The University of the State of New York

The State Education Department
State Review Officer
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No. 13-149

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

Appearances:
Courtenaye Jackson-Chase, Esq., Special Assistant Corporation Counsel, attorney for petitioner, Gail M. Eckstein, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Eli R. Mattioli, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Cooke Center Academy (Cooke) for the 2012-13 school year. The appeal must be sustained.

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

At the time of the proceedings in this case specific to the 2012-13 school year, the student was 14 years old and had been attending Cooke since September 2009 (Tr. pp. 264, 274; Parent Ex. B at pp. 1-2).[1] On April 18, 2012, the parent signed an enrollment contract with Cooke (Parent Ex. L).

On May 4, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Parent Ex. A). The May 2012 CSE determined that the student was eligible for special

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

education programs and services as a student with a speech or language impairment and developed an IEP recommending a special education program, consisting of, among other things, a 15:1 special class in a community school, related services of individual and group speech-language therapy and individual and group counseling, and various modifications within the classroom environment, addressing the student's academic, social/emotional, and health/physical management needs (id. at pp. 1, 4, 22).[2]

By letter, dated August 16, 2012, the parent, through her counsel, notified the district that she had not yet received a final notice of recommendation (FNR), that the student would continue to attend Cooke for the 2012-13 school year, and that she would seek reimbursement from the district for tuition (Parent Ex. C at p. 5). The letter also requested that the district provide transportation for the student to and from Cooke (id. at pp. 5-6). By FNR dated August 27, 2012, the district summarized the recommendations made by the May 2012 CSE and notified the parent of the particular public school site to which it had assigned the student (Dist. Ex. 4).

By letter, dated September 7, 2012, the parent, through her counsel, notified the district that she received the FNR on August 30, 2012 and had concerns about the assigned school based upon school progress reports available on the school's website (Parent Ex. C at pp. 1-2). The letter further noted the parent's disagreement with May 2012 CSE's recommendation for a 15:1 special class and stated that it was "not at all clear how [the student] could make educational progress in such a setting" (id. at p. 2). The parent also informed the district of her intention to visit the assigned school but stated that, unless notification to the contrary was provided thereafter, the letter should be deemed notice to the district of the parent's intention to continue the student's enrollment at Cooke and seek public funding therefor (id.). The parent also reiterated her request for transportation (id.). The parent visited the assigned school on September 12, 2012 (Tr. p. 485).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated October 22, 2012, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year on both substantive and procedural grounds (Parent Ex. B). The parent alleged, among other things, that: (1) the annual goals listed in the May 2012 IEP were not sufficient to meet the student's needs; (2) the CSE's recommended placement was not appropriate for the student; (3) the district failed to recommend appropriate transition services for the student; and (4) the CSE failed to complete the medical alert portion of the IEP, although the student suffered from asthma and allergies (id. at pp. 1, 4). The parent also alleged that the district failed to timely notify the parent of the assigned public school site and that the assigned school was not appropriate for the student because: (1) it had received below average scores in 2010-11 school progress and school survey reports; (2) it was underfunded and not ready and able to implement the student's IEP recommendations, including management strategies and related service recommendations; (3) it implemented an educational program geared towards college bound students, particularly those interested in nursing or dental careers, which was inappropriate for the student; and (4) offered the student a classroom in which he would be inappropriately grouped (id. at pp. 2-5).

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

As relief, the parent requested that the IHO award her the costs of the student's tuition at Cooke, transportation to and from Cooke, as well as reimbursement for the cost of the student's breakfasts and lunches, which he would have received if he attended the district public school (Parent Ex. B at p. 5).

B. Impartial Hearing Officer Decision

On December 11, 2012, an impartial hearing was convened in this matter, and concluded on May 23, 2013, after six days of proceedings (Tr. pp. 1-664). By decision dated July 7, 2013, the IHO found, among other things, that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate placement for the student, and that equitable considerations favored the parents (IHO Decision at pp. 13, 15, 17). The IHO determined that the May 2012 IEP presented the parent with a predetermined outcome, in that the impetus for the CSE's recommendation for a 15:1 special class was that such class was the smallest available at the district high school (id. at p. 9). The IHO also found that the parent was denied meaningful participation, in that the parent was excluded from the process whereby the CSE developed goals for the student (id. at pp. 7-8). Turning to the CSE's recommendations for the student, the IHO found that the 15:1 special class was insufficient to meet the student's needs for small group instruction and 1:1 attention and support (id. at pp. 8-9). She further held that, although the goals were, for the most part, specific and detailed, they were too ambitious for the student, and the methods of measurement were vague and did not align with the stated measurement criteria (id. at pp. 7-8). With respect to transition services, the IHO held that, although the district was correct that such services were not required until the student turned 15, the CSE could have and should have recommended them for the student, particularly because the parent requested that they do so (id. at pp. 11-12).

The IHO also addressed the public school site claims, giving the progress reports cited by the parent little weight, rejecting the parent's contention that the school was too large for the student, and finding that the parent's claim that the assigned school would be unable to implement the student's IEP recommendations speculative and inconsistent with testimony (IHO Decision at pp. 11-12). However, the IHO held that the particular classroom at the public school site was not appropriate to meet the student's educational and management needs, was too advanced for the student, and consisted of students functioning at much higher academic levels than the student (id. at pp. 12-13).

The IHO also found that the parent satisfied her burden of proving that Cooke was an appropriate placement for the 2012-13 school year, noting that the school provided a 12:2 special class, and utilized appropriate teaching strategies and interventions to address the student's needs (IHO Decision at pp. 14-15). Lastly, the IHO determined that equitable considerations favored the parent because the hearing record indicated that she cooperated with the district and acted reasonably in securing a spot for the student at Cooke (id. at pp. 16-17). The IHO rejected the district's argument that the parent's notice to the district of her intent to unilaterally place the student was untimely (id. at p. 17). The IHO also noted that the district had exhibited a lack of good faith by predetermining the student's recommended educational program (id. at p. 16). Consequently, the IHO ordered the district to pay the costs of the student's tuition at Cooke for the 2012-13 school year (id. at pp. 18, 22). The IHO denied the parent's request for the cost of the student's meals (id. at p. 21).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate placement for the student for the 2012-13 school year, and that the equities favored the parents. The district alleges that the student's program recommendation was not predetermined for the student, noting evidence in the hearing record that the CSE considered other program options. The district also asserts that the parent fully participated in the CSE meeting and that, although the goals were drafted after the meeting, they were based upon the CSE's discussions. With respect to the May 2012 IEP, the district asserts that the CSE's recommendation of a 15:1 special class was based on evaluative data, as well as the participation of the parent and the representatives from Cooke, and was appropriate for the student. The district further contends that the CSE drafted appropriate, objectively measureable goals, based on the student's present levels of performance. The district asserts that the CSE properly declined to include transition services as a recommendation on the student's May 2012 IEP. Relative to the assigned school, the district asserts that, since the parent rejected the IEP, the district was not required to demonstrate that the assigned school was appropriate.

The district also alleges that the IHO erred in finding Cooke to be an appropriate placement because the school was overly restrictive. Turning to the equities, the district alleges that the parent did not seriously intend to enroll the student at the public school and gave the district inadequate notice of her intent to enroll the student at Cooke. Finally, the district argues that the parent's contract with Cooke was illusory. The district seeks an order reversing the IHO's decision to award the parent the costs of tuition at Cooke.

The parent answers the district's petition, opposing the district's positions and asserting that the IHO correctly determined that the district failed to offer the student a FAPE, that Cooke was an appropriate placement for the student, and that equitable considerations weighed in favor of awarding the parent tuition reimbursement.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL 3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; 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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't 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. Scope of the Impartial Hearing

Before reaching the merits in this case, I must determine which claims are properly before me on appeal. Specifically, I will examine whether the IHO exceeded the scope of her jurisdiction by deciding issues that were not raised in the parent's due process complaint notice; to wit, that the May 2012 CSE predetermined the IEP program recommendation and that the parent was denied an opportunity to meaningfully participate in the development of the student's annual goals (IHO Decision at pp. 7, 9).

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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]; see N.K. v. New York City Dep't of Educ., 2013

WL 4436528, at *5-*7 (S.D.N.Y. Aug. 13, 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]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *11-*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8.

In the present case, upon review of the parent's due process complaint notice, I find that the allegations therein cannot be reasonably read to include a claim that the CSE predetermined the May 2012 IEP recommendation for a 15:1 special class or that the parent was denied a meaningful opportunity to participate in the development of the student's annual goals (see Parent Ex. B). Nor can it be said that the district opened the door to such a claim by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-50).[3] Therefore, I find that it was not appropriate for the IHO to render a determination on these issues (S.M. v. Taconic Hills Cent. School Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]). Nonetheless, to the extent that these issues overlap with allegations regarding the appropriateness of the goals and the program recommended by the CSE, which were properly raised by the parent in the due process complaint notice, out of an overabundance of caution, they will be addressed below.

B. May 2012 IEP

1. Adequacy of Annual Goals

The district asserts that the IHO erred in her determination that the May 2012 CSE failed to draft appropriate annual goals for the student (IHO Decision at pp. 7-8). 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]). Determinations about the individual needs of a student shall provide the basis for the written annual goals. (8 NYCRR 200.1[ww][3][i]). Short-

[3] While I note that it was the district's attorney that elicited testimony from the special education teacher regarding the drafting of the goals (Tr. p. 141), which ultimately formed the basis for the IHO's determination that the parent was denied an opportunity to meaningfully participate in the development of the student's goals (IHO Decision at p. 7), it appears that the district pursued this examination of the witness as a mere solicitation of general background information as part of routine questioning and not as a means by which the district sought to raise evidence as a defense to a claim that was identified in the due process complaint notice (see A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *10-*11 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *23 [S.D.N.Y. Aug. 5, 2013]; B.M., 2013 WL 1972144, at *6).

term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

To address the student's academic and social/emotional needs set forth in the present levels of performance in the May 2012 IEP and in the evaluative materials, the May 2012 CSE developed 29 annual goals in the areas of reading, math, writing, language skills, social/emotional skills, and study skills (Parent Ex. A at pp. 5-21). The CSE developed the annual goals based on input from the Cooke providers and the parent (Tr. pp. 139-41). With respect to the parent's participation in the development of the student's annual goals, consistent with the IHO's determination (IHO Decision at pp. 7-8), the hearing record indicates that the annual goals were not drafted during the CSE meeting (Tr. p. 141). However, the district special education teacher testified that he wrote the student's annual goals after the meeting based upon the CSE's discussion regarding the student's areas of need (Tr. pp. 140-41). He also indicated that, although he sometimes utilized "basic formats of goals," he would add or subtract information from the basic formats in order to individualize the goals to the particular student (Tr. p. 142). Therefore, I decline to find, under the circumstances of this case, that the development of the goals after the May 2012 CSE meeting constituted a procedural violation that led to a loss of educational opportunity to the student or seriously infringed on the parent's opportunity to participate in the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining that parental presence is not required during actual goal drafting]; E.G., 606 F. Supp. 2d at 388-89; see also Mahoney v. Carlsbad Unified Sch. Dist., 2011 WL 1594547, at *2 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]).

The IHO concluded that overall the annual goals were specific and detailed but that reference to the intent that the student work toward grade level skills was inappropriate because the student worked at a third grade level, although he was entering the ninth grade (IHO Decision at pp. 7-8). The IHO also concluded that the methods of measurement were vague and not aligned with the criteria of the annual goals (id. at pp. 7-8).

One of the student's annual goals contained in the IEP indicated that the student would solve math word and computation problems at a grade level range, incorporating already learned operations of addition, subtraction, multiplication, division, percentages, decimals, and fractions (Parent Ex. A at p. 14). In addition, several of the annual goals in the methods of measurement section indicated that the student would demonstrate a skill "on the way to grade level skills" (see id. at pp. 5-17). The special education teacher testified that the annual goals, indicating the student would develop skills "on the way to grade level," were in alignment with the New York State learning standards and core curriculum (Tr. pp. 144-46). According to the special education teacher, the annual goals would allow the student to develop the skills related to the key performance indicators that underlie the NYS learning standards and core curriculum to assist the student to "clos[e] the achievement gap" by progressing toward grade level skills (Tr. pp. 144-

46).[4] In summary, I find that a special education teacher would modify the student's grade level assignments to the student's instructional level in order to allow the student access to the grade level skills (see Tr. p. 183).[5]

With regard to the measurability of the student's goals, State regulation requires that each annual goal include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4 [d][2][iii][b]). The State Education Department's Office of Special Education issued a guidance document in December 2010 which specifies that evaluative criteria refers to "how well and over what period of time a student must perform a behavior in order to consider it met" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). A student's performance can be measured in terms of frequency, duration, distance, or accuracy; and period of time can be measured in days, weeks, or occasions (id.). Evaluation procedures refers to the method that will be used to measure progress, such as structured observations, student self-monitoring, written tests, recordings, work samples, and behavior charting (id.). Evaluation schedules refer to the date or intervals of time by which evaluation procedures will be used to measure the student's progress (id.).

In this case, the annual goals reflect the requisite information mandated by State regulations (8 NYCRR 200.4[d][2][iii][b]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation"). For example, one of the student's annual goals related to writing indicated that the student would write a complete paragraph with at least five complex sentences with accurate grammar and punctuation (Parent Ex. A at p. 11). According to the corresponding evaluative criteria, the goal would be deemed achieved when the student exhibited 80 percent accuracy during five activities (id.). The methods of measurement indicated that the student would be evaluated by the teacher through the use of "but not limited to" observations, classroom participation, work samples, homework and examinations, rubrics, recording data, and progress reports (id.). The methods of measurement also indicated that the teacher would provide the student with multisensory teaching, scaffolding, and fading assistance to assist the student to meet his annual goal (id.). Twenty-one of the annual goals in the student's IEP contained criteria and methods of measurement identical to the writing goal discussed above (see id. at pp. 5-19). The remaining eight goals would be deemed achieved if the student exhibited the particular skill or ability four out of five trials, to be measured by teacher or provider observation (id. at pp. 20-21). Also, because the IEP provided appropriate criteria for mastery, a teacher could independently determine a more specific manner by which to measure the student's progress toward his goals (Tarlowe, 2008 WL 2736027, at *9). In addition, the special education teacher testified that the district measured the student's progress by reviewing previous IEPs and new evaluative assessments (Tr. pp. 146-47).

[4] The special education teacher described an example, whereby, although a fifth grade student may be reading on a third grade level, the skills of skimming and scanning, key performance indicators for the fifth grade, may be developed utilizing reading materials consistent with the student's lower reading level (Tr. pp. 145-46).

[5] The ultimate goal for this student of approaching grade level skills is also consistent with the CSE's recommendation, based on the parent's request, that the student achieve a Regents diploma (Tr. p. 157; see Dist. Ex. 5 at p. 1; Parent Ex. A at p. 24).

Accordingly, in this instance, the hearing record does not support a conclusion that the particular criteria or procedures to be employed in measuring the student's progress toward his annual goals rose to the level of a denial of a FAPE (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7-*8 [S.D.N.Y. Mar. 28, 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010]).

Moreover, even if I found the criteria and methods of measurement for the annual goals insufficient, the goals, taken as a whole, appropriately addressed all of the student's needs relating to his disability. For example, the IEP present levels of performance indicated that the student needed to develop skills related to organization of time and materials, as well as note taking (Parent Ex. A at p. 2). In light of the student's difficulties with organization and note taking, the May 2012 CSE developed approximately four annual goals in the areas of study skills, organization, time management, and note taking (id. at pp. 15-17). All of the student's annual goals related to study skills and organization were individualized, specific, and contained methods of measurement as to allow the teacher to measure the student's progress and guide instruction. Similarly, the other annual goals contained in the student's IEP were similarly aligned with the student's needs, specific, and measurable (see id. at pp. 5-21).

Based on the foregoing, any deficiency in the student's annual goals did not rise to the level such that it deprived the student of educational benefits or impeded the parent's opportunity to participate in the development of the IEP so as to deny the student a FAPE (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *11 [S.D.N.Y. Aug. 23, 2012], aff'd 2013 WL 3814669 [2d Cir. July 24, 2013]; J.A., 2012 WL 1075843, at *7-*8; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 108-09 [E.D.N.Y. 2011], aff'd 2013 WL 2158587 [2d Cir. May 21, 2013]; W.T., 716 F. Supp. 2d at 289; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294-95 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; Tarlowe, 2008 WL 2736027, at *9).

2. 15:1 Special Class Placement

The district asserts that the IHO erred in determining that the May 2012 CSE's recommendation of a 15:1 special class in a community school was not appropriate for the student (IHO Decision at pp. 8-9). Specifically, the IHO stated that the student required small group instruction and additional 1:1 attention and support and that this would not be available within a 15:1 special class setting (id.).

The May 2012 CSE reviewed several evaluative documents including a 2011 psychoeducational evaluation, a 2011 social history update, a 2011 speech and language evaluation, a 2011 OT evaluation, a 2012 Cooke progress report, and an undated Cooke student assessment portfolio to assess the student's educational needs (Tr. pp. 134-35; Dist. Exs. 6-11). According to the special education teacher, the May 2012 CSE members did not object to the content contained within the evaluations (Tr. pp. 135-36). Testimony of the special education teacher indicated that the May 2012 CSE thoroughly discussed the student's academic skills, strengths, and weaknesses in the areas of reading, math, writing, and language (Tr. pp. 135-136, 138-40). The parent and Cooke personnel provided input into the development of the May 2012

IEP (Tr. pp. 136, 154). However, the parent disagreed with the CSE's recommendation of a 15:1 special class (Tr. pp. 159, 165).

According to the district special education teacher, the May 4, 2012 CSE recommended a 15:1 special class in a community school based on the student's academic abilities and in light of the fact that a special education teacher would modify instruction according to the student's level of understanding (Tr. p. 159). Additionally, the May 2012 CSE also recommended individual and group counseling to address the student's social/emotional needs and individual and group speech-language therapy to address the student's language needs (Tr. pp. 151-52; Dist. Ex. 3 at pp. 2-3, 22).

The IHO concluded "the impetus for the CSE's recommendation was that 15:1 [was] the smallest self-contained class that the [district] offer[ed] in a [district] high school setting" (IHO Decision at p. 9). The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 2013 WL 3868594 [2d Cir. July 29, 2013]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). 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., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294 [S.D.N.Y. 2009]). Contrary to the IHO's conclusion, the hearing record indicates that the district considered other placement options for the student. The special education teacher testified that the May 2012 CSE considered an integrated co-teaching (ICT) class for the student but believed that it would be "emotionally overwhelming" for the student, inhibiting his academic and social/emotional progress (Tr. p. 174; Dist. Ex. 3 at p. 27). Also, the parent testified that she questioned the CSE regarding the change in class size, as compared to the student's IEP from the previous school year, which had recommended a 12:1 special class (Tr. p. 280). The parent indicated that the CSE informed her that the district did not offer a 12:1 special class at the high school level, except in a specialized school (Tr. pp. 280-81). The parent further testified as to her opinion that a specialized school was not appropriate for the student because he would be grouped with students with emotional disabilities and that the student would "pick up on some of [their] behavior" (Tr. p. 283). The special education teacher testified that a specialized school was not appropriate for the student because he would be deprived of interaction with non-disabled peers (Tr. p. 182). Thus, it appears that the CSE, including the parent, agreed that a community school was appropriate for the student and that other placement options were considered.[6]

State regulations provide that a 15:1 special class is designed for students whose special education needs consist primarily of the need for specialized instruction which can best be

[6] To the extent that the parent's testimony indicates her opinion that a 12:1 special class in a community school, but not a 15:1 special class, was appropriate for the student, I note the small difference in class sizes and the fact that State regulations describe the two class sizes together, indicating that the maximum class size should not exceed 15 students, or 12 students in a State-operated or State-supported school (8 NYCRR 200.6[h][4]). However, as discussed below, the parent also indicated her belief that the student required an additional instructor in the classroom (Tr. p. 284).

accomplished in a self-contained setting (8 NYCRR 200.6[h][4]). State regulations contemplate an additional adult in the classroom for those students whose management needs interfere with the instructional process (8 NYCRR 200.6[h][4][i]). State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). In this case, the parent has consistently asserted that the student would be best served in a classroom with two adults (Tr. p. 284; Parent Ex. C at p. 2). However, the evidence in the hearing record shows that the student did not exhibit management needs that interfered with the instructional process to the extent that an additional adult was needed within the classroom to assist in his instruction.

The special education teacher stated that the CSE based its recommendation of a 15:1 special class setting on the student's educational history of attending self-contained classes that allowed for modified instruction aligned with the student's academic instructional levels (Tr. pp. 158-59). He further stated the May 2012 CSE recommended several strategies and supports within the IEP to provide the student's teacher with a guide regarding instruction to allow the student to receive educational benefit (Tr. p. 150). As stated above, the May 2012 IEP contained several such accommodations and supports for the student, which recommended that the student's teacher: provide time to process information; rephrase and repeat directions and concepts; breakdown concepts and directions into steps; utilize a multisensory presentation of materials; utilize manipulatives; check for understanding; refocus to tasks; guide discussions; provide background information before reading and use relatable materials; hold prewriting conferences; use graphic organizers, editing checklists, and word banks; provide clear expectations and clear and consistent consequences; and facilitate and model social communication and conflict resolution (Tr. p. 150; Dist. Ex. 3 at pp. 3-4). While some of these strategies require direct implementation or assistance by the teacher during the day, others are such that they could be prepared in advance of the class as a modification to lessons or utilized for the classroom as a whole. For example, the special education teacher explained that some of the above referenced accommodations fall with the "best practices," which should generally be utilized by a special education teacher (Tr. p. 163). Therefore, based on the hearing record, it is reasonable to conclude that a special education teacher alone could implement the recommended strategies without interfering with the instructional process of the class.

The parties also dispute the level of individual attention and small group instruction that would be available to the student in a 15:1 special class. The assistant head of school at Cooke testified that in her view a 15:1 special class would be too large for the student (Tr. pp. 401-02). Both the assistant head of school and the head teacher from Cooke testified that the student required two teachers to provide modified instruction, as well as small group instruction and individualized attention (Tr. pp. 401-02, 454-55). In contrast, the district's special education teacher testified that the student's teacher would provide the student with 1:1 and small group instruction within a 15:1 special class, and that he did not require additional teaching support (Tr. pp. 163, 177).

The hearing record reflects that the student participated in class discussions, followed multi-step directions, and cooperated within the classroom setting (Tr. pp. 401-02, 454-55; Dist. Ex. 7 at pp. 1, 17). The Cooke teacher described the student as motivated, responsible, and respectful, and demonstrating an ability to meet short-term and long-term goals (Dist. Ex. 7 at p.

1). The occupational therapist who evaluated the student indicated that although the student's teachers and mother reported that the student exhibited difficulties with maintaining attention, the student did not engage in hyperactive behavior and did not require OT services to address such concerns (Dist. Ex. 8 at pp. 1, 4). The social worker reported that the student followed directions and liked to please but exhibited difficulty with processing information (Dist. Ex. 10 at p. 1). The social worker also reported that the student demonstrated progress and was developing various skills to increase his independence (id. at p. 2). According to the social worker, the student exhibited difficulty focusing and needed support regarding social skills (id.). The speech-language pathologist reported that the student easily engaged in conversation but demonstrated difficulties with listening comprehension (Dist. Ex. 11 at p. 2). Although the school psychologist indicated that during the assessment process the student was easily discouraged and lacked efficiency regarding time to compete tasks, the student was "well related" (Dist. Ex. 9 at pp. 1, 3). According to the results of standardized assessments, the student's overall cognitive abilities fell within the low average range and his overall math and reading skills fell within the borderline and low range, respectively (id. at pp. 2, 5). While I can understand that the parents would have preferred smaller-student-to-teacher ratio, based on the foregoing, I find that the evaluations available to the CSE reflected that the student's difficulties with attention, cognition, processing, and social skills did not rise to the level that the student would not receive educational benefits in a 15:1 special class and therefore the CSE was not required to adopt the recommendation of the private experts (G.W. v Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; E.C. v Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321 [S.D.N.Y. Mar. 15, 2013]; Dirocco v Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

In conclusion, the evidence contained in the hearing record establishes that the district's recommended educational program, consisting of a 15:1 special class in a community school, together with related services and IEP accommodations and supports, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

3. Transition Services

The IHO found that the May 2012 CSE summarily rejected the parent's request that transition services be included in the IEP (IHO Decision at pp. 11-12). The district argues that, because the student would not have turned 15 during the 2012-13 school year, that the district was not required to develop a 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]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate

measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

Here, contrary to the IHO's conclusion that the CSE should have provided for transition services for the student (IHO Decision at pp. 11-12), the hearing record shows the CSE's decision to wait until the following year to recommend such services did not rise to the level of a denial of FAPE. As part of the psychoeducational evaluation, and consistent with State regulations requiring a vocational assessment by age 12 (8 NYCRR 200.4[b][6][viii]), the student completed a vocational interview (Dist. Ex. 9 at p. 3; see Parent Ex. A at p. 3).[7] Based on that interview, the evaluator opined that the student had some sense of what was required for him to achieve his stated goal of becoming a train engineer but that "he has not mapped out his trajectory of achieving" such a goal and his vocational and occupational planning was "essentially age appropriate, reality based and positive in orientation" (Dist. Ex. 9 at p. 3). Based on the evaluator's conclusion that the student was age appropriate in this respect, the CSE was not required to recommend that the student commence transition services at an age younger than that contemplated by State regulations.

The special education teacher further testified that the CSE's decision to delay a recommendation for transition services was based, in part, on the student's diploma objective (Tr. pp. 173; see Parent Ex. A at p. 24).[8] The special education teacher explained that participation in State assessments put the student on a more educational track, whereas participation in alternative assessments would put the student on a vocational track (Tr. p. 157). Moreover, although the parent expressed her opinion that transition services should be commenced as early as possible in the course of the student's education (Tr. p. 288), she has not asserted any harm as a result of the CSE's determination not to recommend transition services for the 2012-13 school year. Consequently, I find that, under the circumstances of this case, the CSE's failure to recommend transition services for the student did not impede the student's right to a FAPE, the parent's opportunity to participate in the decision making process regarding a provision of FAPE, or otherwise cause a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]).

To be clear, however, upon determining that transition services were not required for this student despite a specific request therefor by the parent, the district was required to provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, described the CSE's refusal to recommend transition services and an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA

[7] As part of the evaluation process, State regulations require that students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests (8 NYCRR 200.4[b][6][viii]).

[8] The special education teacher also testified that the student's diploma objective could be revisited the next school year once the student's progress was recorded and evaluated (Tr. pp. 158-59).

and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]).[9] Although I find that the district's failure to recommend transition services did not, under the circumstances of this case, rise to the level of a denial of a FAPE to the student, I will nonetheless order, to the extent that it has not already done so, that when the next CSE reconvenes, the district shall recommend transition services for the student.

C. Assigned School

The IHO made several findings regarding the assigned public school site, including her determinations: (1) to given little weight to the school progress report and school survey report; (2) that the large size of the school did not make it inappropriate for the student; and (3) that the parent's allegations that the assigned school would be unable to implement the related services recommended for the student on the May 2012 IEP were speculative and inconsistent with testimony of the district witnesses (IHO Decision at pp. 11-12). Initially, with respect to these findings, the parent has not cross-appealed these portions of the IHO's determination; accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The IHO also held that the testimony at the impartial hearing did not support a finding that the assigned school would have been able to implement the strategies and techniques recommended to address the student's management needs and that the class that the student would have attended was too advanced, with students functioning at a much higher academic level (IHO Decision at pp. 12-13). The district alleges that the IHO erred with respect to those findings and principally argues that the challenges to the assigned school were speculative since the student never attended.

Initially, challenges to an assigned school 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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; 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 that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L., 2013 WL 3814669, at *6; 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 in which a student would be placed 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

[9] The State now requires prior written notice to be completed on a form prescribed by the Commissioner. A sample prior written notice form and guidance materials are located at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html.

the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 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]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K., 2013 WL 2158587, at *4), 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., 2013 WL 3814669, at *6 [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]).[10]

As explained more recently, "[t]he Second Circuit has been clear, however, 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., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see N.K., 2013 WL 4436528, at *9 [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']). In view of the forgoing, I find that the parent cannot prevail on her claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May

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

2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, the district timely developed the student's 2012-13 IEP and offered it to the student.[11] It is undisputed that the parents enrolled the student at Cooke prior to the time that the district became obligated to implement the May 2012 IEP (Parent Ex. L) and rejected the IEP before visiting the assigned school (Parent Ex. C at pp. 1-2). As the time for implementation of the student's IEP at the assigned public school site had not yet occurred when the parents rejected the district's offer, the parent's various challenges relating to the assigned school, including functional grouping and the assigned school's ability to address the student's management needs, were speculative claims. These were claims regarding the execution of the student's program and the district was not obligated present retrospective evidence to refute them (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., F. Supp. 2d at 273).[12] Accordingly, the IHO's findings relating to the inappropriateness of the assigned school location must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year must be reversed as it is not supported by the hearing record. It is therefore unnecessary to reach the issue of whether Cooke was appropriate for the student or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D. D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 7, 2013, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year; and

[11] The district offered the student a placement on August 27, 2012 (Dist. Ex. 4). This date was prior to the start of the 10-month school year, and therefore in conformity with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).

[12] For example, the hearing record offers little information regarding the functional grouping of the student's assigned classroom. The parent and the consulting teacher from Cooke testified that, upon their visit to the assigned school, the teachers with whom they spoke did not have information regarding the educational levels of the students in the classrooms or indicated that the students were not grouped according to their functional levels, and at least one teacher was under the impression that it was "illegal to track students" (Tr. pp. 300-01, 487, 491-92, 495-97). In contrast, the assistant principal at the assigned public school testified that the assigned school followed State guidelines regarding functional grouping (Tr. p. 199). This evidence shows how reliable functional grouping evidence is not static and depends to a very large degree on a student's actual enrollment and attendance at the public school.

IT IS FURTHER ORDERED that at the next annual review regarding the student's special education programming, the district shall recommend transition services for the student.

Dated: **Albany, New York**
September 23, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER