p. 22).

[2] To the extent that the IHO's language may be interpreted as placing a burden of proof upon the parents such a conclusion would be erroneous; however the parents do not appeal from any determination regarding the 2009-10 school year.

The IHO next considered the parents' challenges to the February 2011 CSE and the resulting IEP (IHO Decision at pp. 22-26). The IHO found that the district and private evaluations, together with information provided by the student's teacher, identified the student's present levels of performance and "offered recommendations for the student's educational instruction" (id. at p. 23). The IHO further found that the February 2011 CSE reviewed these evaluations and designed an IEP that offered the student a FAPE (id.). The IHO rejected the parents' argument that the student was improperly classified as a student with a speech or language impairment (id. at pp. 23-24). The IHO found that the student's "significant deficits" in her speech and language skills rendered the CSE's recommended classification appropriate (id. at p. 23). The IHO additionally considered the parents' claim that the student should be eligible for services as a student with multiple disabilities but found that the evidence presented at the impartial hearing did not support this classification (id. at p. 24).

Next, the IHO rejected the parents' challenges to the annual goals, finding them "appropriate and consistent with the student's identified needs in all areas" IHO Decision at p. 24). The IHO additionally found that the student did not exhibit behaviors that warranted specific behavioral management supports (id.). The IHO further found that there was "no evidence that the student's crying and anxiety "hindered her learning" (id.). The IHO additionally noted testimony from the student's teachers at Cooke indicating that, after being spoken to, the student's crying and anxiety became "non-existent" (id.).

The IHO refused to consider the parents' claim that a second FNR should have been issued prior to the beginning of the 2011-12 school year because this claim was not contained in the parents' amended due process complaint notice (IHO Decision at pp. 24-25). The IHO further rejected the argument that the district's concession at the impartial hearing of its failure to offer the student a FAPE during the 2010-11 school year prevented the parents from including this claim in their amended due process complaint notice (id.). However, in the alternative, the IHO held that the FNR, dated March 8, 2011, was effective for the same duration of time contemplated by the IEP—one year, including the commencement of the 2011-12 school year (id.). Therefore, the IHO found that the district timely provided the student with an assigned public school site for the 2011-12 school year (id.).

With regard to the assigned public school site, the IHO rejected the parents' specific challenges to the proposed classroom and found that the district could have implemented the February 2011 IEP (IHO Decision at pp. 25-26). The IHO found that the assigned public school site offered the related services identified in the student's February 2011 IEP and could have provided the student with such services (id. at p. 25). The IHO found that the assigned public school site employed teachers and related service providers who possessed "certifi[cation] in their respective fields" and received appropriate training (id.). Additionally, the IHO found that the student would have been appropriately grouped with the other students in the proposed classroom by "age and abilities" (id. at pp. 25-26).

Although the IHO found that the district offered the student a FAPE for the 2011-12 school year, she proceeded to consider the appropriateness of Cooke as well as equitable considerations (IHO Decision at pp. 26-27). Citing Cooke progress reports, as well as the testimony of the parents and the student's teachers, the IHO found that Cooke was an appropriate unilateral placement that met the student's needs (id. at p. 26). The IHO noted that the student's teachers at Cooke were

"licensed special education teachers or specialists" and that the student made progress in this setting (id.). The IHO further found that the student received appropriate related services and enjoyed opportunities to interact with regular education peers (id. at p. 27). Regarding equitable considerations, the IHO found that the parents acted "cooperatively with the . . . district" and "did not act unreasonably" (id.).

Therefore, the IHO ordered the district to provide the student with the 60 hours of compensatory additional services described above by October 5, 2012 (IHO Decision at p. 27). The IHO additionally denied the parents' claim for tuition reimbursement for the 2011-12 school year, as well as "all other requests for relief" in the parents' amended due process complaint notice (id.).

IV. Appeal for State-Level Review

The parents appeal,[3] seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. First, regarding the IHO's decision, the parents argue that it was issued "very late" and that the record close date was incorrect.

With respect to the February 2011 CSE, the parents argue that they were denied full participation in the development of the student's IEP because the CSE failed to consider the parents' privately obtained evaluations. Next, the parents argue that the IHO erred by finding that the student was properly classified as a student with a speech or language impairment. The parents additionally contend that the February 2011 predetermined its recommendations for the student prior to the CSE meeting. The parents argue that the district's psychoeducational evaluation reported inaccurate or inadequate information about the student. Moreover, the parents allege that the February IEP failed to accurately set forth the student's present levels of performance, including her social/emotional concerns. The parents further aver that the IHO erred by determining that the annual goals included in the student's February 2011 IEP were appropriate and consistent with the student's areas of need. They contend that the February 2011 CSE failed to consider recommending that the student attend a nonpublic school. The parents also argue that the IHO erred in finding that the student did not require a 1:1 paraprofessional and that her crying and anxiety did not hinder her ability to learn.

The parents also argue that the IHO erred by rejecting the parents' claim that a second FNR should have issued as outside the scope of the parents' amended due process complaint notice. Furthermore, the parents allege that the IHO incorrectly determined that the public school site assigned by the district during the 2010-11 school year remained in effect for the 2011-12 school year.

With respect to the assigned public school, the parents argue that the student would not have been appropriately grouped with the other students by functional level or by gender. The parents also assert that the proposed classroom lacked sensory tools and an FM unit, as well as full-time OT and PT providers. Further, the parents assert that the assigned pubic school site only

[3] The petition was untimely and improperly served. In this instance, I have exercised my discretion to excuse the delay and the service defects for good cause shown due to circumstances related to the aftermath of Hurricane Sandy.

offered pull-out speech-language therapy and would not have been able to address the student's social/emotional needs.

Finally, the parents allege that the IHO erred by failing to award the parents reimbursement for the costs of privately obtained evaluations.

In an answer and cross-appeal, the district responds to the parents' petition by denying the material assertions and arguing that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year. First, the district asserts that the parents' petition is deficient for violating form requirements for pleadings pursuant to State regulations. The district also objects to the parents' inclusion of additional evidence with their petition. The district next argues that the IHO properly rejected the parents' various challenges to the February 2011 IEP. With respect to the assigned public school site, the district argues that these claims are speculative and may not be considered. In any event, the district argues that the assigned public school site would have properly implemented the student's February 2011 IEP.

The district also interposes a cross-appeal, alleging that the IHO erred in determining that Cooke was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition reimbursement. Specifically, the district argues that Cooke was too restrictive and did not represent the least restrictive environment (LRE) for the student. The district also alleges that the parents did not seriously consider enrolling their student in a public school, thus precluding an award of tuition reimbursement.[4]

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, 180-83, 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

[4] The district does not appeal the portion of the IHO's decision finding that the district denied the student a FAPE for the 2010-11 school and ordering compensatory education (Pet. at p. 4, n.3). Accordingly, this determination by the IHO is final and binding on the parties and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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. Preliminary Matters

1. Timeliness of the IHO's Decision

The parents allege on appeal that that IHO incorrectly identified the record close date and issued a late decision. On June 12, 2012, the final day of the hearing, the IHO identified the record close date as July 6, 2012 (Tr. p. 948). The cover page to the IHO's decision, however, identifies the record close date as August 27, 2012 (see IHO Decision). There is no evidence in the hearing record resolving this incongruity. While the discrepancy may have been attributable to a specific extension of time granted by the IHO, no such extensions were committed to writing and included

in the hearing record as required by State regulations (see 8 NYCRR 200.5 [j][5][iv]).[5] Given the ambiguity in the hearing record and the fact that the parents do not identify what they contend to be the correct record close date, the date identified on the IHO's decision, August 27, 2012, shall be assumed to be the correct date for purposes of this appeal. Going forward, the IHO is reminded to "promptly respond in writing to each request for an extension" and to make such responses "part of the record" (8 NYCRR 200.5 [j][5][iv]).

The parents additionally allege that the IHO's decision in this matter was "very late." Where, as here, an IHO grants specific extensions of time beyond those required under State and federal law, a decision is due "14 days from the date the [IHO] closes the record" (8 NYCRR 200.5[j][5]). For purposes of this portion of State regulations, "days" means "calendar days" (see 8 NYCRR 200.1[h]). Accordingly, it appears that the IHO's decision, dated September 14, 2012 (see IHO Decision), should have rendered by September 10, 2012 (see 8 NYCRR 200.1[h], 200.5[j][v]). There is no indication that this brief delay denied the student a FAPE or, in fact, had any deleterious effect on the student's education (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *3 [S.D.N.Y. Mar. 27, 2014] [noting that a student's right to a FAPE is not prejudiced by a delay where the challenged IEP is ultimately deemed adequate and where the parents do not suggest "that they would have altered their decision" to remove the student from the public school and challenge the IEP had "the dispute been resolved more quickly"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *8 [S.D.N.Y. Mar. 26, 2014] [finding that, even if a tardy decision constituted a procedural violation, it did not result in the denial of a FAPE]; but see Mackey v. Bd. of Educ., 386 F.3d 158, 164-65 [2d Cir. 2004]).

2. Form Requirements for Pleadings

In its answer, the district challenges the parents' petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. Specifically, the district alleges that the parents' petition exceeds the 20-page limitation established by State Regulations (see 8 NYCRR 279.8[a][5] [providing that "the petition, answer, or memorandum of law shall not exceed 20 pages in length"). Here, the district correctly asserts that the date and signature line fall on page 21 of the parents' petition.

In addition, the parents' petition for review does not comport with the format requirements prescribed by State regulations. Specifically, State regulations require that "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font . . . . Compacted or other compressed printing features are prohibited" (8 NYCRR 279.8[a][2]). Here, it appears that the petition almost exclusively utilized size 11-point font in contravention of the above

[5] Although not relevant in the present case, I note that effective February 1, 2014, State regulations relating to procedures governing impartial hearings were amended (45 N.Y. Reg. 17-19 [Jan. 29, 2014]). Specifically, sections 200.1, 200.5 and 200.16 were amended to address: certification and appointment of impartial hearing officers (IHOs); consolidation of multiple due process complaint notices for the same student; decisions of the IHO; the timeline for an IHO to render a decision; extensions of the timelines for an impartial hearing decision; the impartial hearing record; and withdrawal of due a process complaint notice ("Summary and Guidance on Regulations relating to Special Education Impartial Hearings," Office of Special Education Mem. [Feb. 2014], available at http://www.p12.nysed.gov/specialed/publications/IHguidance-Feb2014memo.pdf; see also 8 NYCRR 200.1[x], 200.5[j][3], [j][5], [j][6], 200.16[h][9]).

requirement. State regulations further provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]). However, in this instance, I decline to exercise my discretion to dismiss the petition. I caution parents' counsel in the future to comply with the pleading requirements expressly prescribed by State regulations or risk dismissal for failure to comply with State regulations.

3. Scope of Impartial Hearing/Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. Initially, I note that the district does not appeal the portion of the IHO's decision finding that the district denied the student a FAPE for the 2010-11 school and ordering compensatory education (Pet. at p. 4, n.3). Accordingly, this determination by the IHO is final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Next, the parents appeal the IHO's determination that they failed to raise a claim in their due process complaint notice that the district should have issued a second FNR for the 2011-12 school year in their petition.[6]

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. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; 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]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; 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. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]).

In this case, the parents' amended due process complaint notice cannot be reasonably read to claim that the district denied the student a FAPE by failing to issue a second FNR (see Dist. Ex. 11). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue in their amended due process complaint notice, the parents

[6] The parents also indicate in their petition that the February CSE failed to discuss parent counseling and training (Pet. at p. 6 ¶ 35). While it is unclear whether the parents are attempting to raise this claim as an independent basis upon which the district denied the student a FAPE, it must be rejected because it is similarly absent from the parents' amended due process complaint notice (see Dist. Ex. 11).

cannot pursue this issue on appeal.[7] Additionally, the IHO properly rejected the parents' argument that this claim became cognizable only following the district's concession that it did not offer the student a FAPE at the impartial hearing (IHO Decision at pp. 24-25). As the IHO explained, even if the district defended the 2010-11 school year at the impartial hearing, nothing prevented the parents from asserting and pursuing this claim (id.).[8]

B. CSE Process

1. Classification

The parents argue that the IHO erred in her determination that the February 2011 CSE properly found the student eligible for special education as a student with a speech or language impairment. Although the parents argue that the student would have been more appropriately deemed eligible for special education as a student with multiple disabilities, they do not argue that the classification of speech or language impairment was inappropriate.

With respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111[d]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]) and, moreover, once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R., 2011 WL 6307563,

[7] 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. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see N.K v. New York City Dep't of Educ., 961 F. Supp.2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), in the present case, the FNR claim detailed above was first raised by the parents (see Tr. pp. 264-67). Further, when the parents raised this issue, the district objected, arguing that it was outside the scope of the parents' amended due process complaint notice (Tr. pp. 267-68).

[8] The parents' attempt on appeal to incorporate each of the allegations in their due process complaint by reference is similarly rejected (see, e.g., T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *15 [S.D.N.Y. Sept. 16, 2013]).

at *9 [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

In the present case, a review of the evidence in the hearing record reveals that the IHO properly determined that the classification of speech or language impairment was appropriate, as the student exhibited significant deficits in expressive and receptive language that adversely affected her educational performance (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). As such, the parents' claim regarding the student's classification is without merit.

2. Predetermination/Parental Participation

The parent argues that the February 2011 CSE predetermined its recommendations for the student, deeming her "ineligible" for any classroom but a 12:1+1 based upon her "disability category." A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd sub nom., R.R. v. Scarsdale Union Free Sch. Dist., 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. 2010]). In addition, 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).

Here, the hearing record reflects that the district school psychologist (who also served as the district representative) reviewed the information contained in the student's file prior to the February 2011 CSE meeting (Tr. p. 97). Such preparation is entirely permissible (Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]). At the February 2011 CSE meeting, as detailed below, the district considered a substantial amount of evaluative information about the student, including both district-generated and privately-obtained evaluations. There is no evidence in the hearing record that suggests that the February 2011 CSE foreclosed the possibility of recommending a different placement for the student, as the parent argues.

Instead the evidence reveals that the February 2011 CSE considered and rejected two alternative placements on the continuum of special education services. First, the CSE considered integrated co-teacher (ICT) services within a general education classroom but rejected this option as it was insufficient to meet the student's "significant cognitive, academic, and speech and language delays" (Dist. Ex. 1 at p. 19). Second, the February 2011 CSE considered placing the student in a nonpublic school but elected not to do so because the student had not yet received special education services and a 12:1+1 special class placement would be in greater conformity

with the IDEA's LRE mandate (id.).[9] This evidence contradicts the parents' unsupported assertion on appeal that the February 2011 CSE's recommendation was predetermined.

With regard to the development of the February 2011 IEP, the parents also argue that they were denied the opportunity to participate vis-à-vis the CSE's failure to appropriately review 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]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; see T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *18 [S.D.N.Y. Sept. 16, 2013]).

The evidence in the hearing record demonstrates that the CSE considered appropriate evaluative information regarding the student, including both evaluations conducted by the district as well as private clinicians. Specifically, the CSE considered private evaluations submitted by the parent, including an OT evaluation, a pediatric neuropsychological evaluation, a psychoeducational report, and an auditory processing report (see generally Dist. Exs. 4, 7-9). Each of these evaluations was considered by the February 2011 CSE at the meeting (Tr. p. 57-58, 64, 143-44, 153, 880-81; see Dist. Ex. 1 at p. 3). An independent review of the hearing record reveals no testimony or documents rebutting this evidence, nor do the parents cite any. Furthermore, as explained above, the CSE was not obligated to accede to recommendations made by the private evaluators (J.C.S., 2013 WL 3975942, at *11; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G, 2013 WL 5178300, at *18; 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]). Based upon the foregoing, the district established at the impartial hearing that it considered all relevant evaluations of the student at the February 2011 CSE.

[9] The parents also argue on appeal that the CSE improperly rejected their request that the student be placed in a nonpublic school. A district is not obligated to consider removal from the public school to a nonpublic placement if it is able to provide the student with an appropriate educational program within the public education system (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006] ["IDEA views private school as a last resort"]). Nevertheless, as noted above, the CSE properly considered and permissibly rejected such a placement.

C. February 2011 IEP

1. Evaluative Information and Present Levels of Performance

The parents argue that the February 2011 CSE relied upon an "inaccurate" district psychoeducational evaluation and that the February 2011 IEP failed to accurately identify the student's needs. Contrary to the parents' allegations, a review of the evidence in the hearing record reveals that the district's psychoeducational evaluation offered evaluative information consistent with information contained in the private evaluations obtained by the parents. Further, the evidence shows that the February 2011 CSE accurately ascertained the student's present levels of performance, including her social/emotional concerns, and developed appropriate annual goals consistent with those levels.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The hearing record shows that the district conducted several evaluations in preparation for the February 2011 CSE meeting; specifically, a PT evaluation, an OT evaluation, a psychoeducational evaluation, and a speech/language therapy evaluation (see generally Dist. Exs. 3, 5, 6, 10).[10] Furthermore, as set forth above, the parents obtained several evaluations of the student, including an OT evaluation, a pediatric neuropsychological evaluation, a psychoeducational report, and an auditory processing report (Dist. Exs. 4, 7-9). After a thorough review of the numerous evaluation reports considered by the February 2011 CSE, the most efficient means of considering the input from so many specialists is to set forth the findings of the private psychoeducational evaluation report—the most recent and comprehensive evaluation of the student available to the February 2011 CSE—and consider these results in relation to the other evaluation reports contained in the hearing record, which are largely consistent therewith (see Dist. Ex. 8).

Between October 2010 and January 2011, the student participated in three individualized assessments of her intellectual functioning, the findings of which are generally commensurate, yielding estimates of the student's full scale IQ at between 65 (1st percentile) and 73 (4th percentile), with the private psychoeducational evaluation reporting a full scale IQ of 68 (2nd

[10] It is not immediately apparent from the face of several of these evaluations that they were conducted by the district because they appear to have been conducted by a private testing company (Dist. Exs. 3, 5, 10). However, based upon the evidence in the hearing record, it appears that these evaluations were conducted at the district's behest (Tr. pp. 862-63).

percentile), which is in the very low range (Dist. Exs. 6 at p. 1; 7 at p. 7; 8 at p. 5).[11] While some variation in the student's performance was evidenced across and within evaluations, the author of the private psychoeducational evaluation report noted that "practice effect likely impacted some of the cognitive scores" (Dist. Ex. 8 at p. 13).[12]

The authors of the private and district psychoeducational evaluation reports and the private neuropsychological evaluation described the student as cooperative and pleasant or friendly (Dist. Exs. 6 at p. 1; 7 at p. 7; 8 at. p. 3). The private evaluator reported that as tasks "increased in complexity," the student became highly emotional and, at times, spoke in a childish voice or complained of a stomachache (Dist. Ex. 8 at p. 3). Each evaluator also reported some aspect of the student's performance that signaled feelings of anxiety, nervousness, or inadequacy (Dist. Exs. 6 at p. 3; 7 at pp. 7-8; 8 at pp. 3-4, 6-8, 19).

The student's academic achievement was measured by both the private psychoeducational evaluator and a district school psychologist. Although each evaluator employed different standardized assessment tools and the private evaluator provided a more comprehensive analysis of the student's academic functioning, the findings were not significantly disparate (compare Dist. Ex. 6 at p. 3, with Dist. Ex. 8 at pp. 10-12). Specifically, both evaluators noted the student's difficulty with fundamental reading skills, with an overall reading standard score at the fourth percentile in the private evaluation and the same standard score for reading comprehension in the district evaluation (Dist. Exs. 6 at p. 3; 8 at p. 10). In addition, the private evaluator indicated that the student was "able to read the passages appropriate for a student in the first grade" and the district evaluator reported first grade reading comprehension skills (id.).

The analyses of the student's writing abilities as depicted in the private and district evaluators' reports reflected a number of commonalities, such as the student's inability to spell certain words and her omission of punctuation (Dist. Exs. 6 at p. 3; 8 at p. 11). The private and district evaluation reports reflect consensus regarding the student's limited writing and composing skills, which the private evaluator summed up as "not commensurate with her peers" (id.).

The private and district evaluators assessed the student's mathematical skills using two different measurement tools and arrived at very similar test results (Dist. Exs. 6 at p. 3; 8 at p. 12). Specifically, according to the private evaluator's report, the student's performance on multiple subtests of a standardized math test yielded scores at the first percentile and within the very low range for a student her age (Dist. Ex. 8 at p. 13). The district evaluator reported that, on an entirely different standardized math test, the student again performed at the first percentile and at the first grade level (Dist. Ex. 6 at p. 3).

An area of concern reported in multiple evaluative reports, including that of the private psychoeducational evaluator, centered on significant delays in the student's overall language

[11] Although the percentile rank was not reported in the district neuropsychological evaluation (see Dist. Ex. 7 at p. 5), the percentile rank set forth above is fixed relative to the standard score/IQ reported.

[12] In referring to the district psychoeducational evaluation report, the author of the private psychoeducational evaluation report misidentified the student's verbal comprehension standard score as the student's full scale IQ (Dist. 8 at p. 13).

function and noted that the student's expressive and receptive language skills earned a standard score of 59 (1st percentile) and that the student exhibited a limited vocabulary and poor listening comprehension (Dist. Ex. 8 at p. 11). The results of a district speech-language evaluation, completed in December 2010, yielded similar, if slightly lower, estimates of the student's expressive and receptive language abilities, with a standard score of 54 (Dist. Ex. 10 at p. 3). During the speech-language evaluation, the student demonstrated difficulties following most 2-3 step directions, repeating sentences, formulating grammatically and syntactically correct sentences, and identifying commonalities between word pairs (id. at pp. 3-4). According to the neuropsychological evaluation report, the student's performance on "verbally mediated" subtests, as well as the student's vocabulary development and comprehension of common social conventions, were within the compromised range (Dist. Ex. 7 at p. 6). When considering yet another aspect of language function, the neuropsychologist noted that the student demonstrated slightly better developed phonological processing skills, but the private psychoeducational evaluator clarified that even though the student did "possess phonological processing skills . . . she [wa]s unable to apply them in order to read words" (Dist. Exs. 7 at p. 6; 8 at p. 10).

The academic performance and learning characteristics portion of the present levels of performance section in the February 2011 IEP incorporated results from the district's October 2010 psychoeducational evaluation, the January 2011 neuropsychological evaluation, the private psychoeducational evaluation, the November 2011 auditory processing evaluation, the December 2010 speech-language evaluation, and the October 2010 speech-language evaluation (Dist. Ex. 1 at p. 3; see Dist. Exs. 6 at p. 3; 7 at pp. 6-9; 8 at p. 25; 9 at p. 4; 10 at p. 4). The evidence in the hearing record reveals substantial agreement as to the student's present levels of performance and needs. As noted by the district school psychologist who participated in the February 2011 CSE, "[p]utting together the different evaluations, it seem[ed] that [the student] was functioning at approximately a first grade level in most academic areas" (Tr. p. 59). In addition, when describing the CSE's discussion of the records listed above, according to the parent, "everyone had something to say . . . [and] everyone had a part of the puzzle" (Tr. p. 924).

Additionally, the information contained within the February 2011 IEP's present levels of performance section incorporated the information considered by the CSE, including the parents' privately-obtained evaluations. For example, regarding the student's academic performance, the results of the student's performance on a standardized measure of intellectual functioning obtained during the private psychoeducational evaluation, were reported in the February 2011 IEP and indicated the student had earned a full scale IQ of 68, with "overall cognitive functioning in the very low range" (Dist. Exs. 1 at p. 3; 8 at p. 9). The academic performance section of the February 2011 IEP also included information drawn from the student's private school classroom teacher, who estimated the student's academic skills were "at the end of first grade level," an estimate consistent with the student's performance during both the district and private psychoeducational evaluations (Dist. Ex. 1 at p. 3; 6 at p. 3; 8 at pp. 10, 25).

The February 2011 IEP also included information regarding the student's speech-language skills that mirrors the results of the December 2010 speech-language evaluation, including the observation that the student presented with "severely delayed receptive and expressive language skills" (Dist. Ex. 1 at p. 5; see Dist. Ex. 10 at pp. 3-4). In addition, the February 2011 IEP indicated the student's "articulatory/phonological skills" were found to be "[approximately] 5 years below age-expected levels" (Dist. Exs. 1 at p. 5; 10 at pp. 2, 5).

The February 2011 IEP also reflects consideration of information reported in both the district and private psychoeducational evaluation reports with regard to the student's social/emotional functioning (Dist. Exs. 1 at p. 6; 6 at p. 3; 7 at pp. 7-8; 8 at p. 3). Throughout the evaluation reports, the student was described as friendly, well behaved, and able to maintain positive peer relationships (Dist. Exs. 3 at p. 3; 5 at p. 1; 6 at p. 3; 7 at p. 3; 8 at p. 3). In addition, a number of evaluators also observed that the student exhibited significant anxiety when presented with tasks she perceived as overly challenging, observations that were reported in the February 2011 IEP (Dist. Exs. 1 at p. 6; 6 at p. 3; 7 at p. 3; 8 at pp. 3-4, 14; see Tr. pp. 60-61). Consistent with more detailed descriptions in the evaluations, the social/emotional present performance section of the February 2011 IEP also noted the student's "problematic" adaptive functioning (Dist. Exs. 1 at p. 6; 8 at pp. 15-17).

Within the health and physical development section of the February 2011 IEP, a brief developmental history was provided that paralleled information presented in the district's December 2010 PT evaluation (Dist. Exs. 1 at p. 7; 3 at p. 1). Specifically, the IEP included information regarding the student's birth and achievement of developmental milestones, such as when she began to walk (id.). The February 2011 IEP also repeated that the student had not received early intervention services, but the parent reported that the student exhibited "low muscle tone," tired easily, and had difficulty with balance and climbing stairs (id.). The IEP also referenced the student's deficits in "visual perceptual, organizational, fine motor, and motor planning skills," difficulties described in multiple evaluation reports (Dist. Exs. 1 at p. 8; 3; 5 at pp. 3-4; 8 at p. 2). Related services of OT and PT were listed under health/physical management needs: recommendations in keeping with the findings and recommendations of the district December 2010 PT evaluation report and the district December 2010 OT evaluation report (Dist. Exs. 1 at pp. 7, 9; 3 at p. 3; 5 at p. 4).

2. Annual Goals

The parents allege that the IHO erred in finding that the annual goals included in the February 2011 IEP were appropriate and "consistent with the student's identified needs" (IHO Decision at p. 24). A review of the evidence in the hearing record confirms the IHO's assessment.

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 CSE (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 25 annual goals to address the student's needs in math, reading, speech-language, OT, and PT (Dist. Ex. 1 at pp. 10-17). Specifically, the annual math goals targeted addition and subtraction problem solving skills, identified as areas of need in the present levels of performance section of the February 2011 IEP (id. at pp. 3-4, 10). The February 2011 IEP also included an extensive collection of annual speech-language goals that were

consistent with the student's identified and that were designed to address the student's overall language functioning (id. at pp. 3, 5, 11-14). Specifically, the speech-language goals targeted the student's challenges with attention/auditory memory, receptive and expressive language skills, and comprehension of a range of basic concepts (id. at pp. 12-13).

The February 2011 IEP also included a number of goals intended to enhance the student's strategic use of speech-language skills while engaged in literate endeavors, such as improving phonological awareness, articulation, and vocabulary knowledge, all of which were noted in the IEP as specific areas of difficulty for the student (id. at pp. 3-5, 13-14). Additionally, the February 2011 IEP included multiple annual goals for PT and OT, each focused on helping the student establish greater independence across a variety of domains, from shoe tying and stair climbing, to keeping track of and completing class and homework assignments; skills that had not yet been established at the time of the February 2011 CSE meeting (id. at pp. 15-17). Finally, each of the annual goals included criteria for determining achievement of the particular annual goal, a method for measuring progress, and a schedule for progress measurement (id. at pp. 10-17).

While the parents argue that the February 2011 IEP's annual goals do not address the student's identified needs in "all areas," the evidence in the hearing record discussed above shows that each area of identified need was addressed and that the goals were sufficient overall. Therefore, I agree with the IHO that the annual goals in the February 2011 IEP were appropriate and reasonably targeted to address the student's deficits.

3. 12:1+1 Special Class and Related Services

It is unclear whether the parents continue to assert a claim relating to the appropriateness of the recommended 12:1+1 special class placement. In the due process complaint notice, they asserted that the "12:1[+]1 classroom setting" was not appropriate and, relatedly that the February 2011 CSE failed to recommend a nonpublic school placement (see Dist. Ex. 11 at p. 6). In their petition, the parents phrase the claim in terms of the CSE's failure to consider a nonpublic school, which, as discussed above, is more relevant to a claim that the district predetermined the student's IEP (see Pet. ¶ 22). In any event, the evidence in the hearing record supports the conclusion that a 12:1+1 special class placement was appropriate for the student.

The parents testified that they did not disagree with the February 2011 CSE's recommendation of a 12:1+1 special class placement (Tr. p. 934).[13] State regulations provide that "students whose management needs interfere with the instructional process [ ] to the extent that an additional adult is needed within the classroom" shall receive special education in a classroom containing 12 or less students (8 NYCRR 200.6[h][4]). Further, "one or more supplementary school personnel [shall be] assigned" to each such class (8 NYCRR 200.6[h][4]). Given the student's need for "praise and encouragement for engaging in academic tasks," as well as the student's significant academic and expressive and receptive language deficits, identified in the February 2011 IEP, the CSE's recommendation of a 12:1+1 special class is supported by the evidence in the hearing record.

[13] The fact that the student's subsequent June 2012 IEP recommended a nonpublic school placement for the student (Pet Ex. A) constitutes retrospective evidence that is not relevant for purposes of this appeal.

The parents also argue that the student's social/emotional and behavioral needs necessitated greater support than that offered by the February 2011 IEP and that IHO erred in finding that the student's crying and anxiety did not hinder her learning (see IHO Decision at p. 24). One strategy for addressing a student's behavioral needs is 1:1 classroom support (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *10 [2d Cir. Mar. 4, 2014]), which the parents allege the February 2011 CSE failed recommended for the student. In C.F., "all witnesses familiar with [the student]" indicated that the student's "maladaptive behavior" necessitated 1:1 classroom instruction (id.). Here, unlike in C.F., the evidence does not show the student required a behavioral management service such as a 1:1 paraprofessional.[14] The evidence in the hearing record does not reveal that the student exhibited any behaviors that seriously interfered with classroom instruction.[15] Indeed, the author of the neuropsychological evaluation stated that the student's "[n]eurobehavioral assessment revealed no significant signs of emotional or behavioral disturbance" and, further, that "[i]ncreased sadness and worry are common in children who are struggling with multiple cognitive difficulties on a daily basis" (Dist. Ex. 7 at p. 9). Further, when queried about why the February 2011 CSE did not recommend counseling as a related service for the student, the district school psychologist recalled that the CSE "felt that those type of behaviors c[ould] be addressed by the special education teacher in the classroom setting with the support of the paraprofessional" (Tr. p. 81). To address the student's social/emotional needs, the February 2011 CSE did, however, identify, "praise and encouragement for engaging in academic tasks" as a strategy to address the student's needs (Dist. Ex. 1 at p. 6). Based on the evaluative information described above, this level of support was sufficient for the student. Based on the foregoing, the evidence in the hearing record shows that IHO correctly determined that the student did not require a 1:1 paraprofessional or different behavioral management supports in addition to those included in the February 2011 IEP.

D. Challenges to the Assigned Public School Site

With regard to the assigned public school site, the parents argue that the IHO erred in finding that the public school could implement the student's June 2011 IEP. 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 a parent's "[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., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments

[14] Although I agree with the IHO's ultimate conclusion on this point, the IHO improperly relied upon retrospective testimony offered by the student's teachers at Cooke, which I have not considered because it was not before the CSE (R.E., 694 F.3d at 186).

[15] Indeed, the parent testified that the author of the private psychoeducational evaluation report recommended against 1:1 classroom support because it "wouldn't be beneficial" for the student because she would "go through life depending on it," which would be "self-destructive" (Tr. p. 913).

that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L., 530 Fed. App'x at 87, 2013 WL 3814669; M.L., 2014 WL 1301957, at *12; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed the student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[16]

[16] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O., 2014 WL 1257924, at *2). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K., 961 F. Supp. 2d at 588-89 [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing and under the circumstances of this case, I find that the parents cannot prevail on their claim that the district would have failed to implement the student's February 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's February 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 186R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Ex. D at pp. 1-2). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on

at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP, and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

her claim that the assigned public school site would not have properly implemented the June 2011 IEP.

In any event, even assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record supports the IHO's finding that the district was capable of implementing the February 2011 IEP at the assigned public school site. The evidence shows that a specific 12:1+1 classroom would have been available for the student (Tr. pp. 294-95, 345). The student would have attended a classroom taught by a certified special education teacher (Tr. pp. 295-96, 341). Additionally, the school employs certified related service providers who could have satisfied the February 2011 IEP's OT, PT, and speech-language therapy mandates (Tr. pp. 296-98). Further, as the IHO found, the evidence supports a conclusion that the student would have been grouped appropriately within her 12:1+1 classroom (Tr. 345-46).[17]

E. Reimbursement for IEE

Finally, the parent appeals the IHO's failure to order the district to reimbursement the parents for the privately obtained psychoeducational evaluation report. The IDEA as well as State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). A parents has the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392 at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]; see also Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 590 [3d Cir. 2000]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 550 [D. Conn. 2002]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

[17] Specifically, the assigned public school classroom teacher testified that three of the five students in her class were eligible for special education and related services as students with a speech or language impairment (Tr. p. 345).

As noted above, two statutory predicates for IEE reimbursement are that a district conducts an evaluation and that the parents disagree with it. In this case, the parent pursued an IEE prior to any evaluation performed by the district. The testing for the IEE in dispute began with a parent interview conducted on September 23, 2010 (Dist. Ex. 8 at p. 1). While it is somewhat unclear from the evaluator's report, it appears that the private evaluator conducted a subsequent "evaluation" on October 6, 2010 and a classroom observation on October 18, 2010 (id. at p. 5). The earliest evaluation completed by the district, and the one to which the parents object in this proceeding, is a psychoeducational evaluation report dated October 22, 2010 (Dist. Ex. 6 at p. 1).

It appears, then, that the parent unilaterally pursued this private evaluation before the district completed an evaluation of the student. This decision was understandable given the district's unreasonable and prolonged failure to evaluate the student.[18] Nevertheless, I am constrained by the language of the IDEA and State regulations which unequivocally indicate that the parents must disagree with a district-conducted evaluation before they are eligible for reimbursement (see, e.g., T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 929 [C.D. Ill. 2012] [reimbursement denied where there "had not yet been a[ ] [district] evaluation with which to disagree"], aff'd sub nom., Giosta v. Midland Sch. Dist. 7, 542 Fed. App'x 523 [7th Cir. 2013]; Tyler V. v. St. Vrain Valley Sch. Dist. No. RE-1J, 2011 WL 1045434, at *4 [D. Colo. Mar. 21, 2011] [reimbursement denied because "[p]arents d[id] not contend that the IEE was performed to rebut a [d]istrict evaluation"]; R.H. v. Fayette Cnty. Sch. Dist., 2009 WL 2848302, at *3 [N.D. Ga. Sept. 1, 2009] [parents failed to request IEE but, "[i]n any event, such a request would have been inappropriate because there was no existing evaluation with which the parents disagree"]; Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 889 [N.D. Ill. 2003] [no reimbursement where district decided not to conduct an evaluation and "there was no evaluation . . . to disagree with"]). While the parents criticize the district's evaluation on appeal as "inaccurate, incomplete, and hastily prepared," post hoc criticism is not synonymous with disagreement, and the parents' claim must therefore be rejected (L.S. v. Abington Sch. Dist., 2007 WL 2851268 [E.D. Pa. Sept. 28, 2007]; see also Holmes. 205 F.3d at 591).[19]

VII. Conclusion

The evidence in the hearing record demonstrates that the district offered the student a FAPE by way of the February 2011 IEP. Having made this determination, it is unnecessary to consider whether Cooke was an appropriate unilateral placement or whether equitable considerations preclude or diminish an award of tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). Additionally, the parent is not entitled to reimbursement for the privately obtained psychoeducational examination pursuant to federal and State regulations.

[18] It would appear that the best option under such circumstances of protracted, repeated delay would be to file either a State complaint or a due process complaint notice for the purpose of compelling the district to immediately conduct the initial evaluation of the student.

[19] At times in their petition, the parents suggested that they are seeking reimbursement for multiple IEEs. Federal and State regulations limit parents to one IEE per year; therefore, these additional requests would not be permissibly reimbursed in any event (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 30, 2014

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JUSTYN P. BATES
STATE REVIEW OFFICER