The University of the State of New York

The State Education Department
State Review Officer
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No. 13-193

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

The Legal Aid Society, attorneys for respondent, Susan J. Horwitz, 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 the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's determinations which found that the district relied upon sufficient, current evaluative information to develop the student's individualized education program (IEP) and to develop the student's annual goals. The appeal must be sustained in part. The cross-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 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

On March 13, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (see Dist. Ex. 2 at pp. 1, 8-9).[1] Finding the student eligible for special education as a student with autism, the March 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with related services consisting of two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and two 30-minute sessions per week of individual

[1] At the time of the March 2012 CSE meeting, the student was eligible for special education programs and related services as a preschool student with a disability, and he was attending an 8:1+2 special class with related services of speech-language therapy and occupational therapy (OT) at a State-approved preschool program pursuant to a December 2011 IEP (see Dist. Exs. 2 at p. 1; 5; 14 at pp. 1-10).

occupational therapy (OT) (id. at pp. 1, 5-10).[2] In addition, the March 2012 CSE developed approximately 7 annual goals with approximately 25 corresponding short-term objectives targeting the student's ability to identify colors and shapes, to express his needs either verbally or by pointing, to respond verbally to a greeting, to process sensory information in order to engage in and interact with his environment, to improve his self-help skills related to dressing, to improve his toileting skills, and to improve his fine motor and visual motor skills (id. at pp. 3-5).

On May 15, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (see Parent Ex. E at pp. 1-2).

By final notice of recommendation (FNR) dated May 21, 2012, the district summarized the special education programs and related services recommended in the March 2012 IEP for the 2012-13 school year, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. G at p. 2).[3]

In a handwritten notation on the FNR dated July 17, 2012, the parent indicated that she did "not agree with this placement" (Parent Ex. G at p. 2). By letter dated August 7, 2012, the parent informed the district that the 6:1+1 "seat at [the assigned public school site]" would not meet the student's educational needs (Parent Ex. J). The parent indicated that she visited the assigned public school site and rejected it based upon her observations of the students in the program, who were not at a "similar academic, social, or life skill level as her son" (id.). The parent also informed the district of her intentions to unilaterally place the student at Cooke for the 2012-13 school year at district expense, beginning September 2012 (id.). In addition, the parent sent the district a form to complete to provide transportation services for the student (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated January 24, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. H at pp. 1-4). More specifically, the parent asserted that the March 2012 CSE did not discuss the student's then-current functional levels and relied solely upon a December 2011 evaluation and the September 2011 related services and educational updates to develop the student's March 2012 IEP (see id. at pp. 2-4). As a result, the parent alleged that the March 2012 IEP was not based on adequate information, and similarly, the student's present levels of performance in the March 2012 IEP were not based on "timely, adequate information" (id. at p. 3). The parent also alleged that the March 2012 IEP failed to include annual goals to address the student's pragmatic and receptive language skills, academic skills related to early mathematics or reading skills, and social/emotional deficits (id. at pp. 3-4). The parent also asserted that the annual goals in the March 2012 IEP were "vague, inadequate, and boilerplate" and failed to reflect the student's needs (id. at p. 4). In addition, the parent alleged that the March 2012 IEP did not include a recommendation for counseling as a related service despite "numerous references in all of the evaluations" concerning the student's "significant difficulties and delays with social interactions, expressing his needs, and regulating his emotions" (id. at p. 3). Finally, the parent asserted that the assigned public school site

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). Within State regulations, autism, in part, means a "developmental disability significantly affecting verbal and nonverbal communication and social interaction" (8 NYCRR 200.1[zz][1]).

[3] The parent visited the assigned public school site on May 30, 2012 (see Tr. p. 136).

was not appropriate because the students in the observed classroom did not constitute an "appropriate functional grouping," and the delivery of related services was not "sufficiently integrated" to allow the student to meet his "goals" (id. at p. 4).

With respect to the student's unilateral placement, the parent asserted that Cooke provided the student with a "high level of individualized instruction that [was] integrated with his therapeutic services," which the student required, and the student made "remarkable progress in his communication, social, and attention skills" during the first half of the 2012-13 school year at Cooke (Parent Ex. H at p. 4). With respect to equitable considerations, the parent alleged that she attended the March 2012 CSE meeting, she visited the assigned public school site, and she provided timely notice of her intent to unilaterally place the student at Cooke for the 2012-13 school year (id. at p. 5). As a proposed remedy, the parent requested that the student attend Cooke at district expense (see id.).

B. Impartial Hearing Officer Decision

On March 1, 2013, the IHO conducted a prehearing conference, and on April 26, 2013, the parties proceeded to an impartial hearing, which concluded on June 12, 2013 after two days of proceedings (see Tr. pp. 1-258). By decision dated September 5, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at Cooke was appropriate, and that equitable considerations weighed in favor of the parent's request for tuition reimbursement (see IHO Decision at pp. 7-14).

Initially, the IHO found that, based upon the weight of the evidence, the March 2012 CSE relied upon sufficient and current evaluative information to develop the student's March 2012 IEP (see IHO Decision at p. 8). Additionally, the IHO found that the March 2012 CSE was properly composed (id.). Next, the IHO concluded that the 6:1+1 special class placement was appropriate for the student (id.). The IHO found that the annual goals in the March 2012 IEP were appropriate and addressed the student's "academic functioning, speech and [OT] deficits and need for toilet training," noting further that the annual goals included "numerous instructional objective or benchmarks to measure short-term performance" (id. at pp. 8-9). The IHO also found the March 2012 IEP included support for management needs to address the student's "inability to remain on task and avoid dangerous areas" (id. at p. 9). And finally, the IHO found that the March 2012 IEP addressed the student's "speech and occupational difficulties" through recommendations for speech-language therapy and OT (id.).

However, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year because the March 2012 CSE did not recommend counseling as a related service (IHO Decision at p. 9). Based upon the evidence, the IHO was not persuaded that counseling services were not appropriate for the student or that the student's "deficits were not sufficiently acute to require counseling" (id.). Moreover, the IHO specifically noted that the March 2012 IEP was "replete with examples" of the student's behaviors, which demonstrated his need for counseling services, and that the March 2012 CSE had "ample information" to establish the student's need for counseling services in order to assist in his "academic and social-emotional growth" (id.).

Additionally, the IHO found that the district failed to establish at the impartial hearing that the assigned public school site was appropriate for the student because the district did not present any evidence of the assigned public school site's ability to "implement the student's IEP" or otherwise establish that the assigned public school site had a "seat" for the student (IHO Decision at pp. 9-10). The IHO also concluded that the district failed to present evidence regarding the assigned public

school site's ability to provide the related services in the student's March 2012 IEP, that the "recommended class" constituted an appropriate functional group for the student, or that the staff were "appropriately certified or licensed" (id.).

With respect to the student's unilateral placement at Cooke, the IHO found that the teachers were qualified to instruct the student, the program addressed the student's academic and social/emotional needs, and the student made "substantial academic and social-emotional progress" at Cooke (IHO Decision at pp. 12-13). As a result, the IHO concluded that Cooke was reasonably calculated to enable the student to receive educational benefits and was, therefore, an appropriate unilateral placement for the 2012-13 school year (id. at p. 13). Turning to equitable considerations, the IHO found no basis upon which to deny the parent's requested relief; consequently, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Cooke for the 2012-13 school year, upon presentation of proper proof of payment, and to directly pay Cooke for any outstanding tuition costs for the student's enrollment during the 2012-13 school year (id. at pp. 13-14).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2012-13 school year based upon findings that the March 2012 IEP did not include a recommendation for counseling as a related service and because the district did not present evidence at the impartial hearing to establish that the assigned public school site was appropriate. Next, the district contends that the IHO exceeded her jurisdiction in finding that the staff at the assigned public school site were not appropriately certified or licensed, as the parent did not raise this issue in the due process complaint notice. The district also argues that the IHO erred in concluding that the student's unilateral placement at Cooke was appropriate and that equitable considerations weighed in favor of the parent's requested relief.

In an answer, the parent responds to the district's assertions with general admissions and denials and argues to uphold 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 unilateral placement, and that equitable considerations weighed in favor of the parent's requested relief. As a cross-appeal, the parent asserts that the March 2012 IEP was not based upon timely or adequate evaluative information, which resulted in a failure to accurately reflect the student's then-current functional levels or educational needs. The parent also argues that the IHO erred in finding that the annual goals were appropriate, contending that the annual goals were not based upon sufficient evaluative information and were not specific enough to reflect the student's individual needs. In an answer to the parent's cross-appeal, the district argues that the parent's allegations are not supported by the hearing record.[4]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

[4] To the extent that neither party appeals the IHO's finding that the March 2012 CSE was properly composed, this determination is final and binding and will not be addressed (see IHO Decision at p. 8; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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), 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. March 2012 IEP

1. Evaluative Information and Present Levels of Performance

Turning first to the cross-appeal, the parent argues that the March 2012 IEP was not based upon timely or adequate evaluative information because the March 2012 CSE relied upon evaluations conducted in September 2011. In addition, the parent contends that, because the student's then-current teacher or related services providers did not attend the March 2012 CSE meeting, the failure to obtain their input resulted in an IEP that did not accurately reflect the student's then-current functional levels or educational needs and failed to account for any progress the student

made on his annual goals since the development of his "last IEP." The district denies these allegations and asserts that the IHO properly found no procedural errors occurred in the development of the March 2012 IEP and that the evaluative information relied upon by the March 2012 CSE was neither insufficient nor outdated. A review of the hearing record supports the district's contentions, and the parent's allegations must be dismissed.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).[5] However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 582 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to

[5] Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come from (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

First, the hearing record demonstrates that the following individuals attended the March 2012 CSE meeting: a district school psychologist (who also acted as the district representative), a district special education teacher, a district social worker, an additional parent member, and the parent (Dist. Ex. 2 at p. 11). In addition, a social worker from the student's then-current preschool program also attended the March 2012 CSE meeting, and a handwritten notation on the attendance page attached to the March 2012 IEP indicated "absent" for an unidentified "[c]lassroom [t]eacher" (id.; see Tr. pp. 40-41, 83). The district school psychologist testified that, based upon her recollection, the handwritten notation referred to the student's then-current special education at the preschool program; she also testified, however, that the social worker from the preschool program arrived at the March 2012 CSE meeting with "updates" and "related service reports" and that the social worker was "very familiar with the student" (Tr. p. 41).

Next, the hearing record demonstrates that the March 2012 CSE relied upon several sources of evaluative information to develop the student's March 2012 IEP, including a September 2011 educational evaluation, a September 2011 OT report, a September 2011 social history update, an October 2011 annual speech-language evaluation, a December 2011 psychological evaluation (December 2011 evaluation), a February 2012 classroom observation, and a February 2012 Vineland Social-Emotional Early Childhood Scales (Vineland SEEC) (Tr. pp. 41-44, 59-64; Dist. Exs. 5-8; Parent Exs. C-D; I).[6] In addition, the district school psychologist testified that the March 2012 CSE also reviewed the student's December 2011 IEP as part of the decision-making process in determining the student's "kindergarten placement and services," and that, as a "general rule," the March 2012 CSE would have also reviewed the December 2011 IEP to assess any progress the student made on the annual goals (Tr. pp. 37-40, 61-63, 77-79).[7] At the time of the March 2012 CSE meeting, the above listed documents represented the student's most recent and current evaluative information available for consideration by the March 2012 CSE, and even a cursory review of the evaluation dates listed on each document reveals that all of the above had been conducted within 6 months prior to the March 2012 CSE meeting (see Dist. Exs. 5 at p. 1; 6 at p. 1; 7 at p. 1; 8 at p. 1; 14 at pp. 1-3; Parent Exs. C at p. 1; D at p. 1; I at p. 1).

In addition, a review of the hearing record reveals that the March 2012 CSE developed the present levels of academic performance and individual needs section of the student's March 2012 IEP based upon information from the September 2011 educational evaluation, the September 2011 OT report, the October 2011 speech-language evaluation, the December 2011 evaluation, and the Vineland SEEC (see Dist. Ex. 2 at pp. 1-2). Notably, the March 2012 IEP directly reflected the evaluative information considered and relied upon by the March 2012 CSE, and the March 2012 IEP

[6] Notably, the parent acknowledges in the due process complaint notice and in the pleadings on appeal that the March 2012 CSE relied upon the September 2011 educational evaluation, the September 2011 OT report, the October 2011 speech-language evaluation, the December 2011 evaluation, and the Vineland SEEC, which comprised five of the seven total documents considered by the March 2012 CSE (see Parent Ex. H at pp. 2-3; Answer & Cross-App. ¶¶ 15-16, 31).

[7] The December 2011 IEP incorporated testing results from the same September 2011 evaluation, September 2011 OT report, and October 2011 speech-language evaluation relied upon by the March 2012 CSE (compare Dist. Ex. 14 at pp. 3-5, with Dist. Ex. 8 at pp. 1-3, and Parent Exs. C at pp. 1-7; D at pp. 1-3). It does not appear that the December 2011 IEP incorporated testing results from the December 2011 evaluation (compare Dist. Ex. 14 at pp. 3-5, with Parent Ex. I at pp. 1-6).

adequately and accurately described the student's then-current abilities related to academic achievement, language development, gross and fine motor development, pragmatic language skills, self-help skills, adaptive skills and social/emotional skills (see id.).

As reported in the December 2011 evaluation, the March 2012 IEP present levels of performance indicated that the student obtained a nonverbal IQ of 51, a verbal IQ of 52, and a full-scale IQ of 49, placing the student within the "[m]ild-to-[m]oderate [m]ental [r]etardation range" (compare Dist. Ex. 2 at p. 1, with Parent Ex. I at p. 3).

As indicated in the September 2011 OT report, the March 2012 IEP present levels of performance described the student's fine motor, graphomotor, grasping and visual motor integration skills as delayed (compare Dist. Ex. 2 at p. 1, with Parent Ex. D at pp. 2-3). The March 2012 IEP indicated that the student demonstrated graphomotor skills at a 2.7 year level and fine motor skills below the 1st percentile, with delays of more than 33 percent in grasping and visual motor integration skills (compare Dist. Ex. 2 at p. 1, with Parent Ex. D at p. 2). According to both the September 2011 OT report and the March 2012 IEP, the student could not follow directions to copy or imitate drawing a line, a circle, or a "vertical horizontal cross" (id.). A review of the March 2012 IEP also indicates that the student demonstrated decreased sensory integration skills, as well as motor planning skills, and he had difficulty negotiating climbing equipment (id.). Additionally, the March 2012 IEP noted that the student demonstrated decreased attention to task and was easily distracted by visual and auditory stimuli (id.). The March 2012 IEP also indicated that the student exhibited delayed self-help skills in toileting and dressing; however, the student could feed himself (id.).

Based upon the October 2011 speech-language evaluation, the March 2012 IEP present levels of performance indicated that the student exhibited "depressed receptive and expressive language skills for his age" (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at pp. 2-3). According to both the October 2011 speech-language evaluation and the March 2012 IEP, the student's receptive language skills, expressive language skills, and auditory comprehension were approximately two years below age appropriate levels (id.). The March 2012 IEP further noted the student's deficits in vocabulary, concept development, comprehension of directions and questions, verbal expression, and pragmatic use of language (id.).

As reflected in the March 2012 IEP, an administration of the Vineland SEEC, which assessed the student's social/emotional behavior, revealed that the student performed below age appropriate levels in the areas of interpersonal relationships and play and leisure time; however, the student performed within an age appropriate level in coping skills (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 6 at p. 5).

Relying upon the September 2011 educational evaluation, the March 2012 IEP present levels of performance reflected that the student's cognitive skills fell within a 28 months to 30 months age range, with scattered skills up to 49 months, and that the student performed "better" with staff support (compare Dist. Ex. 2 at p. 1, with Parent Ex. C at p. 1). With respect to the student's communication skills, the March 2012 IEP reported his ability to use phrases or simple sentences to communicate wants and needs or to request a desired item, but further noted that the student had a tendency to "cry and scream" when his needs were not immediately met (compare Dist. Ex. 2 at p. 1, with Parent Ex. C at p. 3). With respect to expressive language skills, the March 2012 IEP indicated that the student could label picture vocabulary words independently, he required prompting to not use jargon or repetitive speech patterns, and, at that time, his vocabulary consisted of approximately 45 to 50 words (id.). With respect to the student's receptive language skills, both the September 2011 educational evaluation and the March 2012 IEP reported that the student could

follow one-step commands independently and answer "yes/no" and "what" questions but demonstrated difficulty answering "when, where or why" questions (id.). As for academic and readiness concepts, the March 2012 IEP indicated, as noted in the September 2011 educational evaluation, that the student demonstrated delayed concept acquisition skills; however, the student could: make a tower with 10 blocks; label simple colors, picture vocabulary words, and shapes; identify numbers one through nine, as well as some uppercase letters upon request; hold a book correctly and turn pages independently; and recognize his assigned color and symbol (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. C at p. 2). Similarly, the March 2012 IEP indicated that the student exhibited "poor" problem-solving skills and, with respect to memory, he learned "best" in a "highly structured and predictable learning environment" (id.). The March 2012 IEP also reported the student's learning style behaviors consistent with the September 2011 educational evaluation, noting that the student enjoyed school and that "[s]tory [t]ime and [c]ircle" were his "favorite activities;" however, the March 2012 IEP also noted that the student required staff support complete tasks (id.). The student also required supervision when "walking in the hallway" (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. C at p. 2).

In addition, consistent with the evaluative information before the March 2012 CSE, the IEP reflected that the student obtained an adaptive behavior composite score of 60 and estimated his adaptive behavior skills to be at approximately 24 months with scattered skills, indicating overall skills within "low" level of adaptive functioning (compare Dist. Ex. 2 at pp. 1-2, with Parent Exs. C at p. 6; I at p. 4). Also, as noted in the September 2011 educational evaluation, the March 2012 IEP describes the student as being able to use a spoon and fork, drink from a cup, and finger feed himself independently but reported that he had difficulty dressing himself and was not toilet trained (compare Dist. Ex. 2 at p. 2, with Parent Ex. C at p. 6).

Consistent with the evaluative information before the March 2012 CSE, the IEP indicated that the student exhibited a decreased ability to self-regulate, became easily upset during transitions, and had a low frustration level (compare Dist. Ex. 2 at p. 1, with Parent Exs. C at p. 1; D at p. 2). The September 2011 educational evaluation and the March 2012 IEP indicated that the student would occasionally engage in simple interactions with a select number of peers and consistently initiated interactions with adults (compare Dist. Ex. 2 at p. 2, with Parent Ex. C at p. 6). Consistent with the September 2011 educational evaluation, the March 2012 IEP indicated that the student needed staff prompting to focus and attend to tasks and preferred to play by himself (compare Dist. Ex. 2 at p. 2, with Parent Ex. C at pp. 3, 6). Consistent with the available evaluative information, the March 2012 IEP also indicated that the student had a tendency to cry and scream when his want and needs were not immediately met (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at p. 1; Parent Ex. C at p. 3). Furthermore, the student was described as being unaware of danger and needing staff support to avoid dangerous areas and supervision when walking in the hallway (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. C at p. 2). The March 2012 IEP and the September 2011 educational evaluation indicated that the student had decreased attention to task, was distractible and unable to focus, and performed better with staff support (compare Dist. Ex. 2 at p. 1-2, with Parent Ex. C at pp. 1-2, 6).

In sum, the evaluative information available to the March 2012 CSE provided information regarding the student's cognitive development and adaptive behavior skills, his speech-language development, his gross and fine motor skills, his low frustration tolerance and social/emotional development, his academic skills, and his pragmatic language skills (Tr. pp. 45-48; Dist. Exs. 2 at pp. 1-2; 5-8; 14 at pp. 3-5; Parent Exs. C-D; I). Thus, an independent review of the hearing record reflects that the evaluative information considered by the March 2012 CSE provided the March 2012

CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his March 2012 IEP consistent with both State and federal statutes and regulations (D.B., 2011 WL 4916435, at *8; see Application of the Dep't of Educ., Appeal No. 11-147; Application of a Student with a Disability, Appeal No. 11-041).

2. Annual Goals

In the cross-appeal, the parent disputes the IHO's findings concerning the annual goals in the March 2012 IEP. The parent asserts that the annual goals failed to address the student's crucial areas of need, as clearly delineated in the evaluations and the present levels of performance on the March 2012 IEP, which included jargon and repetitive speech, severe social/emotional deficits, and difficulties with motor planning, frustration tolerance, self-regulation, and sensory integration. 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][a]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the student's March 2012 IEP shows that it included approximately seven annual goals and, consistent with the CSE's determination that the student participate in an alternate assessment, corresponding short-term objectives to improve the student's ability to: name or point to shapes and colors; make his needs known verbally or by pointing; respond verbally to a greeting; process sensory information for improved ability to engage in and interact with his environment; improve his self-help skills for improved functional ability related to dressing; improve his toileting skills; and improve his fine motor and visual motor skills (Dist. Ex. 2 at pp. 3-5). As detailed above, the March 2012 IEP present levels of performance described the student as having significant delays in his social/emotional, receptive language, pragmatic language development, and academic skills (id. at pp. 1-2). Despite these significant areas of need, the March 2012 IEP did not include annual goals or short-term objectives to improve the student's social/emotional skills or otherwise provide supports and/or services to address those needs (compare Dist. Ex. 2 at pp. 1-2, with Dist. Ex. 2 at pp. 3-5). Furthermore, the March 2012 IEP included annual goals that were inappropriate to address the student's individual needs in receptive language, pragmatic language, and academic skills, as described in the present levels of performance.

According to the district school psychologist, any "pre-readiness skills" that were not achieved prior to the student entering kindergarten, needed to be addressed (Tr. p. 51). The district school psychologist testified that the March 2012 IEP contained annual goals targeting academic functioning, expressive language, OT, and toileting skills (Tr. pp. 51-52). She further testified that the March 2012 CSE did not develop annual goals to address the student's frustration tolerance level, ability to share, ability to engage in cooperative play, gross motor skills, use of jargon and echolalia, or to increase his length of utterance (Tr. pp. 69-79). In contrast, the student December 2011 preschool IEP included annual goals and corresponding short-term objectives to address each of these areas (Dist. Ex. 14 at pp. 5-7).

A review of the annual goals in the March 2012 IEP reveals that the majority contained sufficient specificity by which to guide instruction and intervention and adequate evaluative criteria

and advised when periodic reports would be provided (Dist. Ex. 2 at pp. 3-5). However, a review of the March 2012 IEP reveals that it contained goals that were not reflective of the student's unique individual needs. Specifically, to address the student's academic needs, the March 2012 IEP included a goal to improve the student's ability to name or point to colors with short-term objectives targeting the student's ability to point to primary colors; to sort blocks by color; and to sort blocks by shape (id. at p. 3). However, the September 2011 educational evaluation and the March 2012 IEP present levels of performance indicated that the student was able to label simple colors and shapes at the time of the March 2012 CSE meeting (Dist. Ex. 2 at p. 1; Parent Ex. C at p. 2). Additionally, the March 2012 CSE reviewed evaluative data indicating that the student had significant receptive, expressive, and pragmatic language needs; however, the March 2012 IEP included only two annual goals to address these areas of significant deficit, one of which addressed skills the student had already developed (see Dist. Exs. 2 at pp. 1-2; 8; Parent Ex. C at p. 3). Specifically, the March 2012 IEP included an annual goal to improve the student's ability to make his needs known verbally or by pointing, with short term objectives targeting: naming or pointing to five toys that he wants; naming or pointing to 10 activities that he wants; and requesting assistance when needed (Dist. Ex. 2 at p. 3). However, the March 2012 IEP present levels of performance indicated that the student was able to use "phrases or simple sentences to communicate his wants and needs" and that the student would "verbally use a simple sentence to request a desired item" and "frequently seek help from a staff member when in distress" (id. at pp. 1-2). Similarly, the October 2011 speech-language evaluation indicated that the student "use[d] language primarily to label objects and state what he does or [does not] want" and included examples of the student's utterances ranging from one to four words (Dist. Ex. 8 at pp. 2-3).

Furthermore, a review of the hearing record indicates that, while the March 2012 IEP provided an adequate description of the student's significant social/emotional needs, described above, the IEP did not include annual goals to address these needs (compare Dist. Ex. 2 at pp. 1-2, with Dist. Ex. 2 at pp. 3-5). Consistent with the student's social/emotional needs described in the March 2012 IEP present levels of performance, discussed above, the district school psychologist testified that the March 2012 CSE "gleaned from the various reports" that the student: was functioning at the 8 to 24 month age level; preferred to play by himself; was very distractible; required a "great deal" of staff prompting to help him focus and attend; appeared to enjoy school; and on occasion would engage with a select number of peers (Tr. p. 48).[8] In addition, the February 2012 classroom observation indicated that the student had a low frustration tolerance, "need[ed] prompts," would whine and moan but would stop when told, and talked to his hands (Dist. Ex. 5). The February 2012 Vineland SEEC described the student's social/emotional skills in interpersonal relationships and play and leisure skills as within the "low" range when compared to other children his age, which according to the examiner placed his skills well below average for his age (Dist. Ex. 6 at p. 5). The SEEC also indicated that the student's coping skills were considered adequate when compared to other children his age (id.). The September 2011 annual speech-language evaluation indicated that the student would cry or whine if he did not get his own way and he had a difficult time with transitions (Dist. Ex. 8 at p. 1). The report further indicated that the student was variably compliant during structured activities that were not his choice and he was perseverative in both activities and verbalizations (id.). The September 2012 speech-language report indicated that the student used jargon and scripted language and exhibited immediate and delayed echolalia (id. at p.

[8] Although the district school psychologist testified that the student's social/emotional functioning was 8 to 24 months, the March 2012 IEP and the September 2011 educational evaluation indicated that the student's social/emotional skills fell in 18-24 months range, with some scatter (Tr. p. 48; Dist. Ex. 2 at p. 2; Parent Ex. C at p. 6).

3). His pragmatic use of language was considered poor, he did not respond spontaneously to greetings, and he was unable to engage in age appropriate conversation (id.). Moreover, the report indicated that the student primarily used language to label objects and to indicate what he did and did not want, but did not use language to gain attention, obtain information or to request help (id.). In addition to the information reported in the March 2012 IEP, the September 2011 educational evaluation also indicated that the student could be uncooperative and could become anxious when his daily routine was changed (Parent Ex. C at p. 6). Finally, the September 2011 OT report indicated that the student was frequently anxious, did not like to "share his space with others," frequently cried during transitions, demonstrated a decreased ability to self-regulate, and was easily upset, especially during transitions (Parent Ex. D at pp. 1-2). Thus, despite the information available to the March 2012 CSE regarding the student's significant social/emotional needs, no annual goal was developed to address these needs.

Based on the foregoing, as the student's social/emotional, receptive language, pragmatic language, and academic needs were known to the CSE at the time of the March 2012 CSE meeting, it was improper for the district to fail to address them appropriately within the body of the IEP. Although the failure to address every one of a student's needs by way of an annual goal will not automatically constitute a denial of a FAPE in every case (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), under the circumstances of this case as described above, the March 2012 CSE failed to develop appropriate annual goals or otherwise recommend appropriate special education supports and services to meet the student's needs and, as a result, failed to offer him a FAPE in this instance, especially in light of the additional weaknesses in the IEP described below (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320[a]; 8 NYCRR 200.4[d][2]; see Application of the Dep't of Educ., Appeal No. 12-137; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Bd. of Educ., Appeal No. 12-132;).

3. Related Services—Counseling

The district contends that the IHO erred, in part, by finding that the March 2012 CSE's failure to recommend counseling as a related service in the March 2012 IEP resulted in a failure to offer the student a FAPE for the 2012-13 school year. The related services recommended by the March 2012 IEP included two 30-minute individual sessions of speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of three, and two 30-minutes individual sessions of OT per week (Dist. Ex. 2 at p. 6).

The district school psychologist opined that the student would not have benefitted from counseling as a related service because his "cognitive functioning [was] so low that he would not have benefitted from it" and that the March 2012 CSE did not recommend it because he did not receive counseling prior to entering kindergarten (Tr. p. 55). The district school psychologist testified that the student's social/emotional, academic, and language needs would have been addressed in the 6:1+1 special class placement recommended by the March 2012 CSE (Tr. pp. 55-56, 85). She further testified that the recommended 6:1+1 special class placement was a program specifically for children with autism, which would focus on verbal and non-verbal issues, delays in social interaction, as well as adaptive, speech, and social/emotional functioning because those are "built into the program" (Tr. p. 85). However, testimony by district personnel during the impartial hearing regarding certain services that they described as "programmatic" does not, in this instance, cure the deficiency in the March 2012 IEP by establishing that the student would have received services beyond those listed in his IEP (see R.E., 694 F.3d at 185-88 [explaining that, with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding

services not listed in the IEP may not be considered]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 574-75 [S.D.N.Y. 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [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]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). Thus, the district school psychologist's testimony that the recommended program would address the student's social/emotional functioning neither explains nor justifies the services listed on the IEP in this instance; rather, it materially alters the written terms of the March 2012 IEP (see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]). There is no indication that the parent was informed at the time of the March 2012 CSE meeting of the manner in which a 6:1+1 special classroom would address the student's social/emotional deficits (see R.E., 694 F.3d at 186). The March 2012 IEP meeting minutes state that the CSE merely discussed the student's need for an educational program that would meet his social development and cognitive needs (Dist. Ex. 3). Furthermore, the March 2012 IEP itself did not indicate how the 6:1+1 special class placement addressed the student's social/emotional needs (see generally Dist. Ex. 2). The March 2012 IEP stated that the student required a small structured class to address significant delays in social/emotional development but failed to describe how this would be provided to the student (id. at p. 2).

Based on the above, the evidence in the hearing record reflects that, in combination with the inadequate annual goals, the March 2012 CSE's failure to recommend counseling as a related service in the March 2012 IEP results in a finding that the district failed to offer the student a FAPE for the 2012-13 school year.

B. Challenges to the Assigned Public School Site

For the reasons set forth below, the district correctly argues on appeal that the IHO erred in finding that it failed to sustain its burden at the impartial hearing to establish that the assigned public school site could implement the student's March 2012 IEP, as these claims are speculative as a matter of law because the parent did not enroll the student in the assigned public school site.[9]

Initially, 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., 2012 WL 4891748, at *14-*16; Ganje., 2012 WL 5473491, at *15 [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes., 2012 WL 6136493, at *7; R.C., 906 F. Supp. 2d at 273 [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

[9] The district also correctly asserts that the IHO exceeded her jurisdiction in finding that the staff at the assigned public school site were not appropriately certified or licensed, as the parent did not raise this issue in the due process complaint notice (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[j][1][ii]); see also, e.g., N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]).

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., 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]).

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"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [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, the parent cannot prevail on her claims that the district would have failed to implement the March 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669, at *6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent

rejected the assigned public school site and instead chose to enroll the student in a nonpublic school of her choosing (see Tr. p. 142; Parent Exs. G at p. 2; J). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 2013 WL 3814669, at * 6). Moreover, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669, at *6; R.C., 906 F. Supp. 2d at 273). Accordingly, the IHO's determination that the district was required to establish that the assigned public school site could implement the student's March 2012 IEP was unsupported as a matter of law and must be reversed.

C. Unilateral Placement

The district asserts that the IHO erred in finding that Cooke was an appropriate placement for the student because Cooke presented a noisy environment with a diverse group of peers, factors which the IHO considered in concluding that the assigned public school site was not appropriate for the student. Furthermore, the district asserts that Cooke was not specifically designed to meet the student's unique needs.

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 offer 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. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207 [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, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

Testimony from the principal of Cooke indicated that Cooke was a 12-month program for students with multiple disabilities in cognitive functioning, speech-language processing, and general developmental delays (Tr. pp. 102-03). He further testified that the kindergarten curriculum was based around social learning theory and "facilitated students" who had very weak social/emotional skills by providing support in "cooperative learning experiences, [and] interaction and interpersonal skills with other students" (Tr. pp. 106-07).

The student's classroom consisted of nine students with one head teacher, one assistant teacher, and two paraprofessionals (Tr. pp. 107, 201, 215). Additionally, the kindergarten classes had a dedicated team for related services made up of a speech-language therapist, occupational therapist, physical therapist, and a counselor (Tr. p. 107). According to the head kindergarten teacher from Cooke, the kindergarten curriculum was a "balanced curriculum" that focused on academics, social/emotional, and physical growth through small group, whole class, and individual instruction (Tr. pp. 215-16, 220-22). He further testified that the social/emotional needs of the students were addressed during "play time/choice time" which was "set up to facilitate social interaction and conflict and problem solving" (Tr. p. 216). Academically, the teacher testified that a reading and writing consultant would work with him weekly to tailor the reading and writing program to each student (Tr. p. 220). Additionally, he indicated that reading, writing, and math activities were "built into every day" and that he would work to tailor math activities to each student (Tr. pp. 220-21). In the student's November 2012 Cooke progress report, the teacher reported that the student would continue to work on academic and social/emotional goals, particularly drawing things other than smiley faces, staying focused on drawing and writing activities for a longer amount of time, playing parallel with others, and sharing (Parent Ex. A at p. 13).

The student received two 30-minute sessions of individual speech-language therapy per week, one 60-minute session of speech-language therapy per week in a group of five, one 30-minute session of individual counseling per week, and two 30-minute sessions of individual OT per week

(Tr. pp. 107-08; Parent Ex. B at p. 1).[10] The student also received push-in counseling sessions in the form of a social skills class and "play center" (Tr. p. 182). The Cooke school psychologist testified that she and the occupational therapist "co-led" the social skills class and that the curriculum focused on engaging the students in subjects in which they were interested and which were "relative to the social world," including learning about the subway, restaurants, theatres, and supermarkets (Tr. pp. 179-80; see also Parent Exs. A. at p. 5; B at p. 4). She further indicated that goals for the social skills class targeted a combination of social skills and speech-language skills, which included "developing pragmatic language and comprehension and vocabulary" (Tr. p. 180). She further testified that the social skills class included "tons of field trips" and hands-on activities, along with direct instruction (id.). The psychologist also testified that she and the occupational therapist planned the "play center," during which the students were divided into small groups to facilitate communication and reciprocal play (Tr. pp. 178-79). The sessions lasted approximately 45-minutes and were provided in the classroom with a combination of sensory activities and "activities that [would] promote turn-taking and sharing and conversation and teamwork and collaboration between the children" (Tr. p. 179).

According to the March 2013 Cooke progress report, the goals targeted in the social/emotional curriculum included cooperative play skills, flexibility during conflict and transitions, relating feelings, expressing needs to others, improving listening skills, and emotion regulation (Parent Ex. B at p. 4). The report also indicated that the student received individual sessions with the therapist, which constituted an extension of the student's classroom work (id. at p. 5). Furthermore, the psychologist testified that she tailored the student's individual counseling goals to his needs (Tr. p. 185). Specifically, the March 2013 Cooke progress report indicated that the individual counseling sessions focused on the student's ability to play cooperatively with adults and peers, to tolerate conflict and transitions, and to express his emotions and needs (Parent Ex. B. at p. 5). Thus, the evidence in the hearing record reveals that Cooke addressed the student's social/emotional needs both programmatically and in a manner tailored to the student's individual needs.

Based on the foregoing, the hearing record demonstrates that Cooke appropriately addressed the student's social/emotional, receptive language, pragmatic language, and academic needs during the 2012-13 school year and, contrary to the district's assertion, there is no indication in the hearing record that the noisiness of the school or the diversity of the student population requires a different conclusion. Thus, the hearing record indicates that Cooke offered the student educational instruction specially designed to meet his unique special education needs, and therefore, the parent's unilateral placement of the student at Cooke for the 2012-13 school year was reasonably calculated to enable the child to receive educational benefits (Frank G., 459 F.3d at 364; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D. D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [Dec. 26, 2012]; Gagliardo, 489 F.3d at 115).

D. Equitable Considerations

The district asserts that the IHO erroneously found that equitable considered weighed in the parent's favor because the parent never seriously intended to enroll the student in a district public

[10] The principal testified that the student also received physical therapy as a related service; however, this is not reflected on the student's March 2013 Cooke progress report (Tr. p. 107, Parent Ex. B at p. 1).

school and because the parent provided the district with insufficient notice of her intent to unilaterally place the student.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; 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]; see 34 CFR 300.148[d]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001].

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

In this instance, the parent informed the March 2012 CSE that she would prefer that the student attend Cooke because her other son attended Cooke and exhibited improvement as a result (Tr. p. 134). However, the parent also testified that she informed the March 2012 CSE that, if the district recommended a public school option in her neighborhood, she would visit the school because a school closer in proximity would make her hectic mornings easier (Tr. pp. 134-35). The hearing also reflects that the parent signed an enrollment contract with Cooke dated May 15, 2012 (Parent Ex. E). The parent testified that she signed the enrollment contract before receiving the FNR in order to save a seat for the student at Cooke (Tr. p. 144). After visiting the assigned public school site on May 30, 2012, the parent decided to enroll the student at Cooke for the 2012-13 school year (Tr. pp. 135-36, 142). The hearing record does not demonstrate that the parent never intended to enroll the student in public school. Under the circumstances presented the parent was free to explore

a potential private school placement, so long as she was working cooperatively with the district to develop an appropriate IEP for the student for the 2012-13 school year.

Addressing the district's argument about the parent's notice of unilateral placement, the hearing record reveals that, in her letter, the parent stated that she was enrolling the student at Cooke for 2012-13 school year and seeking reimbursement from the district, but raised issues pertaining solely to the assigned public school site and assigned class rather than to the student's March 2012 IEP (Parent Ex. J). It is true that, by her August 7, 2012 letter, the parent did not "put FAPE at issue" for the 2012-13 school year so that the district had the opportunity to reconvene the CSE and address any concerns raised by the parent to devise an appropriate plan and determine whether a FAPE could be provided in a public school (see Carmel Cent. Sch. Dist., 373 F. Supp. 2d at 414-15; Greenland, 358 F.3d at 160; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that each year a FAPE is at issue, the parents must comply with the notice requirements and inform the district of their dissatisfaction prior to enrolling the student in a private school and seeking reimbursement]; S.W., 646 F. Supp. 2d at 362-63; Application of a Student with a Disability, Appeal No. 11-103; Application of the Dep't of Educ., Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-099). Notwithstanding this, under the circumstances of this case, I decline to exercise my discretion to reduce the amount of tuition reimbursement awarded to the parent.

VII. Conclusion

In summary, the hearing record supports the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2012-13 school year, to the extent indicated in the body of this decision, that the unilateral placement at Cooke was appropriate, and that equitable considerations support payment of the tuition costs for the student's 2012-13 school year at Cooke (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 5, 2013, is modified by reversing the portion of the IHO's decision finding that the district failed to offer the student a FAPE for the 2012-13 school year because it did not establish at the impartial hearing that the assigned public school site was appropriate and could implement the student's March 2012 IEP; and

IT IS FURTHER ORDERED that the IHO's decision, dated September 5, 2013, is modified by reversing that portion of the IHO's decision that the annual goals in the March 2012 IEP appropriately addressed the student's special education needs.

Dated: **Albany, New York**
December 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER