The University of the State of New York

The State Education Department
State Review Officer
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No. 13-195

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, Cynthia Sheps, Esq., of counsel

Morgan, Lewis & Bockius LLP, attorneys for respondent, Regina Schaffer-Goldman, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Allison Guttu, 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) daughter and ordered it to pay the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year and to provide special education transportation services. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision, and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.515[b], [c]; 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

In this case, the CSE convened on June 5, 2012 for the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 1 at pp. 1, 19; Parent Ex. L at p. 1; see

also Tr. p. 357).[1] As a student eligible for special education as a student with an intellectual disability, the June 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school (see Dist. Ex. 1 at pp. 1, 13-14).[2] The June 2012 CSE identified the student's management needs and recommended related services consisting of two 45-minute sessions per week of speech-language therapy in a small group, one 45-minute session per week of individual hearing education services (HES) in the student's classroom, and one 45-minute session per week of individual HES in a separate therapy room (id. at pp. 1, 3, 13-14). The social development section of the June 2012 IEP noted the parent's concern about the student's need for "[a]t risk counseling and access to [a] counselor to address any concerns as needed" (id. at p. 2). The June 2012 IEP also included approximately 21 annual goals with approximately 110 corresponding short-term objectives; measureable postsecondary goals for living, working, and learning as an adult; a list of transition needs; and a coordinated set of transition activities (see id. at pp. 3-13, 15).

In a final notice of recommendation (FNR) dated June 27, 2012, the district summarized the special education and related services recommended in the June 2012 IEP for the 2012-13 school year, and identified the particular public school site to which the district assigned the student to attend during the 2012-13 school year (see Dist. Ex. 9).

On June 28, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year beginning September 2012 (see Parent Exs. GG at pp. 1-2; HH).

In a letter dated August 24, 2012, the parent, through her attorney, advised that the district had not yet offered the student "a proposed placement" for the 2012-13 school year (Parent Ex. TT).[3] As a result, the parent notified the district of her intentions to unilaterally place the student at Cooke for the 2012-13 school year beginning in September 2012, and to seek reimbursement for the costs of the student's tuition at Cooke (see id.). The parent also requested that the district provide round-trip transportation services for the student (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated April 1, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year

[1] At the time of the June 2012 CSE meeting, the student attended Cooke as a ninth grade student (see Dist. Ex. 1 at p. 1). The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has continuously attended Cooke since the beginning of the 2011-12 school year (see Tr. pp. 187, 246-48, 388-89). In addition, the district assessed the student's cognitive and academic skills in March 2012 as part of a mandated three-year reevaluation (see Dist. Exs. 1 at p. 1; 4 at pp. 1-7).

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

[3] The parent testified at the impartial hearing that she received the June 2012 FNR, and attempted to schedule a visit to the assigned public school site by calling the telephone number, but could only reach a "machine" (see Tr. pp. 422-25; Dist. Ex. 9). The parent and a Cooke representative visited the assigned public school site on October 12, 2012 (see Parent Ex. Z at pp. 1-3).

(Dist. Ex. 10 at p. 3). The parent contended that the district failed to properly evaluate the student, failed to provide a "procedurally valid and substantively appropriate" IEP, and failed to provide an appropriate "placement recommendation" for the student for the 2012-13 school year (id.). Without elaboration, the parent alleged that the June 2012 CSE was not properly composed (id. at p. 4). Additionally, the parent asserted that the student was not "tested in all areas of disability" so as "to establish the student's current levels of performance" (id. at p. 3). The parent also alleged that the information the June 2012 CSE used to develop the June 2012 IEP was "lacking," and the June 2012 CSE improperly relied on information and informal assessments provided by Cooke to develop the student's June 2012 IEP (id.). In addition, the parent contended that the June 2012 IEP did "not contain individualized information" with respect to the student, because the June 2012 IEP used the student's twin sister's name at times, and the June 2012 CSE appeared to have "cut and pasted" "substantial" portions of the twin sister's IEP into the student's IEP without regard to the student's individualized needs (id.). However, the parent asserted that even where the June 2012 IEP correctly identified the student, its content was substantially similar to the twin sister's IEP (id.). The parent also asserted that, in relevant part, the June 2012 IEP was "sloppy and incomplete," noting, again, that the June 2012 IEP erroneously used the twin sister's name in the annual goals to address adaptive living skills (id.). The parent further asserted that annual goals in the June 2012 IEP used "incomplete sentences," that the June 2012 IEP used the "wrong possessive" pronoun in describing the student's test scores (e.g., "'his' or 'his/her' rather than 'her'"), and that in at least one instance the June 2012 IEP referred to the student by using the pronoun "he" instead of properly using "she" (id.). As a result, the parent alleged that the "obvious errors le[d] to the inference that the IEP may have recycled boilerplate language," resulting in an IEP that fell "very short" of meeting the student's "individualized needs" (id. at pp. 3-4).

With respect to the assigned public school site, the parent asserted that her visit had raised "several key concerns about the school" and that she therefore believed that the assigned public school site could not "provide appropriate services" for the student and did not offer the services recommended in the student's June 2012 IEP (Dist. Ex. 1 at p. 4). In particular, the parent contended that the classrooms she observed during her visit "exceeded the mandated functional grouping ratio;" that "scaffolding and a 'fading teacher' model"—as mandated in the June 2012 IEP—and specific academic goals in the student's June 2012 IEP either did "not seem to be a part of the proposed setting or [were] entirely unavailable;" and that the assigned public school site did "not have or make readily available" the programs the student needed to transition "post-school," including a travel training program, an assisted daily living program, and a community inclusion program (id.).

With respect to the student's unilateral placement, the parent asserted that Cooke accommodated the student's needs through a "small school program with structured classrooms, individualized attention, and [effective] teaching methods" (Dist. Ex. 10 at p. 4). As a proposed resolution, the parent requested that the district be ordered to provide direct payment to Cooke for the costs of the student's tuition for the 2012-13 school year, as well as provide round-trip transportation services (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

On May 3, 2013, the IHO conducted a prehearing conference, and on June 7, 2013, the parties proceeded to an impartial hearing, which concluded on July 29, 2013, after four days of

proceedings (see Tr. pp. 1-12, 14, 170, 294, 347, 447). In a decision dated September 6, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement of the student at Cooke was appropriate, and that equitable considerations weighed in favor of the parent's request for relief (see IHO Decision at pp. 3-10).

The IHO found that the district failed to offer the student a FAPE based on a failure to develop "a procedurally and substantively sound IEP or to offer an appropriate placement" (IHO Decision at p. 7). To support this conclusion, the IHO indicated that the June 2012 IEP was "replete with errors" and that the parent's assertion that the June 2012 IEP was "sloppy and incomplete" was "an apt characterization" (id. at p. 8). In particular, the IHO found that the use of the student's twin sister's name "upwards of 72 times" in the June 2012 IEP discredited the district representative's testimony that the June 2012 CSE did use any type of "boilerplate" language to develop the student's IEP (id.). The IHO noted that, "at a minimum," the misuse of the twin sister's name in the student's IEP gave the "appearance" that it was not individualized for the student and "was simply cut and pasted together from her [twin] sister's IEP" (id.). The IHO further found that "[w]hile some of the errors alone might not rise to a level" that would result in a finding that the district failed to offer the student a FAPE, "cumulatively," the errors did so (id.).

Regarding the assigned public school site, the IHO found that it was "incumbent" on the district to "identify a school" capable of implementing the student's IEP (IHO Decision at pp. 8-9). The IHO concluded that the district failed to establish that it offered the student an "appropriate placement" because the district "offered no direct testimony" relative to the assigned public school site or otherwise demonstrated at the impartial hearing that the assigned public school site would appropriately implement the student's IEP (id.). Based upon the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year.

With respect to the parent's unilateral placement of the student, the IHO determined that Cooke's program was "reasonably calculated to confer an educational benefit to the student" (IHO Decision at p. 9). The IHO indicated that the student was "progressing socially, emotionally and academically" at Cooke and that Cooke "crafted an individualized program that me[t] the student's academic and social/emotional needs" (id.).

With respect to equitable considerations, the IHO found that the parent "cooperated fully with the IEP process;" that given its terms, the parent's signing of an enrollment contract on June 28, 2012 did not preclude a finding that equitable considerations weighed in favor of the parent's requested relief; and that the parent "fully complied" with the CSE (id. at pp. 9-10). On the basis of her findings, the IHO ordered the district to provide retroactive direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year and to provide special education transportation services (id. at p. 10).

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. The district argues that the IHO erred in concluding that errors in the June 2012 IEP—including references to the twin sister's name, the appearance of developing the student's June 2012 IEP based upon boilerplate language or cutting and pasting information from the twin sister's IEP, and grammatical or typographical mistakes—

resulted in a failure to offer the student a FAPE. Alternatively, the district asserts that even if these errors, cumulatively, constituted a procedural violation, such violation did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. The district also argues that, notwithstanding these errors, the June 2012 IEP was appropriately individualized for this student and appropriately addressed the student's functional levels, management needs, and provided for annual goals. Although the district acknowledges that the June 2012 IEP referenced the twin sister's name in certain annual goals, the district contends that this was a clerical error and that the annual goals accurately addressed the student's needs notwithstanding this error. The district also asserts that the alleged errors would not affect the implementation of the student's June 2012 IEP. The district further contends that while not raised in the parent's due process complaint notice, the June 2012 IEP included an appropriate coordinated set of transition activities for the student.

With respect to the IHO's finding that the district failed to sustain its burden at the impartial hearing to establish that the assigned public school site could implement the student's June 2012 IEP, the district asserts that such claims are speculative as a matter of law because the parent did not enroll the student in the assigned public school site.

The district further contends that the IHO erred in finding that equitable considerations weighed in favor of the parent's requested relief, asserting that the parent failed to satisfy the IDEA's notice requirements. Regarding the parent's request for direct payment of the costs of the student's tuition to Cooke, the district contends that the parent failed to present sufficient evidence to establish that she was financially unable to front the costs of the student's unilateral placement at Cooke.[4]

In an answer, the parent responds to the district's allegations with general admissions and denials. The parent also asserts that the IHO properly found that the district failed to offer the student a FAPE, that Cooke was an appropriate unilateral placement, that equitable considerations weighed in favor of the parent's relief, and that an award of direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year was warranted. In support of upholding the IHO's decision in its entirety, the parent argues that, for reasons more fully set forth in her accompanying memorandum of law, the June 2012 IEP was not sufficiently individualized because it referred to the student's twin sister and contained "boilerplate language," it was not complete and failed to include "information necessary for its proper implementation," and because it failed to recommend sufficient academic support for the student's needs. In addition, the parent asserts that, for reasons more fully set forth in her accompanying memorandum of law, the district failed to sustain its burden to establish at the impartial hearing that the assigned public school site could implement the student's IEP, specifically asserting that the assigned public school site could not provide the "academic supports, methodologies and transitional services" as required by the student's IEP in order for the student to make progress.

In a reply to the parent's answer, the district contends that there is no legal basis upon which it should be precluded from asserting that the parent did not comply with the IDEA's notice

[4] The district does not appeal the IHO's determination that the parent's unilateral placement of the student at Cooke for the 2012-13 school year was appropriate (see IHO Decision at p. 9).

requirement or that the parent did not prove that she lacked the financial ability to front the student's tuition costs to Cooke for the 2012-13 school year.

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 Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. Specifically, the parent argues that the June 2012 IEP was not sufficiently individualized to meet the student's needs, because, in part, it did not recommend sufficient academic supports for the student's needs (see Answer ¶ 72). However, as more specifically noted in the factual recitation section of the answer, the parent indicates that the student's June 2012 IEP failed to identify the district or agency responsible for the coordinated set of transition activities, and moreover, that the 12:1+1 special class placement recommended in the June 2012 IEP was not appropriate because the student required "more teacher and small group support" in the classroom and the 12:1+1 special class was not appropriate for mathematics instruction, where the student struggled most (Answer ¶¶ 54-55). Additionally, the parent argues that the assigned public school site could not provide the academic supports and methodologies the student required to progress academically (see Answer ¶ 73). As more specifically noted in the "Facts" section of the answer, the parent indicates that the assigned public school site was not appropriate for the following reasons: (1) the observed classrooms did not use "teaching methodologies and supports" mandated in the student's June 2012 IEP, such as multisensory techniques, checklists, manipulatives, graphic organizers, and small group instruction; (2) according to available websites, the assigned public school site only offered "two 12:1+1 programs" designed for students who were not similar to this student; and (3) the observed classrooms included students with severe emotional difficulties or behavioral issues, and would not be appropriate for the student (Answer ¶56-58).

Based upon a review of the hearing record and broadly construing the parent's answer, the following issues, arguably, remain within the permissible scope of review on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year: whether the June 2012 IEP was not sufficiently individualized to meet the student's needs, and whether the failure to identify the district or agency responsible for the coordinated set of transition activities in the June 2012 IEP resulted in a failure to offer the student a FAPE for the 2012-13 school year (compare Dist. Ex. 10 at pp. 1-5, with Tr. pp. 1-449, and Dist. Exs. 1-11 and Parent Exs. C-D; F; I; L; R-V; Y-Z; BB; EE-JJ; LL-TT; WW-ZZ). With respect to the remaining allegations, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing 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]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 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 [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).

Upon review, I find that the parent's April 2013 due process complaint notice cannot be reasonably read to include challenges to the appropriateness of the recommended 12:1+1 special class placement, the sufficiency of academic supports in the June 2012 IEP, or the additional issues related to the assigned public school site now asserted in the parent's answer as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-5). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice to include these issues (see Tr. pp. 1-449; Dist. Exs. 1-11; Parent Exs. C-D; F; I; L; R-V; Y-Z; BB; EE-JJ; LL-TT; WW-ZZ).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, I decline to review these issues. 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., 2012 WL 33984, at *4-*5 [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).5 "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, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).[6]

Accordingly, the allegations in the parent's answer raised for the first time on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with

[5] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (see M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M., 2013 WL 1972144, at *5-*6), the additional issues raised in this appeal were not initially elicited by the district in testimony. Therefore, the district did not "open the door" to these issues under the holding of M.H. (see J.C.S., 2013 WL 3975942, at *9; B.M. v New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]).

[6] As the Second Circuit has explained, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M., 2013 WL 1972144, at *6 n.2 [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]).

a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

B. June 2012 IEP

Turning now to the disputed issues regarding the IEP properly before me on appeal, the district asserts that the IHO erred in concluding that the errors in the June 2012 IEP—including references to the name of the student's twin sister, the appearance of developing the student's June 2012 IEP using boilerplate language or cutting and pasting information from the twin sister's IEP, and grammatical or typographical mistakes, cumulatively as a procedural violation—resulted in a finding that the district failed to offer the student a FAPE for the 2012-13 school year. A review of the evidence in the hearing record supports the conclusion that even if these errors, cumulatively, constitute a procedural violation, such violation—although clearly embarrassing—did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. Accordingly, the IHO's finding that the district failed to offer the student a FAPE for the 2012-13 school year on this basis must be reversed.

In this case, while pointing to the sheer number of errors within the June 2012 IEP rose to a cumulative procedural violation giving rise to a finding that the district failed to offer the student a FAPE, the IHO did not consider how the errors impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits in order to reach that conclusion (see IHO Decision at pp. 7-8). Rather, the IHO summarily discounted unrebutted testimonial evidence that the errors were clerical in nature—owing, in part, to the district representative's admitted lack of expertise in typing—and that the June 2012 CSE did not use boilerplate language to create the June 2012 IEP, as either "incredible" or otherwise inexcusable under the circumstances (id. at p. 8; see Tr. pp. 73-74). To the extent that the IHO concluded that the number of errors in the June 2012 IEP "at a minimum" gave the "appearance" of simply cutting and pasting information from the student's twin sister's IEP to develop the student's June 2012 IEP, an actual comparison of the student's June 2012 IEP with her twin sister's June 2012 IEP reveals that the two IEPs are far from being the same, and, in fact, are distinctly different in describing each respective student's present levels of academic, social/emotional, and physical development; management needs; annual goals and short-term objectives; and overall program recommendations, including related services (compare Dist. Ex. 1 at pp. 1-14, with Parent Ex. C at pp. 1-14; see generally Tr. pp. 101-03, 114-24; Dist. Exs. 4-8).[7]

[7] Understandably, the inaccuracies in the student's June 2012 IEP do nothing to instill a sense of confidence in the parent reviewing it. Therefore, to the extent not already done so, the district shall immediately correct the inaccuracies in the student's June 2012 IEP and provide the parent with a corrected copy. In addition, the district is reminded that nothing in this decision should suggest that the district is relieved of its responsibility to produce IEPs that accurately reflect the particular student for whom the IEP is created.

Under these circumstances, even assuming that these errors constituted a procedural violation, the hearing record does not support a finding that they impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefit upon which to conclude that the district did not offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii] M.H. v. New York City Dep't of Educ., 2011 WL 609880, at * 11 [S.D.N.Y. Feb. 16, 2011]; Application of the Bd. of Educ., 13-154; Application of the Bd. of Educ., Appeal No. 13-032). In this particular instance, to a reasonable person, the typographical errors would be both very obvious and very easily correctable, and thus did not rise to the level of a denial of a FAPE. To find otherwise, would be to "exalt form over substance" (M.H., 2011 WL 609880, at * 11).

1. Present Levels of Performance

The district also argues that notwithstanding these errors, the June 2012 IEP was appropriately individualized for this student, and appropriately addressed the student's functional levels and management needs. A review of the hearing record supports the district's assertion.

As noted above, among the 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]). An IEP's present levels of academic performance and functional levels provide the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25–*26 [S.D.N.Y. Sept. 29, 2009]). 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.

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]). Moreover, 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]).

In this case, the hearing record reflects that the June 2012 CSE considered and relied upon the results of a 2011 social language evaluation, a 2011 classroom observation, and a 2012 bilingual psychoeducational evaluation in the development of the student's June 2012 IEP, as well as a 2011-12 Cooke educational progress report, which provided insight into the student's instructional program at Cooke, including process and content goals and targeted student skills

(Tr. pp. 78-79, 101-102; Dist. Exs. 4-7). In addition, the June 2012 CSE had assessment information prepared by Cooke staff regarding the student's academic functioning in reading, vocabulary, reading comprehension, and mathematics, which the June 2012 CSE incorporated into the present levels of performance section of the student's June 2012 IEP (Tr. pp. 86, 101; Dist. Ex. 1 at pp. 1-2; Parent Ex. LL). Further, the hearing record establishes that Cooke staff prepared a draft of the student's annual transition goals, which was presented orally to the June 2012 CSE, and revised based upon the CSE's discussions (Tr. pp. 80, 98, 102, 129-130, 191-192; Dist. Exs. 1 at pp. 8-13, 15; 2; Parent Ex. L at p. 3). Finally, the district representative attending the June 2012 CSE testified that while the student had not had an updated audiological evaluation, the student had been receiving HES, and the June 2012 IEP was based upon, among other things, the HES reports regarding the appropriateness of the annual goals that were assessed (Tr. pp. 81-83). Based upon the review and consideration of this evaluative information, as well as the input from participants, the June 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school with the related services of speech-language therapy and HES (Tr. pp. 102-103, 189-190; Dist. Ex. 1 at p. 13). The June 2012 CSE also recommended an occupational therapy evaluation, and the provision of "at-risk counseling" for the student (Tr. pp. 87, 116; Dist. Ex. 1 at p. 13).

Upon review, the present levels of performance section of the student's June 2012 IEP reflect information obtained from the evaluative information available to the June 2012 CSE. For example, the present levels of performance noted the student's achievement as measured by assessment tools administered by Cooke staff, providing gross estimates of the student's independent and instructional levels for reading, vocabulary, reading comprehension, and math concepts, operations and computation and process and applications (Dist. Ex. 1 at pp. 1-2; Parent Ex. LL at pp. 2-5). Specifically, the student earned grade equivalent scores that estimated her independent reading level at first grade, her instructional reading level at second grade, and her word list [reading] at third grade (Dist. Ex. 1 at p. 1; Parent Ex. LL at p. 2). The Cooke-administered reading evaluation also yielded an overall grade equivalent score at 1.9 (i.e., the ninth month of first grade), a reading vocabulary grade equivalent of 2.4, and a grade equivalent score of 1.6 for the student's reading comprehension (Dist. Ex. 1 at p. 1; Parent Ex. LL at p. 3). In addition, the student's performance on the Cooke-administered math assessment, on which she earned a grade equivalent score of 2.1, was also noted in the student's June 2012 IEP (Dist. Ex. 1 at p. 1; Parent Ex. LL at p. 4).

The Cooke educational progress report provided additional information regarding the student's classroom functioning in various subject areas and across the school year, and the June 2012 CSE incorporated aspects of this information in the present levels of performance section of the June 2012 IEP (Dist. Exs. 1 at pp. 1-3; 6 at pp. 2-3, 7-8, 12). Examples of this carryover included the student's expanding use of reading strategies—such as making connections, inferences and predictions—as well as her increased facility with financial transactions while shopping (Dist. Exs. 1 at p. 2; 6 at pp. 3, 7).

The present levels of performance section also provided a brief summary of the 2012 bilingual psychoeducational evaluation report, noting that the student's performance in all areas of cognitive functioning fell within the "very low" range for a student her age (Dist. Exs. 1 at p. 1; 4 at pp. 2-6). The Cooke educational progress report also provided descriptions of the student's work habits, her positive peer relationships, and signs of her growth as a reader and writer, and much of

this information was included in the present levels of performance section of the June 2012 IEP (Dist. Exs. 1 at p. 2; 6 at pp. 3, 7-8).

The student's functioning on a standardized measure of social language, which was administered by a Cooke speech-language pathologist, was also incorporated into the student's June 2012 IEP, outlining her relative strengths (e.g., her ability to ask questions of her peers, actively participate, and engage in eye contact), as well as her continuing challenges (e.g., difficulties making inferences, problem solving, and social interactions) (Dist. Exs. 1 at p. 2; 7). In addition, the present levels of performance referenced the student's well-mannered behaviors and her positive peer relationships, as reported in the 2011 classroom observation (Dist. Exs. 1 at p. 2; 5).

Finally, the June 2012 IEP described the environmental, human, and material resources (management needs) required to address the student's needs identified in the present levels of performance, including the following: preferential seating away from extraneous noise and with a close and clear view of the teacher and instructional sound source; a small class; use of a calculator; use of manipulatives; opportunities for generalizing of skills; explicit connections between computation and everyday living; direct modeling; scaffolding; social scripts; and visual cues (Dist. Ex. 1 at p. 3).

Accordingly, the hearing record establishes that despite the errors noted, the June 2012 IEP accurately documented and described the student's present levels of academic achievement, functional performance and learning characteristics, as well as the student's needs relating to her social development and physical development, upon which appropriate annual goals and special education programs and related services could be recommended.

2. Annual Goals and Short-term Objectives

Although the district acknowledges that the June 2012 IEP referenced the twin sister's name in certain annual goals, the district contends that this was a clerical error and that the annual goals accurately addressed the student's needs. The district also argues that notwithstanding the errors in the June 2012 IEP, the annual goals were appropriately individualized for this student.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The June 2012 IEP contains approximately 19 annual goals and almost 100 corresponding short-term objectives developed to address this particular student's strengths and needs across a wide range of domains, including auditory memory, reading, writing, mathematics, and oral

language pragmatics (such as conversational turn-taking) (Dist. Ex. 1 at pp. 4-13).[8] The annual goals targeted the student's need to develop skills necessary for successful transition to postsecondary life, including self-advocacy, work readiness, travel training, food, money, and household management, as well as the identification and development of appropriate leisure activities (id. at pp. 8-11). With the exception of one annual goal and its corresponding short-term objectives, all of the annual goals in the student's June 2012 IEP included criteria by which to measure achievement and a variety of ways in which to measure progress (id. at pp. 4-13). The June 2012 IEP also indicated that progress toward each annual goal would be measured one time per quarter (id.).

The parent asserts that due to a variety of errors, the June 2012 IEP was not sufficiently individualized to meet the student's needs. Among the parent's concerns regarding the June 2012 IEP, the hearing record shows the student's name was mistakenly replaced by that of her twin sister in numerous places (Dist. Ex. 1 at pp. 5-6, 8-12, 18). In addition, the June 2012 IEP included several annual goals and short-term objectives that were either missing information, had grammatical or typographical errors, were written as incomplete sentences, or incorrectly used pronouns (Tr. pp. 97-98, 108-109, 161, 312; Dist. Ex. 1 at pp. 5-6, 8-9, 13, 15). As noted briefly above, when questioned at the impartial hearing about these errors, the district representative admitted responsibility for the "clerical errors," including "interchangeably revers[ing] the names on [the] IEP," but stressed that with the exception of the twin sister's annual goal in the transition skills domain, all of the remaining annual goals and corresponding short-term objectives were specifically intended to address this particular student's special education needs and not those of her twin sister (Tr. pp. 109, 125-128, 316; Dist. Ex. 1 at pp. 12-13).

Despite the errors catalogued by the parent, a careful review of the June 2012 IEP provides evidence that with the one exception noted above, the annual goals and short-term objectives were founded upon information contained in evaluative information reporting this particular student's functioning across multiple domains, as well as input from those attending the June 2012 CSE meeting (Tr. pp. 79-87; Dist. Exs. 1-2; 4-8; Parent Ex. L). Therefore, although an annual goal or short-term objective might be framed using the twin sister's name or with an inappropriate pronoun reference, the annual goals and short-term objectives otherwise accurately reflect the student's strengths and needs, as described by those familiar with her then-current functioning. For example, while the annual goal targeting the student's written language development substituted the student's name with that of her twin sister, the supporting short-term objectives mirror language in the present levels of performance section of the student's June 2012 IEP, as well as being reflected in the meeting minutes prepared by both Cooke staff and district staff (Dist. Exs. 1 at pp. 2, 5; 8 at p. 2). In another example, a set of three annual goals and the related short-term objectives failed to include any student name, but the language and format of these annual goals were taken directly from the student's Cooke educational progress report (Dist. Exs. 1 at p. 7; 6 at p. 22). Therefore,

[8] Notably, one of the annual goals and its six short-term objectives appear in the document twice; this annual goal has been counted only once (Dist. Ex. 1 at pp. 4-5, 12). In addition, one other annual goal and its corresponding short-term objectives was erroneously included in this student's June 2012 IEP; as acknowledged by the district, this annual goal and its corresponding short-term objectives had been intended for the student's twin sister's IEP (Tr. pp. 313-16, 336-37; Dist. Ex. 1 at p. 12-13). In addition, this particular annual goal and its corresponding short-term objectives mistakenly included in this student's June 2012 IEP lacked criteria by which to measure its achievement (Dist. Ex. 1 at pp. 12-13).

a reasonable instructor would be able to utilize these goals notwithstanding the errors and they would thereby offer the student the opportunity for progress, not regression. As a consequence, while these errors are no doubt irritating to the parent and embarrassing to the district, they do not rise to the level of a denial of a FAPE to the student.

Thus, overall, the annual goals and short-term objectives contained in the student's June 2012 IEP, when read together targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring her progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

3. Transition Services

Turning to the parent's assertion that the district's failure to identify the district or agency responsible for the coordinated set of transition activities in the June 2012 IEP, the IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

Initially, the parent does not dispute the appropriateness of either the transition services or the coordinated set of transition activities, except, as the parent correctly indicates, for the June 2012 CSE's failure to identify the district or agency responsible for implementing those specified activities (see Dist. Ex. 1 at p. 15). However, while regulation requires this element as part of a transition plan, the services and activities listed in the coordinated set of transition activities are also addressed in the annual goals and short-term objectives section of the student's IEP; therefore, it appears that classroom staff would be able to implement the activities within a classroom setting (compare Dist. Ex. 1 at p. 15, with Dist. Ex. 1 at pp. 4-13). Although the hearing record demonstrates that Cooke initially drafted the majority of the student's transition goals and

objectives that the June 2012 CSE revised and incorporated into the June 2012 IEP, these too, include errors, including an incomplete sentence, use of the student's twin sister's name, and references to "he" instead of "she" (compare Dist. Ex. 1 at pp. 3-4, 8-13, with Dist. Ex. 2 at pp.1-4). Nonetheless, with the exception of the twin sister's goal mistakenly included in the student's June 2012 IEP, the remaining transition goals and objectives are sufficiently consistent with the evaluative information available to the June 2012 CSE, as well as the goals and short-term objectives that were a part of the transition document prepared for the student at the June 2012 CSE meeting (Tr. pp. 97, 153-154, 312, 332-333; Dist. Exs. 1 at pp. 5, 8-12; 2 at pp. 2-4).

As with the transition goals, the June 2012 CSE created the coordinated set of transition activities based upon information and input directly provided by Cooke (compare Dist. Ex. 1 at p. 15, with Dist. Ex. 2 at pp. 5-6). The transition activities set forth in the June 2012 IEP identified the focus of supports needed to facilitate the student's transition to postsecondary life, and included suggested areas of instruction, recommended related services, community experiences, employment, and other aspects of daily living (see Dist. Ex. 1 at p. 15). In certain instances, the June 2012 IEP transition plan employs terminology that varied from that of the Cooke-drafted plan, but the focus and intent remained similar (compare Dist. Ex. 1 at p. 15, with Dist. Ex. 2 at pp. 5-6). For example, while the Cooke plan recommends "instruction in life skills and adaptive life skills," the June 2012 IEP described the same content as "instruction in activities of daily living" (Dist. Exs. 1 at p. 15; 2 at p. 5).

Based on the foregoing, although the coordinated set of transition activities developed by the June 2012 CSE contains deficiencies, such deficiencies, alone, constitute technical defects that do not otherwise render the transition plan, the coordinated set of transition activities, or the June 2012 IEP, as a whole, inappropriate such that the district failed to offer the student a FAPE for the 2012-13 school year (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). I remind the district to ensure that the IEP specifies individual or entity likely to be responsible for implementing the transition services and that such individuals or agencies are invited to attend the relevant CSE meetings (see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications /iepguidance/IEPguideDec2010.pdf; "Transition Planning and Services for Students with Disabilities," Office of Special Educ. Mem. [Nov. 2011] available at http://www.p12.nysed.gov/specialed/publications/transitionplanning-nov11.pdf).

C. Challenges to the Assigned Public School Site

Finally, 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 June 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.

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the

recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. 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 Dep't of Educ. 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]).[9]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see 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., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]).

In view of the forgoing, the parent cannot prevail on her claims that the district would have failed to implement the June 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's June 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 F3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended, and instead chose to enroll the student in a nonpublic school of her choosing (see Tr. pp. 242, 246-248, 361-62, 388-89; Parent Exs. HH-JJ; TT). 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 June 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., F. Supp. 2d at 273). Accordingly, the IHO's determination that the district was required to establish at the impartial hearing that the assigned public school site could implement the student's June 2012 IEP was unsupported as a matter of law and must be reversed.

VII. Conclusion

In summary, having determined that the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's

[9] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

unilateral placement at Cooke was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12). I have considered the parties remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 6, 2013 is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year, and which ordered the district to provide direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, within 10 days of the date of this decision, the district shall correct the inaccuracies in the student's June 2012 IEP and provide the parent with a copy of the corrected IEP.

Dated: **Albany, New York**
December 5, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER