The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-178

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

Appearances:

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

Law Offices of Neal H. Rosenberg, attorneys for respondents, Jenna Pantel, 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 parents') son and ordered it to pay for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The CSE convened on May 18, 2012 to develop the student's IEP for the 2012-13 school year (Dist. Ex. 3). Finding the student eligible for special education and related services as a student with an intellectual disability, the May 2012 CSE recommended a 12-month 12:1+1 special class placement in a specialized school (id. at pp. 1, 13-14, 19).[1] In addition, the May 2012 CSE recommended related services of one 45-minute session per week of individual speech-language therapy; two 45-minute sessions per week of speech-language therapy in a group (3:1); two 45-minute sessions per week of physical therapy (PT) in a group (3:1); one 45-minute session per

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

week each of individual and group (3:1) occupational therapy (OT), one 45-minute session per week of individual counseling; and two 45-minute sessions per week of counseling in a group (3:1) (id. at pp. 14-15).[2]

In a final notice of recommendation (FNR) dated June 21, 2012, the district summarized the special education programs and related services recommended by the May 2012 CSE and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 5).

In a letter dated July 3, 2012, the parents advised the district that they were in the process of scheduling a visit to the assigned public school site (Parent Ex. A at p. 1). However, the parents noted that the district had assigned the student to the same public school site the previous two years and set forth their impression, based on past visits, that the assigned public school was not appropriate for the student because (1) the student would not be grouped with students with similar needs; (2) the student would not be able to transition between classrooms or navigate the "extremely confusing" school building ; (3) the school did not offer the level of support required by the student in order to achieve success in the classroom; (4) the school did not integrate related services into the classroom setting; and (5) the school offered insufficient life skills training (id. at pp.1-2).

In a letter dated July 19, 2012, the parents advised the district that they visited the public school site and believed it was not appropriate for the student based on many of the same concerns as set forth in their prior letter (Parent Ex. B at p. 1). In addition, the parents indicated that a 12:1+1 special class was "too large" for the student and that he required "a smaller educational environment" (id.). As a result, the parents advised the district that they would not accept the recommended public school placement for the student, but informed the district of their plan to revisit the public school site in September "to consider the regular program" (id.). The parents also indicated that, based on their concerns, they would "reserve a space" for the student at Cooke and seek public funding for the costs of the student's tuition (id.). The parents also requested that the district provide them with further information about the assigned public school site, including a class profile and curriculum relative to the classroom in which the student would be placed (id. at pp. 1-2).

On August 28, 2012, the parents executed an enrollment contract for the student's attendance at Cooke for the 2012-13 school year (Parent Ex. F).[3]

In December 2012, the parents visited the assigned public school site and, by letter dated December 12, 2012, rejected the public school site as not appropriate for the student (Parent Ex. C at p. 1). The parents set forth the reasons for their objections, reiterating the concerns set forth in their previous letters to the district, and additionally describing a "disturbing incident," observed during their visit to the public school site (id. at p. 2). The parents concluded their letter by advising

[2] The May 2012 CSE meeting minutes indicate that the district's school psychologist had requested that the student be evaluated as part of his "three year mandated review," which she indicated was "in a review stage" (Dist. Ex. 7 at p. 7).

[3] 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).

the district of their intention to continue the student's enrollment at Cooke for the 2012-13 school year and seek public funding for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated April 12, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year and that both the May 2012 IEP and assigned public school site would not provide the student with educational benefits (Dist. Ex. 1). With regard to the development of the student's IEP, the parents contended that the May 2012 CSE was not properly composed and that the CSE failed to consider appropriate evaluative data and did not discuss post-secondary goals as part of the student's "transition planning" (id. at pp. 1-2). The parents also alleged that the May 2012 IEP failed to accurately and completely reflect the information presented to the CSE, did not include appropriate and sufficient annual goals, short-term objectives, and management needs for the student, and did not include "promotion criteria" (Dist. Ex. 1 at pp. 1-2). The parents further alleged that the May 2012 CSE's recommendation for related services to be provided on a "pull-out" basis was inappropriate because it would "inhibit[the student's] progress in the academic and related service program" (id. at p. 2).

Additionally, the parents alleged that the assigned public school site was not appropriate for the student because it did not provide a program tailored to the student's needs, in that it failed to offer sufficient support, sufficient social or community inclusion opportunities or life skills training, or a therapeutic component integrated into the academic environment (Dist. Ex. 1 at pp. 2-3). The parents further asserted that the students they observed in the classroom they visited would not be appropriately grouped with the student based on their functional levels or disabilities (id. at p. 3). In addition, the parents asserted that the school environment was not appropriate for the student because it was in a "very large school" and the student would have difficulty navigating the building (id.).

With respect to the student's placement at Cooke, the parents asserted that instruction at Cooke was tailored to the student's needs and he was making progress (Dist. Ex. 1 at p. 4). As relief, the parents requested (1) direct funding of the cost of the student's tuition at Cooke or, in the alternative, tuition reimbursement; (2) provision of transportation; and (3) unspecified related services (id.).[4]

B. Impartial Hearing Officer Decision

On May 9, 2013, the parties met for a prehearing conference for scheduling purposes and proceeded to an impartial hearing on June 4, 2013, which concluded on July 1, 2013, after three days of proceedings (Tr. pp. 1-367). In a decision dated August 14, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement for the student, that equitable considerations weighed in favor of the parents' request for relief, and that the parents were entitled to direct funding of tuition costs associated with the student's placement at Cooke for the 2012-13 school year (IHO Decision).

[4] The parents also, in the event the district had previously funded the student's placement at Cooke, invoked the student's right to a stay put (pendency) placement there (Dist. Ex. 1 at p. 4).

Initially, the IHO found that the CSE did not possess current evaluations for the student as called for in a "triennial review" and that "appropriate, updated, evaluations should have been conducted," noting the May 2012 CSE's acknowledgement that further testing was necessary (IHO Decision at p. 28). The IHO also found that the May 2012 IEP did not accurately identify the student's needs (id. at p. 33). Next, the IHO found that, because of the lack of current evaluative data, the parents were not able to participate in the CSE meeting (id.). Furthermore, the IHO determined that, because the May 2012 CSE failed to properly evaluate the student, it did not consider sufficient information to support the recommendations or annual goals included in the May 2012 IEP (id. at p. 29). The IHO also found that the annual goals included in the May 2012 IEP were not appropriate for the student because the CSE relied on Cooke's goals for the student from the 2011-12 school year, thus ignoring the "individualized current needs of the student" (id. at pp. 29-30, 32-33). The IHO next found that the IEP failed to provide for personalized instruction with sufficient support to permit the student to receive educational benefit (id. at p. 32). In addition, the IHO found that, although a 12-month program was recommended for the student, there was no evidence in the hearing record that a 12-month program was discussed at the May 2012 CSE meeting (id.). The IHO also found that the CSE's failure to discuss the manner in which related services would be provided to the student made it "impossible to determine if the recommended pull out services would benefit the student" (id. at pp. 30-31). Further, the IHO found that the May 2012 CSE failed to identify the manner in which the student's transition activities were to be accomplished in a "natural setting" or what party would be responsible for implementing each transition activity (id. at p. 31).

With respect to the unilateral placement of the student at Cooke, the IHO found that educational instruction at Cooke was "designed to meet the unique needs of the student" and that the program at Cooke was "reasonably calculated to enable the [student] to receive educational benefits" (IHO Decision at p. 36). The IHO also found that the level of related services provided at Cooke was appropriate and that the program at Cooke provided an "appropriate class group and ratio" (id. at pp. 35-36).

Turning to equitable considerations, the IHO found that the parents "cooperated" with the district and communicated their concerns at the May 2012 CSE meeting (IHO Decision at p. 37). Finding that the parents could not afford the cost of the student's tuition, the IHO ordered the district to reimburse the parents for the amount of tuition they had paid and direct payment to Cooke for any balance due for the costs of the student's tuition at Cooke for the 2012-13 school year (id. at pp. 38-39).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement for the student for the 2012-13 school year, and that equitable considerations weighed in favor of the parents' request for relief. First, the district argues that the IHO erred in finding that "appropriate, updated, evaluations" were necessary in order to make an appropriate recommendation for the student. The district contends that updated testing was not necessary in order to make a recommendation because the student's test scores and classification did not change and Cooke provided the district with the student's test results. Second, with respect to the IHO's finding that the parents were not afforded the opportunity to participate during the CSE meeting due to the lack of evaluative data, the district argues that "everyone" at the CSE meeting had the

opportunity to participate, including the parents. Third, relative to the IHO's finding that the annual goals in the May 2012 IEP were not appropriate for the student, the district argues that the annual goals were appropriate, measurable, and sufficient to address the student's areas of deficits. Fourth, the district argues that the 12:1+1 special class placement recommendation was appropriate because the student was "low functioning" and the placement would provide the student with small group instruction. Fifth, regarding the IHO's finding that the CSE failed to discuss how the delivery of related services would benefit the student, the district contends that the there was a discussion on this matter at the CSE meeting and testimony indicated that the student would benefit from pull-out related service sessions because he would receive more individualized attention from his related service providers. Sixth, with regards to the IHO's finding that the IEP failed to reflect how the transition goals were to be "accomplished in a natural setting" and did not "reflect any party responsible for the activities," the district argues that the IEP provided a transition plan for the student that set forth the manner in which the student would receive the transition services. The district further argues that the regulations do not require the district to provide transition services to the student in a "natural setting." Finally, relative to the IHO's finding that the May 2012 CSE failed to discuss the provision of services on a 12-month basis, the district argues that such a failure was at most a de minimus procedural error that did not rise to the level of a denial of a FAPE.

As to the parents' unilateral placement of the student at Cooke, the district contends that the parents failed to meet their burden of proving that Cooke was an appropriate placement for the student. Specifically, the district argues that the parents failed to demonstrate that the program at Cooke was specially designed to meet the unique needs of the student because it failed to provide the student with sufficient related services and did not adequately monitor the student's progress.

Next, the district argues that equitable considerations preclude the parents' request for relief because the parents never intended to enroll the student in a public school placement. Regarding the IHO's finding that the parents were entitled to "direct payment" of the balance of the student's tuition at Cooke, the district argues that the parents failed to establish that they could not afford the tuition payments.

In an answer, the parents respond to the district's petition by denying the allegations and asserting that the IHO's decision should be upheld in its entirety.

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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v.

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

Before reaching the merits in this case, a determination must be made regarding which claims are properly heard on appeal. First, a review of the hearing record reveals that the IHO exceeded his jurisdiction by sua sponte addressing and relying upon an issue that was not raised in the parents' due process complaint notice to support, in part, the conclusion that the district failed to offer the student a FAPE for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-4). Specifically, the IHO concluded that the May 2012 CSE failed to discuss its recommendation that the student receive special education and related services on a12-month basis (IHO Decision at p. 32).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing and may not raise issues at the impartial hearing

that were not raised in its 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][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]; 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 *5-*6 & n.2 [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. S. 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 *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). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parents' due process complaint notice cannot reasonably be read to allege that the recommendation for a 12-month program was not properly discussed during the CSE meeting (see Dist. Ex. pp. 1-4). Moreover, a further review of the hearing record shows that the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice (see Tr. pp. 1-367; Dist. Exs. 1-7; Parent Exs. A-R; IHO Exs. I-IV) and, therefore, the IHO should not have considered this matter. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . ., is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13). Nor can it be said that the district opened the door to such claims 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). Consequently, the IHO's determination that a 12-month program was not properly discussed with the parents during the CSE meeting must be reversed.

Turning to the IHO's findings (1) that a mandated reevaluation of the student was "past due" and (2) that the May 2012 IEP did not "accurately reflect the results of evaluations to identify

the student's needs," as well as the IHO's order that the CSE conduct a complete reevaluation of the student, including OT, PT, speech-language, and psychoeducational evaluations, a review of the petition reveals that the district did not appeal these portions of the IHO's decision (see IHO Decision at pp. 33, 37). The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Initially, the district concedes the IHO's finding and order with regard to the mandated reevaluations of the student (see IHO Decision at p. 37). With respect to the IHO's finding that the May 2012 IEP failed to accurately reflect the student's needs, although the petition contains a reference to the student's present levels of performance in the context of the district's recitation of the underlying facts of the case (see Pet. ¶ 8), the district does not directly challenge the IHO's finding or particularize this argument in its petition. It is not permissible to craft such an argument on the district's behalf and, accordingly, I find that the district has elected not to appeal these adverse findings of the IHO relating to the adequacy of the May 2012 IEP and, therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; C.H., 2013 WL 1285387 at *9).

B. Evaluative Data/Present Levels of Performance

Based on the foregoing discussion regarding the scope of review, the finality and effect of the unappealed IHO determinations must be addressed. With respect to the IHO's order that the CSE conduct a complete reevaluation of the student, including OT, PT, speech-language, and psychoeducational evaluations (IHO Decision at p. 37), I find no fault with IHO's remedial order, which was within his equitable authority under these circumstances and I will order that, if it has not already done so during the pendency of these proceedings, the district shall conduct a reevaluation of the student in accordance with the procedures prescribed by federal and State regulations (34 CFR 300.303-300.311; 8 NYCRR 200.4[b][4]-[6]).

Next, with respect to the IHO's finding that the May 2012 IEP did not "accurately reflect the results of evaluations to identify the student's needs" (IHO Decision at p. 33), such a final determination may form the basis for an overall finding that the district failed to offer the student a FAPE for the 2012-2013 year. As stated in a December 2010 guidance document issued by the Stated Education Department, an IEP's present levels of performance act as "the foundation on which the [CSE] builds to identify goals and services to address the student's individual needs" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Thus, a district's failure to adequately describe a student's present levels of performance, alone, in some circumstances is sufficient to rise to the level of a denial of a FAPE (see 20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000] [holding that the failure to describe in an IEP some of a student's "major learning difficulties" may constitute a failure to develop a program that is reasonably calculated to confer educational benefits

on the student], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]; Application of the Dep't of Educ., Appeal No. 12-183; Application of the Dep't of Educ., Appeal No. 12-062; Application of the Dep't of Educ., Appeal No. 09-051).[5]

C. 12:1+1 Special Class

Even if the IHO's finding regarding the district's failure to accurately describe the student's present levels of performance was insufficient to support the conclusion that the district failed to offer the student a FAPE, the evidence in the hearing record also reveals that the May 2012 CSE's recommendation for a 12:1+1 special class for the student was not appropriate and, on that additional basis, the district denied the student a FAPE for the 2012-2013 year.

Initially, the hearing record provides little information regarding the May 2012 CSE's basis for recommending a 12:1+1 special class for the student. According to the special education teacher who participated in the May 2012 CSE meeting, the CSE relied on the March 2012 Cooke progress report, as well as discussion with Cooke participants and the parent to develop the student's IEP (Tr. pp. 7, 9-11; Dist. Exs. 6; 7). Following the discussion of the student's skills, needs, and goals, the CSE recommended a 12-month 12:1+1 special class placement in a specialized school (Dist. Exs. 3 at pp. 13-14; 7). Related service recommendations included: two group sessions of PT per week; one individual and one group session of OT per week; one individual and two group sessions of speech-language therapy per week; and one individual and two group sessions of counseling per week (Dist. Ex. 3 at p. 14). The IEP indicated that all related therapy sessions were to be 45 minutes in length and provided in a separate location (id.). While the May 2012 IEP indicates that the CSE considered and rejected a class in a community school for the student, there is no indication that the CSE considered other special class sizes on the continuum (see id. at p. 21; see also Tr. pp. 177-78).

State regulations contemplate a 12:1+1 special class for those students whose management needs interfere with the instructional process, an 8:1+1 special class for students whose management needs are determined to be intensive, and a 6:1+1 for student whose management needs are determined to be highly intensive (8 NYCRR 200.6[h][4][i]-[ii]). 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]).

The May 2012 IEP indicated that the student's management needs consisted of the following: visual and auditory cues; visual schedules; visual prompts; graphic organizers; direct modeling; teacher redirections; scaffolding; tasks broken into small steps; daily review of material; multisensory learning opportunities; language based instruction; breaks between activities, including breaks to stretch and walk around; small class and small group instruction; opportunities for 1:1 learning; opportunities to practice skills in real life context; social scripts; prompts to increase the volume of his voice, to speak slower, to choose topics with peers and teachers, and to remain on task; and support relating to abstract ways of thinking, problem solving, understanding language, and expressing and using pragmatic language (Dist. Ex. 3 at pp. 2-3). Moreover, many of the strategies listed in the student's IEP required some level of direct implementation or

[5] In light of the unappealed determination regarding the student's deficits and skill levels, I decline to address whether the annual goals and short term objectives in the IEP were appropriate.

assistance by classroom staff. Thus, based on the number and type of the student's management needs in the particular circumstances of this case, it is not reasonable, based on the evidence in the hearing record and without further explanation, to conclude that a teacher and paraprofessional could adequately provide instruction and support to the special class while also attending to the various academic and social/emotional management needs of the student in the instant case.

Following the placement recommendation by the district CSE participants, the parent and the Cooke coordinator expressed their disagreement with and concern that the recommended 12:1+1 special class setting was "too big" for the student, that he would not be able to keep up with the other students, and that the 12:1+1 special class would not provide him with the academic and social support he required (Dist. Ex. 7 at pp. 6-7). According to the May 2012 CSE meeting minutes, the student received academic instruction at Cooke in classes with eight students, either one or two teachers, and a teacher aide/assistant (id. at pp. 1-2).[6]

A review of the March 2012 Cooke progress report reflects that the student was making slow, incremental progress commensurate with his cognitive abilities (Dist. Ex. 6). Absent evaluative information from the district to show otherwise, evidence of the student's progress indicates that his placement at Cooke in 8:1+1 or 8:2+1 classrooms with push-in related services met his needs and there is insufficient evidence support in the hearing record to support a finding that the district's recommendation for a less supportive environment (12:1+1 special class with pull-out related services) was appropriate.

D. Additional IHO Findings Relating to the May 2012 IEP

Despite the above findings, a review of the hearing record, undertaken in the alternative, reveals that the evidence does not support the IHO's determinations that the district failed to afford the parents an opportunity to participate in the development of the student's May 2012 IEP and that the annual goals and transition plan included in the May 2012 IEP were not appropriate.

The IHO concluded that the parents were not afforded the opportunity to participate in the CSE meeting because of the lack of current evaluative data and because the district CSE members made the placement recommendation (IHO Decision at pp. 29, 33). However, the parents testified that the CSE went through the March 2012 Cooke progress report "step by step," the parents expressed their concern about the accuracy of the proposed annual goals, and they and the Cooke coordinator answered questions about the student posed by the CSE (Tr. pp. 167-75). Although, as discussed above the CSE did not have recent evaluation reports available to review, this fact alone does not establish that the district precluded the parents from the opportunity to participate in the CSE's discussion of the student's skills and needs. To the contrary, the hearing record also shows that, at the CSE meeting, the parents and the Cooke coordinator participated and voiced their disagreement with the placement recommendation (Tr. pp. 175-77). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA

[6] The department chairperson of the student's program at Cooke testified that related services were provided to the student in his classroom throughout the school day, thus further lowering the classroom student-to-teacher ratio (Tr. pp. 210, 215, 218; see Tr. p. 291).

violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. D.C., 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Turning to the IHO's findings with respect to the transition plan developed by the May 2012 CSE, to the extent that the IHO found the May 2012 IEP did not reflect how the student's transition needs would be accomplished in a "natural setting," the IDEA does not place such a requirement on a district (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]; see IHO Decision at p. 31). However, the IHO correctly found that the IEP's coordinated set of transition activities plan failed to identify the school district or agency responsible for providing the services recommended (IHO Decision at p. 31; Dist. Ex. 3 at pp. 16-17; see 8 NYCRR 200.4[d][2][ix][e]). While this in and of itself may not necessarily rise to the level of a denial of a FAPE, the district is hereby reminded of its obligation to conform to the requirements of the statute (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at * 9 [Mar. 21, 2013]; see also K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]).

In summary, I am convinced that the deficiencies in the May 2012 IEP identified above, (both with respect to appealed issues and accepting those matters unappealed), resulted in an IEP that was not reasonably calculated to enable the student to receive educational benefits.

E. Challenges to Assigned Public School Site

The parents contend that the district failed to show that the assigned public school site would have been able to implement the student's IEP. The district contends that these arguments are speculative. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 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. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; 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 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, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [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. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [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., 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]).

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. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 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. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; 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 is "entirely speculative"]; see also N.K., 2013 WL 4436528, at *9 [rejecting challenges to placement in a specific classroom]).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the May 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the May 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Ex. B). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so. Accordingly, the IHO's findings

relating to the appropriateness of the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

F. Appropriateness of the Unilateral Placement

On appeal, the district asserts that the student's program at Cooke was not specially designed to meet his unique needs because the school did not provide sufficient related services to the student, and did not adequately monitor his progress. For the reasons explained below, a review of the hearing record supports the IHO's conclusion that the student's program at Cooke was appropriate (IHO Decision at p. 36).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 14; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S., 231 F.3d at 104; see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207 [identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

> child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; Frank G., 459 F.3d at 364-65).

The student attended Cooke during the 2012-13 school year in the Learning for Living program (Tr. pp. 214-15). The department chairperson for Cooke's Learning for Living program (Cooke chairperson) testified that, relative to the rest the students at Cooke, students in the Learning for Living program required heavier emphasis on functional academic skills, life/adaptive skills, activities of daily living skills (ADLs), and the ability to access community resources (Tr. pp. 210, 213, 223-24; see Parent Ex. L). Reading levels of students in the Learning for Living program ranged from pre-kindergarten to second grade, and, according to the Cooke chairperson, students required speech-language therapy and OT services integrated into the classroom and community activities (Tr. pp. 213-14). Students in the program presented with similar deficits in adaptive and social communication skills (Tr. p. 219). The Cooke chairperson testified that the Learning for Living program was a "good fit" for the student because of his deficits in social communication, ADLs and ability to access community resources (Tr. pp. 217-18).

During the 2012-13 school year the student attended a class consisting of nine students, three related service providers or teachers, and three paraprofessionals who were assigned to individual students (Tr. p. 218). The student received instruction in "blocks" entitled community living (literacy, speech, and social studies) and daily living (adaptive skills, OT, science) (Parent Exs. L at pp. 1-3). He was also provided with math, movement, art, transition skills, and technology instruction, and a forum on men and women's issues (Parent Ex. K). The student also participated in a weekly trip into the community (id.).

According to the Cooke chairperson, the student received two weekly sessions of "push-in" PT, and three weekly sessions of both "push-in" OT and speech-language therapy (Tr. pp. 257-58, 261-62). Additionally, the student received instruction addressing his articulation skills during his "advisory" time and speech-language therapy during the community trips (Tr. pp. 258-59; Parent Ex. K). Twice weekly counseling sessions were provided to the student on a "pull-out" basis (Tr. p. 261). The Cooke chairperson testified that counseling occurred outside the classroom because students may not feel comfortable discussing sensitive material during community living or daily living block instruction times (Tr. pp. 265-67). She further testified that it was important for the student to receive PT, OT, and speech-language services in the classroom because he

needed his social communication skills addressed in a natural setting with peers or in the community for generalization purposes (Tr. p. 267).

The district argues on appeal that Cooke did not provide the student with any individual related services, as recommended on the May 2012 IEP. However, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parents need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). Further, a review of the May 2012 IEP shows that, out of the 10 sessions of related services recommended per week, only three were individual sessions (Dist. Ex. 3 at p. 14). Additionally, although the Cooke chairperson acknowledged that some skills needed to be addressed in a one-to-one setting in order for a student to acquire those skills, she testified that the student did not require individual related services because the group setting provided him with the opportunity to practice the social communication skills that he needed to "progress into adulthood" and interact with employers, people in the community, and friends (Tr. pp. 302-03). She indicated that the group sessions allowed for repeated practice in natural settings and generalization of skills and that the student had developed such generalization of skills (Tr. p. 303). Therefore, a review of the hearing record does not support the district's argument that the student's program at Cooke was not appropriate because the student did not receive related services on an individual basis.

Regarding the district's assertion on appeal that Cooke did not adequately monitor the student's progress, just assuming for the sake of argument that a unilateral placement is required to monitor progress in the same manner as a public school district is required monitor a student's progress toward IEP goals, the district's argument is without merit. The hearing record indicates that Cooke prepared three reports of individual student progress per year (see Dist. Ex. 6; Parent Exs. D; E). The progress reports reflected the student's performance in all areas of instruction and related services, identified the level of prompting the student required as he progressed toward mastering a goal, and provided narrative comments regarding the student's progress in specific skill areas (id.). Additionally, Cooke administered both the Group Math Assessment and Diagnostic Evaluation, and the Group Reading Assessment and Diagnostic Evaluation to the student, used word lists, and provided him with short passages to assess his reading comprehension (Dist. Ex. 3 at p. 1). The Cooke chairperson testified that the student's related service providers assessed the student using informal observations, checklists, and rubrics (Tr. p. 289). Thus, a review of the hearing record shows that Cooke assessed the student's skills through a variety of means and provided progress reports, and, therefore, the district's position that Cooke failed to adequately monitor the student's progress is without merit.[7]

[7] Aside from the matter that the evidence points to the opposite conclusion, it appears disingenuous for the district to fail to conduct updated assessments of the student on the one hand and then, on the other hand, point at Cooke and quibble with the manner in which it assesses the student's progress.

G. Equitable Considerations

Having determined that Cooke was an appropriate placement for the student for the 2012-13 school year, the next issue is whether equitable considerations support the parents' claim for the costs of the student's tuition.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 363 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376 [2d Cir. 2006]; M.C., 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In this instance, the district contends that equitable considerations should preclude relief because the parents never intended to enroll the student in a district public school; however, as detailed below, the hearing record does not substantiate the district's claim.

According to the hearing record, the parents advised the district in their letter dated July 19, 2012 that, based on their concerns regarding the public school site, they would "reserve a

space" for the student at Cooke, unless the program became appropriate; however, they indicated their willingness to re-visit the public school site in September to consider the program (Parent Ex. B at p. 1). Likewise, at the impartial hearing, the parents testified that they continued attempting to schedule a visit to the public school site from September to December because they had "continued hopes that the setting would be appropriate" for the student (Tr. p. 319). Additionally, the hearing record indicates that the parents attended the May 2012 CSE meeting and fully cooperated with the CSE during the review process (Tr. pp. 175-77). Therefore, the hearing record shows that the parents repeatedly communicated their concerns to the CSE, availed themselves of the opportunity to visit the public school site on several occasions, and timely notified the district of their intention to enroll the student at Cooke (id.; Parent Exs. A-C). Based upon the foregoing, the evidence in the hearing record establishes that the parents acted reasonably under the circumstances of this case and did nothing to hinder the district from developing an appropriate IEP. Therefore, I find that equitable considerations favor the parent overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R., 910 F.Supp.2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]).

H. Relief

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428); see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[8] Since the parents selected Cooke as the unilateral placement, and their financial status is at issue, I assign to the parents the burden of production and persuasion with respect to whether the parents have the financial resources to "front" the costs of Cooke and whether they are legally obligated for the student's tuition payments (Application of the Dep't of Educ., 12-132; Application of a Student with a

[8] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the district argues that the parents did not sufficiently establish that, due to a lack of financial resources, they were unable to front the costs of the tuition at Cooke for the 2012-13 school year. A careful review of the evidence supports the district's assertion.

The hearing record shows that on August 28, 2012, the student's father signed a tuition payment plan with Cooke relative to the student's attendance for the 2012-13 school year (Dist. Ex. F). The payment plan indicated that the total cost of tuition for the 2012-13 school year was $40,500.00 (id.). The parents testified that, in light of accrued debt, cost of living, and financial responsibilities, they had been unable to pay the student's tuition costs at Cooke (see Tr. pp. 330-331). In particular, the parents testified that they had three children, including two special needs children who attend Cooke, and that they were responsible for paying medical expenses and legal fees (Tr. p. 330). The parents also testified that, if they were unsuccessful at the impartial hearing, they understood that they were still obligated to pay the full amount of the tuition costs under the enrollment contract (Tr. p. 331). Based upon the foregoing, the weight of the evidence supports the IHO's finding that the parents were legally obligated to pay the full amount of the student's tuition costs at Cooke for the 2012-13 school.

Next, however, a review of the hearing record indicates that the parents did not provide sufficient evidence regarding whether, due to a lack of financial resources, they were financially unable to front the costs of the tuition at Cooke for the 2012-13 school year. In addition to the testimonial evidence submitted regarding the financial circumstances of the parents' household, the parents also submitted a portion of their 2011 and 2012 income tax returns that reflected a relatively substantial combined income (Parent Exs. I; J). While the parents' income is not insignificant, the hearing record does not contain any other evidence of the parents' assets, liabilities or expenses during the relevant time period, nor is there evidence of the parents' investments, savings, or other resources that make up their "financial resources". Based on the parent's 2011 and 2012 combined income, the lack of additional information in the hearing record, and the amount of tuition owed for the 2012-13 school year, I decline to order the district to directly fund the student's tuition. However, the district will be directed to reimburse the parents for the student's tuition at Cooke for the 2012-13 school year.

VII. Conclusion

Based on the foregoing, the hearing record support the conclusion that the district failed to offer the student a FAPE during the 2012-13 school year, that t Cooke was an appropriate placement for the student, and that equitable considerations weighed in favor of the parents' request for reimbursement for the costs of the student's tuition at Cooke for the 2012-13 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 13, 2013 is modified, by reversing that portion which ordered the district to make direct payment to Cooke; and

IT IS FURTHER ORDERED that, the district shall reimburse the parent for the student's tuition costs at Cooke for the 2012-13 school year upon the submission of proof of payment to the district; and

IT IS FURTHER ORDERED that, if it has not already done so, the district shall conduct an evaluation of the student in accordance with State and federal regulations.

Dated: **Albany, New York**
November 29, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER