The University of the State of New York

The State Education Department
State Review Officer
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No. 13-233

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Morgan, Lewis & Bockius, LLP, attorneys for petitioner, Jonathan Frodella, Esq., of counsel

Advocates for Children of New York, attorneys for petitioner, Allison Guttu, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Francesca J. Perkins, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's decision to the extent that she determined an issue not included in the parent's due process complaint notice and from the IHO's alternative determinations that equitable considerations favored the parent's requested for direct funding. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [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

In June 2012, the student had been attending Cooke since for one school year, the 2011-12 school year (Tr. p. 212). [1] On June 5, 2012, the CSE convened to develop the student's IEP for

[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 2012-13 school year (Dist. Ex. 3 at pp. 1, 19). Finding that the student remained eligible for special education and related services 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 (id. at pp. 1, 15-16, 18-19).[2] The June 2012 CSE also identified the student's management needs and recommended the provision of related services consisting of two weekly 45-minute sessions of speech-language therapy in a small group, one weekly 45-minute session of occupational therapy (OT) in a small group, one weekly 45-minute session of counseling in a small group, one weekly 45-minute session of individual hearing education services (HES) to be delivered within the special education classroom, and one weekly 45-minute session of individual HES to be provided in a therapy room (id. at. pp. 2, 15-16). The June 2012 CSE further recommended that the student participate in adapted physical education (id. at p. 18). Additionally, the June 2012 CSE developed annual goals and short-term objectives relative to the following domains: HES, mathematics, social/emotional needs, activities of daily living (ADL), speech-language needs, executive functions, visual-motor skills, OT, and reading (id. at pp. 4-15). The June 2012 IEP also included post-secondary transition activities and goals (id. at pp. 3, 17). Moreover, the June 2012 IEP indicated that the student would participate in New York State alternate assessments due to her global delays (id. at p. 18).

On June 28, 2012, the parent executed an enrollment contract with the Cooke to cover the student's attendance during the 2012-13 school year (Parent Ex. S at pp. 1-2).

In a final notice of recommendation (FNR) dated June 29, 2012, the district summarized the 12:1+1 special class and related services recommended in the June 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 11).

By letter to the district dated August 24, 2012, the parent advised that the district had not yet offered the student "a proposed placement" for the 2012-13 school year (Dist. Ex. 12). Consequently, the parent notified the district of her intention to unilaterally place the student at Cooke for the 2012-13 school year, beginning on September 10, 2012, and "seek tuition payment for such placement from the [district]" (id.). In addition, the parent requested that the district provide the student with round-trip transportation to and from Cooke (id.).

According to the hearing record, on October 12, 2012, accompanied by a representative from Cooke, the parent visited the assigned public school site (Tr. pp. 216-17).

A. Due Process Complaint Notice

By amended due process complaint notice dated June 5, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 13 at p. 2). Specifically, the parent argued that the June 2012 CSE was not properly constituted because it lacked a member who could interpret the instructional implications of evaluation results (id. at p. 3). Moreover, the parent asserted that the district school psychologist (school psychologist) was not qualified to serve as district representative (id.). Additionally, the

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (Tr. pp. 114, 201; see 8 NYCRR 200.1[zz][7]; see also 34 CFR 300.8[c][6]).

parent alleged that the June 2012 IEP did not indicate whether a qualified Spanish-speaking interpreter attended the CSE meeting (id.). Next, the parent alleged that the district did not obtain sufficient evaluative data in order to develop the June 2012 IEP (id. at p. 2). In particular, the parent asserted that, although the June 2012 IEP referenced the student's hearing loss, the district failed to administer an audiological evaluation to the student in order to assess the educational effects resulting from the student's condition (id.). The parent further claimed that, in formulating the June 2012 IEP, the district relied heavily on the evaluative data provided by Cooke, which she described as insufficient "to be the foundation of an IEP" (id.). Additionally, the parent characterized the June 2012 IEP as "sloppy and incomplete" and further noted that it contained a number of typographical errors, which the parent maintained gave rise to a conclusion that the June 2012 IEP was not individualized or reflective of the student's educational needs (id.). The parent also argued that the June 2012 IEP lacked individualized information regarding the student's needs because portions of the student's IEP were copied into her twin sister's IEP, which was created on the same date (id. at p. 3). Specifically, the parent claimed that a "cursory comparison" of the student's IEP with her sister's IEP suggested that the June 2012 CSE consolidated the two sisters' needs into a single document or "completely ignored the other sister's individual and distinct needs" (id.). The parent next asserted that, although the June 2012 IEP contained postsecondary activities for the student, it did not identify the agency which would be responsible for overseeing and providing those services (id.). The parent also noted that the June 2012 FNR was written in English, although her primary language was Spanish (id.). She proceeded to maintain that the district's failure to provide her with the "required notices" in her native language inhibited her ability to participate fully "in the placement process" and access information about the assigned public school site (id. at p. 4).

The parent also raised claims challenging the district's assigned public school site, including that it did not offer a 12:1+1 special class placement for students within the student's "age range and needs" (Dist. Ex. 13 at p. 3). She further claimed that students within the proposed classrooms were not functionally grouped and, therefore, the student would not receive appropriate instruction commensurate with her academic levels in mathematics or reading (id.). The parent next alleged that personnel employed at the assigned public school site would not implement the strategies identified to address the student's management needs or her annual goals enumerated in the June 2012 IEP (id.). Moreover, the parent contended that the assigned public school site lacked adequate staffing levels needed to provide the student with the individualized services mandated by the June 2012 IEP (id.). Next, the parent alleged that the assigned public school site did not offer or have readily available postsecondary activities mandated by the June 2012 IEP, such as a travel training or ADL programs (id. at pp. 3-4).

The parent asserted that Cooke was able to accommodate the student's needs "through a small school program with structured classrooms, individualized attention, and teaching methods that have proven effective for students like [the student]" (Dist. Ex. 13 at p. 4). As a remedy, the parent requested that the IHO order to the district to make direct payment of the student's tuition costs to Cooke and to provide the student with roundtrip transportation to and from Cooke (Dist. Ex. 13 at p. 4).

B. Impartial Hearing Officer Decision

On May 23, 2013, the parties proceeded to an impartial hearing, which concluded on October 8, 2013, following six days of proceedings (Tr. pp. 1-422). By decision dated November 18, 2013, the IHO dismissed the parent's claim for relief, having determined that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 12-16, 18). First, the IHO concluded that the district afforded the parent a meaningful opportunity to participate in the development of the June 2012 IEP (id. at p. 14). Specifically, the IHO found that, while not a certified interpreter, the certified bilingual special education teacher served as an interpreter throughout the June 2012 CSE meeting (id.). Additionally, the IHO found that there was no evidence that the language barrier hindered the parent's participation (id.). Next, the IHO concluded that the June 2012 CSE had sufficient information in order to create the June 2012 IEP, despite the lack of an audiological evaluation of the student (id. at p. 12).

Regarding the parent's characterization of the June 2012 IEP as "sloppy and incomplete," the IHO concluded that, regardless of the June 2012 IEP's typographical errors, they did not render the June 2012 IEP inappropriate (IHO Decision at p. 13). Further, despite the parent's claim that the student's June 2012 IEP was similar in nature to her sister's IEP, and therefore, not individualized, the IHO found no basis in the hearing record to substantiate the parent's allegation (id.). Rather, the IHO noted that the student's sister's IEP was not relevant to the instant case and determined that the June 2012 CSE had various documents that described the student's needs, which resulted in a discussion of the student's needs and recommendations to suit those needs (id.). Additionally, the IHO concluded that, regardless that some of the annual goals listed in the June 2012 IEP did not set forth criteria for measurement of achievement, in the form of percentages, the annual goals were nonetheless appropriate (id. at p. 12). Next, regarding the appropriateness of the 12:1+1 special class, the IHO did not find any evidence to suggest that the student would not have received educational benefits from this proposed program (id. at p. 14). Specifically, the IHO noted that, except for mathematics, the student attended a 12:1+1 classroom at Cooke (id.). The IHO also determined that the district's failure to identify an agency responsible for implementing the student's transition activities did not rise to the level of a denial of a FAPE to the student (id. at p. 13).

Additionally, with respect to the appropriateness of the assigned public school site, despite the parent's claims that the language barrier frustrated her efforts to arrange for a visit, the IHO found that the assigned public school site employed Spanish-speaking personnel and the school's telephone message contained prompts for Spanish speakers (IHO Decision at pp. 14-15). In any event, the IHO noted that, since the parent did eventually visit the assigned public school site along with a representative from Cooke, she was not "ultimately preclude[d] . . . from participating in the placement process" (id. at p. 15). Next, the IHO found no evidence to support the parent's claims that the student population at the assigned public school site consisted of students with emotionally disturbances, thereby rendering the school inappropriate for the student (id.). The IHO also determined that the assigned public school site would have been able to provide travel training for the student both within the school and the community (id.). She further found that the student would have received individual attention in the proposed classroom, if the student did not comprehend the group lesson (id.). Accordingly, the IHO concluded that the evidence supported a finding that the assigned public school site would have been able to implement the June 2012 IEP (id.).

Although the IHO determined that the district offered the student a FAPE for the 2012-13 school year, for purposes of completion, she proceeded to render findings with respect to whether Cooke was an appropriate unilateral placement for the student and whether equitable considerations weighed in favor of the parent's requested relief (IHO Decision at pp. 16-18). With regard to whether Cooke constituted an appropriate unilateral placement for the student, the IHO found that Cooke offered the student a program designed to meet her unique needs (id. at p. 17). Next, the IHO determined that the parent participated in the CSE process, did not engage in any conduct that would have obstructed the CSE process, and provided the district with the requisite notice that she planned to enroll the student in Cooke (id. at p. 18). Accordingly, the IHO concluded that equitable considerations would have weighed in favor of the parent's requested relief (id.). Lastly, the IHO also concluded that the hearing record established that the parent's financial circumstances would have supported an award of direct payment of the student's tuition (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE. First, the parent argues that the IHO erred in finding that the absence of a certified Spanish interpreter from the June 2012 CSE did not impede the parent's ability to meaningfully participate in the development of the June 2012 IEP. Next, the parent claims that the IHO erred in finding that the district's failure to obtain an audiological evaluation of the student did not render the June 2012 IEP inappropriate. Next, the parent contends that the IHO erred in determining that the June 2012 IEP included necessary content despite the several typographical errors. The parent also maintains that the June 2012 IEP was not individualized for the student and, in support thereof, cites the June 2012 CSE's use of the wrong gender pronoun and evidence that portions of the student's IEP were copied into her sister's IEP. With respect to the annual goals, the parent argues that "[t]he IHO inappropriately credited the [district's] impermissible attempts to rehabilitate the missing percentages in the IEP". Next, the parent alleges that the IHO erred in concluding that the 12:1+1 special class placement was appropriate to address the student's special education needs. Lastly, with respect to the transition services set forth in the June 2012 IEP, the parent contends that the post-secondary goals were not based on the student's strengths, preferences, or interests and that the June 2012 CSE's failure to identify an agency responsible for implementing the transition activities contributed to a denial of a FAPE to the student.

With respect to the challenges to the assigned public school site, the parent notes that the IHO failed to make any findings or made insufficient findings with respect to a number of her claims. She alleges that student would have been inappropriately grouped within the proposed classrooms with students who experienced emotional and behavioral difficulties. The parent also argues that, contrary to the IHO's conclusion, the assigned public school site could not have implemented the travel training program or the supports identified on the June 2012 IEP to address the student's management needs.

In an answer and cross-appeal, the district asserts that the IHO correctly determined that it offered the student a FAPE for the 2012-13 school year. However, the district seeks to overturn the IHO's determinations that, but for her conclusion that the district offered the student a FAPE, equitable considerations would have weighed in favor of the parent's request for relief and that the parent would have been entitled to an award of direct payment of the student's tuition at Cooke.

The district asserts that the IHO correctly found that the absence of "a dedicated and certified Spanish interpreter" at the June 2012 CSE did not result in a denial of a FAPE to the student. Furthermore, the district maintains that the IHO properly concluded that the June 2012 IEP was based on sufficient evaluative material and that the lack of an audiological evaluation of the student did not render the June 2012 IEP inappropriate. Next, although the district acknowledges that the June 2012 IEP contained some typographical errors, the district alleges that the IHO properly found that the June 2012 IEP was otherwise appropriate because such errors did not affect the interpretation of the IEP. With respect to the annual goals enumerated in the June 2012 IEP, the district maintains that they were specific, measurable, and accurate, notwithstanding the omission of corresponding accuracy percentages for two goals. Similarly, the district argues that the IHO properly concluded that the June 2012 IEP's transition plan was appropriate because it was complete and developed in compliance with State regulation. Although the IEP did not specify, the district maintains that it was the party responsible for carrying out the student's transition activities. Additionally, the district disputes the parent's allegation that the June 2012 IEP was not sufficiently individualized; rather, the district submits that the information contained in the IEP was based on evaluative data from Cooke in conjunction with parent and teacher input.

The district asserts that the IHO improperly rendered findings with respect to appropriateness of the 12:1+1 special class placement because the parent did not challenge inclusion of a 12:1+1 special class on the IEP in her due process complaint notice. In any event, the district alleges that the IHO correctly concluded that placement of the student in a 12:1+1 special class was appropriate to address her special education needs.

Next, although the district maintains that the parent's challenges to the assigned public school site are speculative in nature, the district argues that the IHO correctly determined that the assigned public school site would have appropriately implemented the June 2012 IEP. In relevant part, the district contends that supports for the student's management needs would have been implemented in accordance with the June 2012 IEP. Furthermore, the district argues that the assigned public school site would have fulfilled the student's related services mandates and would have also implemented her transition plan consistent with the June 2012 IEP.

With respect to equitable considerations, the district contends that the parent failed to provide an adequate 10-day notice letter because the parent did not sufficiently detail her concerns surrounding the June 2012 IEP. Furthermore, the district maintains that parent's request for direct payment of the student's tuition was not supported by the hearing record, in that the evidence did not establish the parent's legal obligation to pay the student's tuition at Cooke or her inability to afford such amount.

In an answer to the cross-appeal, the parent responds to the district's cross-appeal by denying the allegations raised.[3] The parent also maintains that the IHO had jurisdiction to entertain

[3] In addition, in her answer to the cross-appeal, the parent also generally denies claims raised in the district's answer and cross-appeal and reiterates allegations set forth in the petition. To the extent that the parent purports to respond to matters outside of the district's cross-appeal that are not defenses to the parent's claims on appeal, I remind counsel for the parent that such responses are not permitted as part of a reply under State regulations and will not be considered (8 NYCRR 279.6).

claims relating to the appropriateness of the 12:1+1 special class placement for the student and that they have been properly preserved for review on appeal.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought

desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. June 2012 CSE Process

1. Parental Participation

Turning first to the parent's allegation that the absence of a certified Spanish-speaking interpreter from the June 2012 CSE circumscribed her ability to meaningfully participate in the development of the June 2012 IEP, the evidence in the hearing record belies the parent's claim.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

The district "must take whatever action is necessary to ensure that the parent understanding the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[j][3][vi]; see also Application of the Dept. of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119). Here, the parent testified that she has a limited understanding of the English language (see Tr. p. 381).

Participants at the June 2012 CSE meeting included a district school psychologist (who also served as the district representative), a district special education teacher, a certified bilingual special education teacher, the parent, an additional parent member, a representative from Cooke, and the student's then-current mathematics teacher from Cooke (via telephone) (Dist. Exs. 3 at p. 21; 4 at p. 1; see Tr. pp. 99-101, 104-106, 212). Although the parent had limited understanding of the English language, the hearing record reflects that the district made efforts to facilitate the parent's understanding of the CSE meeting due to the language barrier. For instance, the school psychologist described the June 2012 CSE meeting as "a long review that required the translation to the parent" (Tr. p. 100). It is also undisputed that the bilingual special education teacher, who took part in the June 2012 CSE meeting, served as a Spanish-speaking interpreter at the CSE

meeting for the parent (Tr. pp. 99-101, 105-06, 212-13, 382; see Tr. p. 157; Dist. Ex. 4 at p. 1).[4] The hearing record further indicates that the additional parent member provided translation relative to "the parent representative standpoint" (Tr. p. 105). Although the certified bilingual special education teacher was not a certified interpreter, the hearing record reflects that Spanish was her first language and that she held an advanced certification in bilingual education (Tr. p. 135). The parties have pointed to no authority suggesting that an interpreter provided for the parent's benefit at a CSE meeting must possess any special certification.

Furthermore, despite the parent's concern over the language barrier, the hearing record reflects the parent's meaningful participation in the IEP development process. According to the school psychologist, the parent was asked if she understood the present levels of performance shared by the Cooke representatives and whether or not she agreed with the proposed annual goals (Tr. p. 107). The school psychologist further testified that the parent asked questions during the meeting and the interpreter translated the information (Tr. p. 157). In addition, according to the school psychologist, as the student's mathematics teacher reported on the student's functioning, the information he provided was typed into the June 2012 IEP, along with the management needs and the annual goals (Tr. p. 107; see Dist. Ex. 4 at p. 1). Furthermore, although the student's mathematics teacher from Cooke did not stay for the entire duration of the June 2012 CSE meeting, the Cooke representative remained (Tr. pp. 150-51). Moreover, the hearing record demonstrates that the Cooke representative voiced her concerns about the June 2012 CSE's recommendation for a 12:1+1 special class placement, as well as the recommendations for counseling and OT (Tr. pp. 124-25, 214-15, 238; Dist. Ex. 4 at pp. 3-4).

Under the circumstances, although the district did not secure the participation of a "certified" Spanish-speaking interpreter for the June 2012 CSE meeting, there is no evidence to suggest that the certified bilingual special education teacher was ineffective in providing interpretation for the parent or failed to interpret at the CSE meeting. In addition, the Cooke representatives participated and voiced concerns. Accordingly, the IHO properly concluded that there was no indication in the hearing record that the lack of a certified Spanish-speaking interpreter 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]).

2. Sufficiency of Evaluative Information

With respect to the parent's claim that the June 2012 CSE failed to obtain sufficient evaluative information to develop the student's IEP, namely an audiological evaluation of the student, a review of the hearing record fails to substantiate this allegation.

An 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

[4] The school psychologist indicated that the certified bilingual special education teacher forgot to sign in at the June 2012 CSE meeting (Tr. p. 101; see Dist. Exs. 3 at p. 1; 4 at p. 1).

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]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). 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 agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). 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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

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]). 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]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

According to the school psychologist, the June 2012 CSE considered a December 2011 classroom observation, a March 2012 Cooke progress report, and a May 2012 bilingual psychoeducational evaluation, as well as the student's file and input from the parent and the Cooke representatives (Tr. pp. 98-99, 106, 109-11, 114-15; see Dist. Exs. 8-10). According to the hearing record, the student exhibited significant delays relating to academic functioning, cognitive functioning, executive functioning, attention, social/emotional needs, speech-language needs, ADLs, and fine motor skills, in addition to hearing loss (see Dist. Exs. 8 at pp 2-8; 9 at pp. 3-4, 6, 8).

More specifically, the June 2012 CSE considered a December 12, 2011 classroom observation of the student conducted by the school psychologist during an English language arts

(ELA) lesson at Cooke (see Dist. Ex. 10). The observation report revealed that the ELA class consisted of one teacher, one teacher assistant, 12 students, and two 1:1 paraprofessionals, assigned to specific other students (id.). The report further revealed that, in response to the teacher's request, the student shared about her weekend with the class (id.). The school psychologist further noted that, as the teacher led a whole group lesson, the student followed along and copied answers into her graphic organizer worksheet (id.). Additionally, the report reflected that, as the student read independently, she accepted teacher assistance (id.). The report also indicated that the student participated in the lesson by answering a reading comprehension question; however, she then declined to share with her group regarding the reading assignment (id.). In summary, the school psychologist described the student as "attentive and participatory" and reported that the student followed directions, demonstrated adequate listening skills, and did not exhibit emotional or behavioral difficulties (id.).

The June 2012 CSE also considered a bilingual psychoeducational evaluation report (see generally Dist. Ex. 8). On May 4, 2012, a private evaluator conducted a bilingual psychoeducational evaluation of the student, funded by the district, to assess her needs in the areas of cognition, academics, ADLs, vocational skills, and social/emotional functioning (see id. at pp. 1-4). Behaviorally, the evaluator noted that the student's English receptive and expressive language skills were more advanced than her Spanish language skills (id. at p. 2).

Administration of the Differential Ability Scales-Second Edition (DAS-II) to the student yielded standard scores (percentile rank) of 31 (<0.1) in verbal reasoning, 55 (0.1) in nonverbal reasoning, 62 (1) in spatial reasoning, and 47 (<0.1) in general conceptual ability (Dist. Ex. 8 at p. 6). According to the evaluator, the student performed in the overall very low range compared to same age peers in the areas of verbal and nonverbal reasoning (id. at p. 2). Behaviorally, the evaluator described the student as pleasant and cooperative, and, although the student appeared motivated to appropriately respond for her age, the evaluator reported that the student also demonstrated significant difficulties with attention (id. at pp. 3, 5).

With respect to academic achievement, administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student yielded standard scores (percentile rank) of 48 (<0.1) in letter-word identification, 51 (<0.1) in calculation, 61 (0.5) in spelling, 37 (<0.1) in passage comprehension, 38 (<0.1) in quantitative concepts, and 41 (<0.1) in writing fluency (Dist. Ex. 8 at p. 7). The evaluator indicated that the student demonstrated "major deficits in all academic areas" (id. at p. 3). Overall, the student demonstrated relative weaknesses in math concepts, reading comprehension, decoding, and writing short sentences with time limits; however, she exhibited relative strengths in the areas of spelling and calculation (id.). In addition, per administration of the Beery-Buktenica Developmental Test of Visual Motor Integration, Fifth Edition (VMI), the student attained scores in the deficient range for graphomotor skills; however, in light of a mild amount of intra-subtest scatter, the evaluator surmised that the student exhibited a "somewhat higher capability" (id. at p. 3).

According to the results of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), with the parent serving as informant, the student achieved standard scores of 74 in communication, 71 in daily living skills, 74 in socialization, and an adaptive behavior composite of 71 (Dist. Ex. 8 at p. 4). According to the evaluator, the student performed in the moderately low range across all domains (id.). The evaluator reported information from the parent that the

student could shop independently, cook simple items, but did not independently use public transportation (id.). The evaluator further reported information from the parent that the student often selected her clothes in the morning, used to have a cell phone, independently made phone calls, adequately controlled her moods, and enjoyed socializing with others and interacting on topics of mutual interest (id.).

In addition, the evaluator conducted a vocational interview of the student that revealed the student enjoyed participating in school clubs related to movies and cooking and that she preferred to work in groups, rather than by herself (Dist. Ex. 8 at p. 4). The report also revealed that, although she did not know what training was required, the student wanted to become a nurse after completing school (id.). Additionally, the evaluator noted that, within the home environment, the student's chores included sweeping, cleaning her room, and washing dishes (id.).

A March 2012 Cooke progress report that was reviewed by the June 2012 CSE provided information regarding the student's academic functioning and related services needs (see generally Dist. Ex. 9). With respect to ELA, the student demonstrated progress in reading and writing when provided with accommodations and supports, such as limited text on the page and the provision of direct questions and graphic organizers to identify the main ideas and characters in a book (id. at p. 3). The student's ELA instructors also noted that they were encouraging the student to increase participation and ask more questions when confused rather than waiting for a teacher to intervene (id.). The student's skills instructor similarly reported that the student worked hard, related well with peers, listened in class, and was respectful to the teachers (id.). However, according to the March 2012 progress report, the student required support to read and was working on summarizing passages of a book using details (id.). Regarding her mathematics class, the student's instructors noted her difficulty with more advanced math concepts beyond basic calculations but indicated that, with prompts, she could complete many of the assigned tasks (id. at p. 4). Additionally, the student's instructors noted that the student continued to struggle with the mechanics of measurement, particularly in the finer details of using a ruler (id.). With respect to history class, the student's instructors noted that the student worked hard, listened carefully, completed all assignments, and benefitted from frequent review and repetition of new topics to ensure comprehension (id. at p. 6). In science class, the student's instructor indicated that, overall, the student completed many of the assignments; however, the student required repeated prompts in order to stay on task (id. at p. 8). The student's travel training instructor described the student as an active participant, and further noted that she planned to work with the student to find ways to contribute to classroom discussions and outside activities with less prompting from teachers (id. at pp. 12-13). In language skills class, the student's instructor reported that the student demonstrated a partial understanding with respect to her ability to describe her wants and needs, follow multi-step verbal and written directions, and use language strategies to produce and carry out a logical plan to meet a goal (id. at p. 16). With respect to OT, her therapist noted that the student was working at a beginning level in the areas of handwriting, visual motor/perceptual skills, and ADLs (id. at p. 18). Overall, the report indicated the student usually or always worked collaboratively, participated in discussions and activities, organized and managed materials, and followed directions and rules in all of her classes (id. at pp. 3, 5, 7, 9, 11-12, 15, 17).

In addition to above-referenced evaluative information, the hearing record reflects that the June 2012 CSE also solicited input from the student's mathematics teacher, who provided information that was typed into the June 2012 IEP, including information that the student needed

a multidisciplinary and multisensory approach to learning, preferential seating, and individual and/or direct instruction (Tr. p. 107, see Dist. Ex. 4 at p. 1; see also Dist. Ex. 3 at p. 1). Further evidence in the hearing record indicates that the Cooke representative provided information to the June 2012 CSE regarding the student's performance in ELA, noting that listening comprehension was a relative strength for the student and was a skill on which the student tended to rely in order to participate in class activities (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 4 at p. 2).

Furthermore, notwithstanding the lack of an audiological examination of the student, the hearing record does not suggest that the June 2012 CSE did not have sufficient information to formulate the June 2012 IEP; rather, a review of the hearing record supports the IHO's conclusion that the lack of an audiological examination did not result in a denial of a FAPE to the student (see IHO Decision at p. 12).

The June 2012 IEP identified the student's hearing needs and reflected that the student had a "mild conductive hearing loss of 15db in her left ear" (Dist. Ex. 3 at p. 2). Accordingly, the June 2012 IEP provided accommodations to assist the student to function within a classroom in light of her hearing loss, which included small group instruction, use of comprehension tools, a multisensory approach, one-to-one instruction for learning new material, support due to difficulties with hearing and focusing, repetition and review, directions read aloud, auditory and visual cues, and preferential seating away from noise as well as a close/clear view of teacher (see id.). In addition, the June 2012 IEP contained annual goals related to auditory memory and auditory comprehension (Tr. pp. 112; Dist. Ex. 3 at p. 4). Furthermore, to address the student's needs related to hearing, the June 2012 CSE also recommended one 45-minute session per week of individual HES in a special education classroom and one 45-minute session per week of individual HES to take place in a therapy room (Dist. Ex. 3 at. pp. 15-16).

Contrary to the parent's claims that the lack of an audiological evaluation rendered the June 2012 IEP deficient, the school psychologist testified that the June 2012 CSE did not need an audiological examination to develop the student's IEP (Tr. p. 112). According to the school psychologist, the HES provider, who had worked with the student, met with the parent and developed annual goals related to auditory memory and comprehension prior to the June 2012 CSE meeting (id.). Consequently, the June 2012 CSE discussed and adopted those goals (id.). Moreover, the school psychologist also testified that she had conferenced with the HES provider prior to the June 2012 CSE meeting (Tr. pp. 112-13). Finally, the hearing record reveals that none of the June 2012 CSE participants requested additional evaluations at the time of the June 2012 CSE meeting or objected to any of the evaluations upon which the June 2012 CSE relied in order to develop the June 2012 IEP (Tr. p. 111). Assuming that the lack of an audiological evaluation was a procedural violation there is no evidence that it rose the level of a denial of a FAPE.

In summary, the evidence in the hearing record demonstrates that the June 2012 CSE adequately considered and reviewed a variety of sources to ascertain information about the student's abilities and needs and developed the student's June 2012 IEP based on this information. Based on the foregoing, the parent's assertions regarding the sufficiency of the evaluative data and its consideration by the June 2012 CSE lack a basis in the hearing record and must be dismissed (see D.B., 2013 WL 4437247, at *13-*14; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]).

B. June 2012 IEP

1. Typographical Errors / Annual Goals

Next, regarding the parent's contention that typographical errors contained in the June 2012 IEP resulted in an incomplete IEP that lacked crucial information and was not individualized, the evidence does not support that conclusion. In addition, the hearing record does not support the parent's assertion that the annual goals included in the June 2012 IEP were not appropriate because some included typographical errors or incomplete information and because two goals lacked criteria for measurement of achievement.

The parent correctly submits that the June 2012 IEP contained typographic and/or grammatical errors (see Dist. Exs. 3 at pp. 1, 5-7, 14). For example, the June 2012 IEP included an incomplete sentence, which read as follows: "The technical report for the DAS-II indicated a mild amount of inter-test scatter. It included a st" (Dist. Ex. 3 at p. 1). The school psychologist testified that this incomplete sentence constituted a typographical error (Tr. p. 137). However, the sentences preceding the incomplete sentence indicated that the student scored in the very low range regarding cognitive skills, which provided the needed clarification for the reader of the IEP (Dist. Ex. 3 at p. 1).

The June 2012 IEP also misused a gender pronoun in the IEP when reporting the results of the Basic Reading Inventory (BRI) as follows: "His/her independent reading level is 2nd grade" (Dist. Ex. 3 at p. 1). The June 2012 IEP also used the gender pronoun "his" when referring to the student's performance of a 2.1 grade equivalent on the Group Reading Assessment and Diagnostic Evaluation (GRADE) assessment (id.).[5] The school psychologist testified that, despite the use of pronouns "his" and "his/her," the June 2012 IEP referred to the student (Tr. p. 138).

A short-term objective in the June 2012 IEP contained an error that indicated the student would "retell the main idea in an independent reading test by stating the 5 2s in a reading text" (Dist. Ex. 3 at p. 14). The school psychologist testified that the short-term objective included a typographical error, in it read "5 2s" instead of "5 Ws" (see Tr. p. 142; Dist. Ex. 3 at p. 14). The June 2012 IEP contained two additional typographical and/or grammatical errors in the annual goals section (Dist. Ex. 3 at pp. 6-7). However, the school psychologist testified that these two errors in the June 2012 IEP were either typographical errors or due to poor sentence structure (Tr. pp. 143-44; see Dist. Ex. 3 at pp. 6-7). According to the school psychologist, although the district omitted language from the short-term objective relating to the student's awareness of personal space, she explained that the goal addressed appropriate personal space and that it pertained to the student's travel readiness skills (Tr. p. 143). Despite these errors, there is no indication in the hearing record that they altered the accuracy of the June 2012 IEP, where, as here, the June 2012 IEP, when read as a whole, contained sufficient information to provide the student with educational benefits under the plan (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational

[5] According to the GRADE evaluation score report, the student achieved a total test grade equivalent of 2.1, as indicated in the June 2012 IEP (compare Dist. Ex. 3 at p. 1, with Parent Ex. U).

benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).

Contrary to the parent's assertions, the hearing record does not suggest these errors rendered the June 2012 inappropriate as a whole. 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., 2011 WL 609880, at *11). 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).

Furthermore, even with the typographical errors that appeared in the student's annual goals in the June 2012 IEP, an independent review of the IEP supports a finding that overall, the annual goals and short-term objectives were based on the evaluative information considered by the CSE and aligned with the student's present levels of performance (see Dist. Ex. 3 at pp. 4-15). To address the student's needs set forth in the present levels of performance, the June 2012 IEP contained 25 annual goals and, in accordance with the June 2012 CSE's determination that the student would participate in the New York State alternate assessment, 143 short-term objectives that focused on the student's identified needs related to auditory comprehension, auditory memory, problem-solving, self-advocacy, safety and personal awareness, use of community services, leisure activities, math measurement, budgeting, visual motor/perceptual, communication, social/emotional functioning, reading, math concepts, ADL skills, fine motor skills, and language processing (id.). The school psychologist testified that the June 2012 IEP's goals came directly from Cooke and that the CSE discussed and adopted the goals that it deemed appropriate (Tr. p. 118). The evidence in the hearing record suggests that the parent agreed to the proposed goals (Dist. Ex. 4 at p. 3).

As to the measurability of the annual goals, the hearing record is unequivocal that two of the annual goals did not contain criteria from which to measure the student's progress (Dist. Ex. 3 at pp. 5-6) and that none of the short-term objectives contained mastery criteria (id. at pp. 4-15).[6] However, although two annual goals or short-term objectives might lack evaluative criteria, overall, the annual goals and short-term objectives otherwise accurately reflected the student's identified strengths and needs and were measureable (see id.). For example, with respect to the measurability of the annual goals, the hearing record reflects that the June 2012 IEP contained an annual goal related to ADL skills that indicated the student would increase functional independence in school, home, and community environments with 70 percent accuracy as assessed by teacher made materials, class activities, portfolios, teacher observation, performance assessments, checklists, and verbal explanation one time per quarter (id. at p. 12). The annual goal contained five corresponding short-term objectives that related to food preparation, nutrition,

[6] Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

grocery shopping, and safety, which addressed life skills needs identified in the present levels of performance related to functional independence in school, home, and community settings (id. at pp. 2, 12). Under the circumstances, based on a review of the June 2012 IEP and as illustrated in the above example, the hearing record indicates that the annual goals and short-term objectives related to the student's individual needs as reflected in the present levels of performance and were sufficiently specific and measurable to guide instruction.

In summary, while there is no dispute that the June 2012 IEP contained some incomplete sentences, typographical errors, omissions, and the use of incorrect gender pronouns, the hearing record supports a finding that the June 2012 CSE developed an individualized IEP for the student that addressed her identified needs (see generally Dist. Ex. 3). Furthermore, overall, the annual goals and short-term objectives contained on 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., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; 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]).

2. 12:1+1 Special Class Placement

Turning next to the appropriateness of the 12:1+1 special class placement, neither party disputes that the parent did not raise this claim in her due process complaint notice. The district argues that the IHO improperly made findings with respect to this claim and it should not be further addressed on appeal. However, as the parent asserts, it is at least arguable that in this particular instance it was the district "opened the door" at the impartial hearing with the objective of defeating the parent's claim that FAPE was not offered to the student (see Tr. pp. 114-15, 124-26; M.H, 685 F.3d at 250-51), and therefore, the IHO was correct to address this additional issue that was not in the due process complaint notice (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *6 [2d Cir. 2014] ["We hold that the waiver rule is not to be mechanically applied"]). Accordingly, analysis of the parties' claims surrounding the appropriateness of the 12:1+1 special class placement is warranted.

After considering the evaluative information described above and the input from the participants at the June 2012 CSE meeting, the CSE recommended a 12-month school year program in a12:1+1 special class within a specialized school setting for the student (Tr. pp. 113-15; Dist. Ex. 3 at pp. 15-16, 18). State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate

to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

According to the school psychologist, the June 2012 CSE recommended a 12:1+1 special class for the student based on her current level of performance including her significant delays in all area of academics (Tr. pp. 114-15). Furthermore, the school psychologist indicated that the June 2012 CSE recognized that the student was able to function in a 12:1+1 setting at Cooke (Tr. p. 145; see also Tr. pp. 232-33). [7] In addition, the school psychologist explained that the student presented with significant academic delays and that the student required a balanced approach to address both her academic and vocational needs (see Tr. pp. 114-15). Likewise, per the June 2012 CSE meeting minutes, the Cooke representative advocated for a program that offered support for in the student's academic, transition, and social/emotional needs, therefore, the June 2012 CSE discussed how a 12:1+1 special class would be able to address those areas of need (Tr. pp. 125-26; Dist. Ex. 4 at p. 4). The evidence in the hearing record indicates the June 2012 CSE explored other placement options for the student including a 10-month school year program in a special class within a community school setting; however, the June 2012 CSE rejected this option having determined that the student required a "more vocational type of program" that would be offered in a specialized school setting (Tr. pp. 125-26; Dist. Ex. 3 at p. 20).

Furthermore, to address the student's needs related to language processing, motor skills, hearing, and social/emotional functioning, the June 2012 CSE recommended the provision of speech-language therapy, OT, HES, and counseling (Dist. Ex. 3 at pp. 15-16). In addition, to address the student's management needs, the June 2012 CSE recommended the following environmental and human or material resources: (1) small group instruction; (2) direct instructional modeling to reinforce key concepts; (3) use of comprehension tools; (4) use of multisensory approach; (5) support due to difficulties with hearing and focusing; (6) one-to-one instruction for new material and support due to hearing and focusing issues; (7) repetition and review; (8) the provision of marked cards to follow along in text; (9) directions read aloud; (10) use of manipulatives and graphic organizers/checklists for writing and thought process; (11) use of drawing to process thoughts; (12) auditory/visual cues; (13) positive reinforcement and encouragement; (14) guided practice; (15) scaffolding of new material; and (16) preferential seating away from extraneous noise with a close and clear view of the teacher (id. at p. 2).

In summary, the evidence in the hearing record supports a conclusion that the recommendation of a 12-month program in a 12:1+1 special class placement in a specialized school with related services was designed to provide the student with adequate support to address her needs, such that the June 2012 IEP was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

[7] According to the Cooke representative, the student made progress at Cooke with the support of two teachers in the classroom, combined with modifications, and the use of various methodologies, although she indicated that the student still required "a lot" of prompting and work specifically with comprehension, reading comprehension and processing information (Tr. pp. 232-33).

3. Transition Services

The parent asserts that the district failed to identify the district or agency responsible for the coordinated set of transition activities in the June 2012 IEP and that such omission contributed to a denial of a FAPE to the student.

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]).

Here, the hearing record reflects that the June 2012 CSE created the coordinated set of transition activities based upon information and input directly from Cooke (compare Dist. Ex. 3 at pp. 3, 17, with Dist. Ex. 6 at pp. 1-6). The transition activities set forth in the June 2012 IEP identified the necessary supports to facilitate the student's transition to postsecondary life and included areas of instruction, recommended related services, community experiences, employment, and a focus on daily living skills (Dist. Ex. 3 at p. 17). Furthermore, the transition services were based upon the transition goals submitted by Cooke (Tr. p. 121).[8] Lastly, the hearing record reflects that none of the June 2012 CSE participants raised an objection regarding the appropriateness of the transition services (id.).

While the coordinated set of transition activities articulated the necessary activities to prepare the student for post-secondary life, there is no dispute that the district did not identify the school district or agency responsible for providing the services recommended, as required by State regulation (see 8 NYCRR 200.4[d][2][ix][e]); see also Dist. Ex. 3 at p. 17). However, such a deficiency, alone, constitutes a technical defect that does not otherwise render the transition plan, the coordinated set of transition activities, or the June 2012 IEP, as a whole, inappropriate such that it would support a finding that the district failed to offer the student a FAPE for the 2012-13 school year (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *9 [S.D.N.Y. Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]). However, the district is reminded to ensure that the IEP specifies the 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]

[8] As part of the bilingual psychoeducational evaluation, the evaluator conducted a vocational interview of the student (Dist. Ex. 8 at p. 4).

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

The parent next alleges that the hearing record does not support a finding that the assigned public school site would have been able to appropriately implement the student's June 2012 IEP. In contrast, the district asserts that the parent's claims in this regard are speculative but that, in any event, the hearing record reflects that the assigned public school site would have been able to meet the student's needs and implement the IEP. As explained below, the parent's allegations regarding the appropriateness of the assigned public school site lack merit.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264 [2d Cir. Jan. 8, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments 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., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. 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. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[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. 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., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP 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'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that a "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims that the district would have failed to implement the June 2012 IEP at the assigned 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., 530 Fed. App'x at 87; 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 that the student would have attended and

[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.

instead chose to enroll the student in a nonpublic school of her choosing (see Dist. Ex. 12; Parent Ex. S). 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., 530 Fed. App'x at 87). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claims that the assigned public school site would not have properly implemented the June 2012 IEP.

In any event, based on my independent review of the hearing record, if I were to reach the issue of the appropriateness of the assigned public school site, I see no reason to disturb the IHO's finding that the evidence established that "the recommended placement could have implemented [the student's] IEP" (IHO Decision at p. 15).

VII. Conclusion

In summary, having determined that parent has not prevailed in her claims that the district failed to offer 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 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]). I have considered the parties remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 20, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER