The University of the State of New York

The State Education Department
State Review Officer
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No. 14-018

Application of a STUDENT WITH A DISABILITY, by his 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:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be 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

On May 22, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 12-13; see Dist. Ex. 11 at pp. 1-4). Finding that the student remained eligible for special education and related services as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school, and the following related services: three 45-minute sessions per week of individual speech-language therapy, one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a small group (see

Dist. Ex. 3 at pp. 9-10).[1] The May 2012 CSE also developed annual goals with corresponding short-term objectives and a transition plan (id. at pp. 3-11).

In a final notice of recommendation (FNR) dated June 15, 2012, the district summarized the special education and related service recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 17). The parent visited the assigned public school site on June 20, 2012, and by letter dated June 21, 2012, rejected it because—based upon her observations—the level of academic work fell below the student's current levels, the "chaotic and noisy" environment was not appropriate for the student's social/emotional needs, and the public school site focused on job placement (Parent Ex. B at p. 1). The parent also indicated that the student had not been evaluated since 2009, and thus, the May 2012 CSE did not have sufficient evaluative information to develop an appropriate IEP (id.). As a result, the parent notified the district that until the student was placed in an "appropriate classroom," she intended to reenroll the student at Cooke for the 2012-13 school year and to seek reimbursement for the costs of the student's tuition (id.).[2]

On June 25, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (see Parent Exs. D at pp. 1-2; E at pp. 1-2).

By letter dated August 22, 2012, the parent informed the district that the 12:1+1 special class placement and related services recommended in the student's May 2012 IEP were not appropriate (see Parent Ex. C at p. 1). The parent also indicated that the May 2012 IEP did not address the student's academic management needs or social/emotional needs, and the May 2012 IEP did not assist the student in transitioning to independent living (id.). In addition, the parent reiterated her concerns about the assigned public school site, which had been set forth in her previous letter, dated June 21, 2012 (compare Parent Ex. C at pp. 1-2, with Parent Ex. B at p. 1). The parent notified the district of her intentions to reenroll the student at Cooke for the 2012-13 school year and to seek direct payment of the costs of the student's tuition (see Parent Ex. C at p. 2).

In a due process complaint notice dated March 18, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year based upon deficiencies in the May 2012 IEP and the parent's determination that the assigned public school site was not appropriate (see Dist. Ex. 1 at pp. 1-5). On May 16, 2013, the parties proceeded to an impartial hearing, which concluded on June 19, 2013 after three days of proceedings (see Tr. pp. 1, 112, 255). In a decision dated July 18, 2013, the IHO concluded that equitable considerations, alone, precluded an award of tuition reimbursement because the parent failed to notify the district that she had requested a private psychological evaluation of the student and the parent failed to provide the district with the results of that evaluation (see Application of a Student with a Disability, Appeal No. 13-157). The parent appealed the IHO's decision, and alleged, among other things, that the IHO erred in not

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] 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 2008-09 school year (see Parent Ex. N at p. 2).

making any determinations regarding whether the district offered the student a FAPE for the 2012-13 school year and whether Cooke was an appropriate unilateral placement (id.). The district asserted the same allegations in a cross-appeal of the IHO's decision (id.). After resolving issues not relevant to the present appeal, the matter was remanded to the same IHO due to the IHO's failure to initially determine whether the district failed to offer the student a FAPE before proceeding directly to the equitable considerations analysis and concluding that the parent was not entitled to an award of tuition reimbursement (id.).

The instructions upon remand were to render determinations regarding whether the district offered the student a FAPE for the 2012-13 school year, and if necessary, the appropriateness of the parent's unilateral placement of the student at Cooke and whether equitable considerations weigh in favor of an award of tuition reimbursement (Application of a Student with a Disability, Appeal No. 13-157). In addition, the IHO was directed to reach a final decision with respect to whether the district offered the student a FAPE for the 2012-13 school year based upon the following limited issues set forth in the due process complaint notice, unless otherwise agreed to by the parties: (1) whether the May 2012 CSE failed to conduct a required triennial evaluation and/or vocational assessment of the student, and if so, whether such violation resulted in a denial of a FAPE; (2) whether the May 2012 CSE inappropriately failed to modify the student's IEP in view of the parent's expressed concerns that a 12:1+1 special class was not an appropriate educational placement; (3) whether the May 2012 IEP was inappropriate due to an improper balance between academic instruction and vocational training; (4) whether the May 2012 IEP was inappropriate due to the alleged failure to adequately integrate the student's related service with his academic instruction, vocational training, and independent skills development; and (5) whether the student was denied a FAPE because the May 2012 CSE did not consider or the IEP did not include transitional teacher support services or parent counseling and training (see id.). As the student did not attend the assigned public school site, the IHO's determination regarding whether the district offered the student a FAPE for the 2012-13 school year was also limited to the issues so identified (id.).

A. Impartial Hearing Officer Decision upon Remand

In a decision dated December 20, 2013, the IHO addressed the five issues listed above, and determined that the district offered the student a FAPE for the 2012-13 school year, and accordingly, denied the parent's request for relief (see IHO Decision at pp. 3, 5-8).[3] Turning to the first issue regarding whether the district was required to conduct a triennial evaluation and/or a vocational assessment of the student, the IHO found that at the time of the May 2012 IEP meeting the student's most recent, privately obtained psychoeducational evaluation, dated March 19, 2009 and June 2, 2009 (June 2009 evaluation report), remained with the statutory period, and moreover, an administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5) to the student on October 19, 2011, also fell within the statutory period (id. at p. 5).[4] Therefore, the district was not obligated to conduct a triennial evaluation of the student (id.).

[3] Upon remand the parties were provided the option but waived any rights to additional hearing dates (see IHO Decision at p. 3).

[4] The parent privately obtained the June 2009 psychoeducational evaluation of the student (see Dist. Ex. 5 at p.1).

Regarding the second issue of whether the district failed to modify the May 2012 IEP in view of the parent's expressed concerns that the 12:1+1 special class placement was not appropriate, the IHO noted that the district addressed the parent's concerns it was aware of at the time of the May 2012 CSE meeting, and the May 2012 IEP reflected the parent's concerns (id. at p. 6). In addition, the IHO indicated that the May 2012 CSE meeting minutes revealed that the parent agreed with the annual goals in the May 2012 IEP (id.). The IHO also noted that during the impartial hearing the parent did not state that she told the May 2012 CSE that the 12:1+1 special class placement was "not an appropriate educational placement" for the student (id.).

Next, the IHO addressed the third issue: whether the May 2012 IEP was inappropriate due to an improper balance between academic instruction and vocational training (see IHO Decision at pp. 6-7). Based upon the evidence, the IHO found that "nothing" in the May 2012 IEP prevented the student from participating in either a part-time or full-time vocational program at the assigned public school (id. at p. 6). The IHO noted that students involved in a full-time vocational program continued to work on "literacy skills, reading skills, functional math skills, [and] employment skills" (id. at pp. 6-7). In addition, the "work site" afforded students with time during the day to work on "academics" and to "work in the community based program" (id. at p. 7). The IHO further noted that the district special education teacher who attended the May 2012 CSE meeting testified that the student would "benefit" from a "school that provided academic as well as vocational skills," and in the 12:1+1 special class, the student would receive both (id.). Given the availability of either a part-time or full-time vocational program, the IHO indicated that the "program was flexible" enough to "meet the specific needs of this particular student and balanced both an academic and vocation[al] program" (id.).

Regarding the fourth issue concerning whether the May 2012 IEP was not appropriate due to an alleged failure to adequately integrate the student's related services with his academic instruction, the IHO concluded that the parent did not raise any "challenge" at the impartial hearing with respect to whether the "district's school could not provide the student with related services" (IHO Decision at p. 7).

Finally, in response to the fifth issue regarding whether the district failed to offer the student a FAPE because the May 2012 CSE did not consider or the May 2012 IEP did not include transitional teacher support services or parent counseling and training, the IHO found that the "Cooke Report" provided the May 2012 CSE with information to develop the "transition component" of the May 2012 IEP (IHO Decision at p. 7). The IHO also noted that the recommendations in the May 2012 IEP for a 12-month school year program in a 12:1+1 special class placement in a specialized school, together with related services of counseling and speech-language therapy, and a flexible vocational program, accommodated the student's needs, including his academic needs (id. at pp. 7-8). Consequently, the IHO denied the parent's request for tuition reimbursement (id. at p. 8).

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 for the 2012-13 school year. The parent also appeals the IHO's failure to address whether Cooke was an appropriate unilateral placement for the student and whether equitable considerations weighed in favor of her request for relief. More specifically, the parent asserts that,

contrary to the IHO's finding, the district did not have the results of the SB-5 (administered in October 2011) available for review at the May 2012 CSE meeting. The parent also argues that the IHO erred in finding that the 2009 evaluation of the student fell within the statutory time period, and thus, the district was not obligated to reevaluate the student. With regard to evaluations, the parent further asserts that the IHO erred by failing to address whether the district was required to conduct a vocational assessment of the student. Next, the parent argues that the IHO erred by failing to address whether the 12:1+1 special class placement was appropriate, and instead, only determined that the May 2012 CSE addressed the parent's concerns known at the time. In addition, the parent argues that the May 2012 IEP failed to specify the amount of academic and vocational instruction the student was to receive, and further, that the IHO erred in finding the May 2012 IEP was flexible and met the student's specific academic and vocational needs. The parent contends that the IHO failed to address whether the May 2012 IEP adequately integrated the student's related services with his academic instruction, vocational training and independent skills development. The parent also asserts that the IHO failed to adequately address whether the failure to recommend parent counseling and training, as well as transitional support services, resulted in a failure to offer the student a FAPE. Additionally, the parent contends that although the issues remanded to the IHO precluded those pertaining to the assigned public school site, the assigned public school site was not appropriate and the district failed to present evidence to establish that it could satisfy the requirements of the May 2012 IEP. Finally, the parent alleges that Cooke was an appropriate unilateral placement and equitable considerations weigh in favor of her request for direct reimbursement of the costs of the student's tuition at Cooke for the 2012-13 school year.

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's decision in its entirety. The district asserts that the May 2012 CSE had sufficient evaluative information—without relying upon results reports in the October 2011 SB-5—to develop an appropriate IEP, and the district was not required to conduct a triennial reevaluation of the student. In addition, the district admits that the May 2012 CSE did not conduct a vocational assessment, but under the circumstances, the failure to do so did not result in a failure to offer the student a FAPE. Next, the district asserts that the IHO properly noted that the May 2012 CSE addressed the parent's expressed concerns, and both the parent and the Cooke attendees had the opportunity to express their opinions at the meeting. With respect to whether the 12:1+1 special class placement was appropriate, the district contends the parent did not raise this as an issue in dispute in the due process complaint notice and thus, it may not now be considered on appeal. Alternatively, the district contends that the evidence in the hearing record supports a finding that the 12:1+1 special class placement was appropriate. Next, the district alleges that the evidence in the hearing record supports a finding that the student would receive an appropriate balance between academic instruction and vocational training pursuant to the May 2012 IEP. Regarding the alleged failure to adequately integrate the student's related services with his academic instruction, the district argues that the hearing record contains no evidence that the student required related services provided in this fashion and that none of the May 2012 CSE attendees voiced disagreement with the recommendation to provide related services in a separate location. Finally, with regard to the failure to include parent counseling and training, as well as transitional support services, in the May 2012 IEP, the district argues that as a procedural violation, the absence of parent counseling and training would not result in a determination that the district failed to offer the student a FAPE. Moreover, the hearing record did not contain sufficient evidence that the student required the provision of transitional support services, as the student's recommended placement was comparable in restrictiveness to the student's setting at Cooke. Finally, the district asserts that

since the student did not attend the assigned public school site, the district was not obligated to establish its ability to implement the May 2012 IEP.

The district also asserts that the parent did not establish that Cooke was an appropriate unilateral placement, and equitable considerations did not weigh in favor of the parent's request for relief.

In a reply to the district's answer, the parent argues that she raised the issue regarding whether the 12:1+1 special class placement was appropriate for the student in the due process complaint notice. The parent also argues that the May 2012 IEP failed to properly integrate the student's related services with his academic instruction.

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. May 2012 IEP

1. Evaluative Information

The parties dispute whether the district was required to conduct a triennial reevaluation of the student prior to the May 2012 CSE meeting and whether the district was required to conduct a vocational assessment of the student. An independent review of the hearing record supports the IHO's finding that the student's most recent June 2009 evaluation remained timely and the district was not obligated to proceed with a triennial reevaluation at that time. In addition, a review of the hearing record supports a conclusion that the district's failure to conduct a vocational assessment of the student did not result in a failure to offer the student a FAPE for the 2012-13 school year. Consequently, the parent's assertions related to these two issues must be dismissed.

Turning first to the issue regarding a triennial reevaluation of the student, 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][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). In this case, the hearing record indicates that the June 2009 evaluation relied upon, in part, by the May 2012 CSE to develop the student's May 2012 IEP had been completed on June 2, 2009 after two days of testing (see Dist. Ex. 5 at p. 1). Therefore, based upon both federal and State regulations, the district's three-year timeframe within which to conduct the student's triennial reevaluation expired—at the earliest—on or about June 2, 2012 (see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]). Therefore, contrary to the parent's contention, the district was not obligated to conduct a triennial reevaluation of the student prior to the May 22, 2012 CSE meeting.

Next, a review of the hearing record also supports the district's contention that the May 2012 CSE had sufficient evaluative information to develop the May 2012 IEP, including the development of the transition plan. According to the hearing record, the following individuals

attended the May 2012 CSE meeting: a district special education teacher, a district school psychologist (who also served as district representative), the parent, a Cooke consulting teacher, and the student's then-current English language arts (ELA) teacher at Cooke (Cooke teacher) (via telephone) (compare Dist. Ex. 3 at p. 15, with Dist. Ex. 22 at pp. 1-2, and Parent Ex. M at pp. 1-3, and Parent Ex. S at p. 1).[5] To develop the student's May 2012 IEP, the May 2012 CSE reviewed a June 2009 evaluation report, a March 2012 Cooke progress report, and an "IEP Transition" report (transition report) prepared by Cooke (see Dist. Ex. 22 at p. 2; see also Dist. Exs. 4 at pp. 1-16; 5 at pp. 1-9; 6 at pp. 1-3; 12 at p. 1). In addition, the hearing record indicates that the May 2012 CSE considered input from the parent, the Cooke teacher, and the Cooke consulting teacher (see Tr. pp. 172-79; Dist. Exs. 7 at pp. 1-2; 8 at pp. 1-3; 9 at pp. 1-2; 10 at pp. 1-2; 11 at p. 4; 12 at pp. 1-5; Parent Ex. S at pp. 1-2). Together, the evaluative information provided the May 2012 CSE with a detailed description of the student's needs, as set forth in the present levels of performance and individual needs section of the May 2012 IEP (compare Dist. Ex. 3 at pp. 1-2, with Dist. Exs. 4-10).

As part of the parent's privately obtained June 2009 evaluation of the student, the evaluators administered several formal and informal assessments to measure the student's abilities in the areas of cognition, adaptive behavior, and academics (see Dist. Ex. 5 at p. 1).[6] The June 2009 evaluation report indicated that the student performed "well below grade level" and was described as "socially isolated" (id.). In addition, the evaluation noted a previous finding of "[m]oderate [m]ental [r]etardation," as well as being diagnosed as having autism (id.).

Behaviorally, the student presented as "variably related and socially awkward" with "poor social skills" (Dist. Ex. 5 at pp. 1-2). An administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) to the student yielded the following standard scores: verbal comprehension, 63 (extremely low range); perceptual reasoning, 67 (extremely low range); working memory, 68 (extremely low range); processing speed, 75 (borderline range); and a full scale IQ of 60 (extremely low range) (id. at p. 2). The student demonstrated similarly developed verbal and nonverbal reasoning abilities (id. at p. 3). However, the student's overall cognitive abilities related to verbal and perceptual reasoning, as well as working memory and processing speed, all fell well below average when compared to the student's same age peers (id. at pp. 2-4).

The evaluators administered the Vineland Adaptive Behavior Scales—Second Edition (Vineland-II) with parent as informant to assess the student's adaptive behavior (see Dist. Ex. 5 at p. 4). The student's adaptive behavior composite score of 64 fell within the low range, indicating significantly below average skills in communication, daily living skills, and socialization (id. at pp. 4-5). Specifically, the student exhibited deficits in receptive, expressive, and written language

[5] Witnesses at the impartial hearing presented direct testimony through affidavits, but appeared live at the impartial hearing for the purposes of cross-examination and redirect testimony (see, e.g., Tr. pp. 54-109; Dist. Ex. 22 at pp. 1-7).

[6] A review of the October 2011 SB-5 narrative report of the student reveals information that was consistent with the June 2009 psychoeducational evaluation report reviewed by the May 2012 CSE (compare Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 5 at pp. 1-9). The October 2011 SB-5 narrative report solely assessed the student's cognitive abilities using the SB-5 (see Dist. Ex. 15 at p. 1). The results of the SB-5 and the results of the WISC-IV (as reported in the June 2009 evaluation report) both indicated the student's overall cognitive abilities fell well below average when compared to his same age peers (see Dist. Exs. 5 at pp. 1-9; 15 at pp. 1-2).

(id. at p. 4). In addition, the student exhibited difficulties in the areas of self-care skills, as well as household and community tasks (id. at p. 5). Additionally, the student exhibited deficits in the areas of interpersonal relations, play and leisure time, and coping skills (id.). Results from the Child Behavior Checklist (CBCL), with the parent as informant, indicated that the student demonstrated difficulties with anxiety, depression, and withdrawal, as well as internalizing behaviors and externalizing behaviors when compared to his same age peers (id.). Additionally, the student's visual motor integration skills fell within the low average range when compared to his same age peers (id. at p. 7).

An administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to the student yielded the following standard scores: broad reading, 76; broad math, 68; and broad written language, 88 (see Dist. Ex. 5 at p. 9). Based upon the results, the student demonstrated "limited" skills in math calculation, "limited to average" writing skills, and "very limited" sight word reading skills (id. at pp. 7-8).

The March 2012 Cooke progress report reviewed and relied upon by the March 2012 CSE in the development of the student's March 2012 IEP provided information about the student's academic and social/emotional functioning and related goals (see Dist. Ex. 4 at pp. 1-8, 11, 15-16). The progress report indicated the student received one 45-minute session per week of counseling in a group, one 45-minute session per week of individual counseling, and two 45-minute session per week of speech-language therapy in a group (id. at p. 1). In his ELA class, overall the student demonstrated understanding with support or partial understanding of concepts related to reading comprehension, editing, and communication through informal discussions and formal presentations (id. at p. 2). In "transition mathematics" class, the student worked on adaptive math skills by engaging in cooking activities that involved skills related to fractions, measurement, adding, subtracting, multiplying, and dividing (id. at p. 4). The progress report indicated the student shopped and cooked well with minimal support, and demonstrated emergent skills related to fractions (id.). With respect to social studies class, the student worked on geography and maps and would next work on identifying cause and effect of major European conflicts (id. at p. 6). In his "[i]nvestigations in [s]cience" class, the student distinguished between biotic and abiotic factors, used technology for research, performed experimentation and dissection, and applied the scientific method to various activities (id. at p. 7). With respect to his transition skills class, the student understood the role of guardianship in his life with support, and he reflected on his disability as it related to life decisions (id. at p. 11). The progress report also indicated that the student explored post-secondary options of day and work programs (id.). With respect to his internship, the student worked in a hospital in the radiology department where he was responsible for sorting and organizing inventory and filing supply requests (id. at p. 12). While at his internship, the student exhibited a positive attitude and maintained attention as well as worked on improving communication skills (id.). In language skills class, overall the student asked questions, followed multistep verbal and written directions, verbally interacted, and navigated the community with support (id. at pp. 15-16). With respect to ELA, mathematics, social studies, science, transitions, and language skills classes, the March 2012 Cooke progress report indicated that the student always worked collaboratively with peers, participated in class discussions and activities, completed work in a timely fashion, organized and managed class materials, and followed directions and rules (id. at pp. 3-4, 6, 8, 11, 16).

In addition, the May 2012 CSE reviewed a transition report prepared by Cooke staff (see Dist. Ex. 6 at pp. 1-2). The transition report included annual goals and short-term objectives related to transition, the student's transition needs, and a list of transition activities related to community services, related services, employment, and adaptive living skills (see id.).

Although it is undisputed that the May 2012 CSE did not conduct a vocational assessment prior to developing the transition plan in the May 2012 IEP, a review of the hearing record reveals that the May 2012 CSE reviewed adequate postsecondary and vocational related information about the student and developed a comprehensive transition plan in the May 2012 IEP (Tr. pp. 69, 89, 91-92; Dist. Exs. 6 at p. 1-3).[7] As noted above, the Cooke transition report contained annual goals and short-term objectives related to transition, the student's transition needs, and a list of transition activities related to community services, related services, employment, and adaptive living skills (see Dist. Ex. 6 at pp. 1-2). The hearing record indicates that the May 2012 CSE discussed the student's post-secondary setting, types of transition activities, the student's transition needs, and the goals the student was currently working on in this area (see Tr. pp. 195-98; Dist. Ex. 6 at pp. 1-3). In addition, the May 2012 CSE developed the student's transition plan based upon the transition report and information obtained from Cooke staff attending the CSE meeting (see Tr. pp. 69-71, 89-92; Dist. Exs. 3 at pp. 3, 10-11; 12 at p. 3; 22 at p. 6; see also Dist. Ex. 6 at p. 1-3). The May 2012 CSE meeting minutes documented that, at that time, the student was exploring vocational interests and completing an internship at a radiology department (see Dist. Ex. 12 at p. 3).

The postsecondary transition plan included in the May 2012 IEP identified long-term adult outcomes and transitional services with respect to the student's instructional activities, community integration, post high school activities, and independent living (see Dist. Ex. 3 at pp. 10-11). Specifically, the transition plan indicated that the student would participate in person-centered planning, participate in a work-study program, and receive instruction in ADL skills and travel readiness skills within the community (id.). The transition plan also indicated that the student would participate in small group activities to develop person-centered planning and self-awareness

[7] Here, although the parent did not allege in the due process complaint notice any deficiencies with regard to the transition plan or services set forth in the May 2012 IEP, the parent did assert that the district "never had a vocational assessment or any other assessment designed to identify his needs with respect to training, education, employment, and independent living skills" (Dist. Ex. 1 at p. 3). The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 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) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

related to work life, as well as to develop and practice social interactions with unfamiliar adults (id. at p. 11). Additionally, the transition plan provided that the student would practice money handling and budgeting, personal finance skills, and participate in small group vocational activities and a work-study program to develop job work skills (id.). The transition plan further reflected that the student would participate in community projects with sequences of life skills activities, including planning and budgeting a community activity (id.). The May 2012 IEP included measurable postsecondary goals related to education and training, employment, and independent living skills (id. at p. 3). Specifically, the May 2012 IEP indicated that the student would attend a two-year community college or vocational school, gain qualification as teacher assistant, and engage in a part-time job and access available career service agencies after graduation (id.). As a supplement to the transition plan, the May 2012 IEP also included annual goals related to transition (id. at pp. 3-4, 8-9). However, the transition plan did not indicate that the responsible party for implementation regarding transition services (see id. at pp. 10-11).

Based on the hearing record, while the district did not conduct a vocational assessment and the transition plan developed by the May 2012 CSE did not identify the party responsible for implementing transition services, such inadequacies, alone, constitute technical defects that do not render the transition plan or the May 2012 IEP, as a whole, inappropriate (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]).

Accordingly, the hearing record establishes that the evaluative information relied upon by the May 2012 CSE and the input from the CSE participants during the meeting provided the May 2012 CSE with sufficient information about the student's cognitive, academic, language, ADL skills, social functioning, and transition needs and his individual needs to enable the May 2012 CSE to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. 12:1+1 Special Class Placement

Next, the parent argues that the IHO erred by failing to address whether the 12:1+1 special class placement was appropriate, but also erred in finding the May 2012 IEP was flexible and met the student's specific academic and vocational needs. Upon review, and as more fully described below, the hearing record demonstrates that the May 2012 IEP accurately reflected the student's needs, the 12:1+1 special class placement was appropriate, and the May 2012 IEP adequately balanced the student's academic needs, as well as vocational needs.

State regulations provide that a 12:1+1 special class placement is designed for those 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]). Consistent with State regulation, the May 2012 CSE appropriately recommended a 12:1+1 special class placement to address the student's cognitive, academic,

language, ADL skills, social functioning, and transition needs as described in the May 2012 IEP (see Dist. Ex. 1 at pp. 1-3, 10-12).

A review of the May 2012 CSE meeting minutes prepared separately by the district special education teacher and the Cooke consulting teacher indicated that the May 2012 CSE discussed the student's academic, social, and physical present levels of performance, as well as management needs (see Dist. Exs. 11 at pp. 1-4; 12 at pp. 1-5). The same CSE meeting minutes also noted discussions regarding the student's transition needs, as well as discussions related to the evaluative results (see id.). The May 2012 IEP present levels of academic, social, and physical performance and individual needs reflected information commensurate with the information presented to the May 2012 CSE about the student's abilities and needs (compare Dist. Ex. 3 at pp. 1-2; with Dist. Exs. 4-5). Specifically, the student performed well below average in the area of academics, language processing, and ADL skills when compared to his same age peers (compare Dist. Ex. 3 at p. 1; with Dist. Exs. 4-5).

In conjunction with the supports available in the 12:1+1 special class placement, as stated above, the May 2012 IEP recommended a number of modifications and strategies to further address the student's management needs within the 12:1+1 special class placement (see Dist. Ex. 3 at p. 2). In addition, the May 2012 IEP also included annual goals to address the student's identified needs in the areas of money concepts, banking, technology, reading, writing, social/emotional functioning, communication, vocational skills, ADL skills, and travel readiness (id. at pp. 3-9). The hearing record also demonstrates that the May 2012 CSE recommended related services to support the student in his 12:1+1 special class placement, which included speech-language therapy and counseling (id. at p. 9). In addition, the frequency and duration of the related services in the May 2012 IEP were consistent with the frequency and duration of related services the student received at Cooke during the previous school year (compare Dist. Ex. 3 at p. 9, with Dist. Ex. 4 at p. 1).

With respect to the parent's concern that the 12:1+1 special class placement could not provide the student with sufficient support, or the May 2012 CSE failed to address her concerns, a review of the hearing record reflects that the May 2012 CSE considered input from the parent and Cooke staff who attended the meeting (see Tr. pp. 61-62; Dist. Exs. 11 at p. 1-4; 12 at pp. 1-5). According to the May 2012 CSE meeting minutes, the parent and Cooke staff expressed their concerns regarding the 12:1+1 special class placement recommendation, noting in particular that the student required a "balance[d] program" and a "real supportive environment" (see Dist. Exs. 11 at p. 4; 12 at pp. 3-4). In addition, the May 2012 CSE meeting minutes indicated that the Cooke consulting teacher "requested a small learning environment" due to concerns that a "large setting" would cause the student to "lose confidence and 'go back into his shell'" and further, that the parent wanted the student to "be safe" and she had "hear[d] things about public schools" (Dist. Ex. 12 at p. 4). However, at the time of the May 2012 CSE meeting, the Cooke consulting teacher indicated that the student attended mathematics class in a 12:1+1 setting and attended ELA class in a 11:1+1 setting at Cooke (see Tr. p. 61; Dist. Ex. 3 at p. 1). Based on the hearing record, although the parent and Cooke staff at the May 2012 CSE meeting disagreed with the 12:1+1 special class placement, the hearing record does not contain sufficient evidence upon which to conclude that the recommendation was not appropriate to meet the student's needs or that it the recommended placement could not provide the student with a small, structured setting or appropriate opportunities for individualized support in a special education environment.

With regard to the parent's contention that the May 2012 IEP did not adequately balance the student's academic needs and vocational needs, the May 2012 IEP included contained both an academic and post-secondary transitional component (see Dist. Ex. 3). More specifically, the May 2012 IEP contained annual goals and services related to academics and post-secondary transition, as well as a recommendation for the student to participate in a work-study program (see Dist. Ex. 3 at pp. 3-9, 11). At the impartial hearing, the district special education teacher who attended the May 2012 CSE meeting testified that within a 12:1+1 special class placement, the student would receive both academic and vocational instruction (see Tr. pp. 57-58). She also testified that the May 2012 IEP identified the vocational skills the student would learn (see Tr. p. 60). However, the May 2012 IEP did not specifically break down how much time the student would receive academic instruction compared to how much time the student would receive vocational instruction, but rather, the district special education teacher testified that the parent would learn that information from the public school the student attended (see Tr. pp. 58-59).

Evidence obtained through IEP coordinator's testimony, as well as through her affidavit, provides support to conclude that the assigned public school site could have implemented both the academic and vocational components of the student's May 2012 IEP. In particular, the IEP coordinator indicated that a school counselor completed intakes with new students and their parents to discuss a student's needs, functional levels, and abilities in order to make an appropriate classroom assignment (see Dist. Ex. 21 at pp. 2-3). The IEP coordinator further indicated that the teachers at the assigned public school site provided differentiated instruction to the students regarding classroom work (id. at p. 3).

In addition, the IEP coordinator reported that the assigned public school site offered both academic and vocational programs for students (see Dist. Ex. 21 at p. 3). The IEP coordinator testified that students at the assigned public school site participated in part-time and full-time vocational work placements, which included an academic component (Tr. pp. 4-5, 10-15). According to the IEP coordinator, students worked on their academic and related goals for either part of the school day or for the entire school day depending upon work-site responsibilities (see Dist. Ex. 21 at p. 3). According to the IEP coordinator, the assigned public school site offered both on-site and off-site vocational programs to students (id.). The IEP coordinator also reported that academics remained a "focus at our work study programs" (id.). The IEP coordinator testified that nothing in the student's May 2012 IEP precluded his participation in either a part-time or a full-time vocational work placement (see Tr. pp. 13-14).

According to the IEP coordinator, work-site placements included an academic component, wherein the student worked on skills related to literacy, functional math, and employment skills (see Tr. pp. 14-15). The IEP coordinator also testified that students in the full-time vocational placement worked on academics for approximately one to two hours a day (see Tr. p. 15). Part-time, off-site vocational placements typically required students to work at the site for three and one-half hours per day, two to three days a week, and attend classes for the remainder of the time (see Dist. Ex. 21 at p. 3). Examples of on-site vocational programs offered to all students included wood shop and retail training, as well as a travel-training program (id. at pp. 3-4). According to the IEP coordinator, the assigned public school site could have addressed all of the student's goals and fully implemented the student's May 2012 IEP (id. at p. 4-5). Based on the hearing record, the assigned public school site could have been implemented the academic and vocational components

in the student's May 2012 IEP in such a way as to provide the student with an adequate balance of academic programs and vocational programs.

3. Transitional Support Services

The parent asserts that the IHO failed to adequately address whether the failure to recommend transitional support services resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. The parent argues that given the student's new eligibility classification of autism, couple with the student's potential transfer from Cooke—a "small and highly supportive environment" to a public school—a "larger school setting"—the May 2012 CSE should have recommended transitional teacher support services. The district rejects the parent's contention, arguing that the 12:1+1 special class placement in a specialized school was not a less restrictive setting when compared to the student's setting at Cooke. A review of the hearing record supports the district's assertions.

State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

First, to the extent that it could be argued that there was any change at all in the restrictiveness of the settings between Cooke and the public school program, such change from a special class in a specialized nonpublic school to a special class in a specialized public school with no change in access to regular education peers would appear to have been minimal, which further diminishes a need to recommend transitional support services on the student's IEP (8 NYCRR 200.1[ddd]).

Second, there is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of a highly intensive special class settings, such as the 12:1+1 special class placement recommended in this case. Instead, it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

Third, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v.

New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

However, notwithstanding the above, the May 2012 IEP was designed to facilitate the student's transition to the assigned public school site as the IEP included supports such as counseling, speech-language therapy, accommodations, and strategies as discussed below in addition to the support provided by the student's special education teacher and paraprofessional within the 12:1+1 special class placement (see Dist. Ex. 3 at p. 9). More specifically, the May 2012 IEP recommended accommodations for the student's transition needs through the provision of academic and social supports, including modified instruction materials, small group instruction, discrete teaching of learning strategies and skills, use of graphic organizers and checklists, and repetition of instruction using multiple modalities (id. at p. 2). The May 2012 IEP also included several other accommodations, as follows: introduction of new concepts in small chunks with sufficient time to learn, checklists, reminders, use of manipulatives, direct teaching modeling, visual and auditory cues, one-to-one review, chunking, scaffolded instructions, time to process each step, teacher redirection, access to a counselor when frustrated, and continued opportunities for the student to take a leadership role (id.). In addition, the hearing record reflects that the May 2012 CSE heavily relied upon the detailed progress report from Cooke and the input from the Cooke representatives at the CSE meeting to understand the depth of the student's needs and abilities and to draft appropriate annual goals and set forth appropriate supports and services (see Dist. Exs. 11 at pp. 1-4; 12 at pp. 1-5).

Based upon the foregoing, the May 2012 IEP as a whole addressed the student's transition related needs in the areas of academics and social/emotional functioning, and the hearing record does not support the parent's assertion that the district failed to offer the student a FAPE for the 2012-13 school year because the May 2012 IEP did not include a recommendation for transitional support services.

4. Parent Counseling and Training

Turning next to the parties' contentions with respect to the May 2012 CSE's failure to recommend parent counseling and training, the hearing record supports a finding that the absence of this related service did not result in a failure to offer the student a FAPE for the 2012-13 school year.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at

191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

It is undisputed that the May 2012 CSE did not recommend parent counseling and training as a related service in the student's May 2012 IEP. However, the hearing record does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the May 2012 IEP, resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. In addition, although the May 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; see also M.W., 725 F.3d at 141-42).[8]

5. Related Services

Finally, the parent asserts that the IHO failed to address the issue of whether the May 2012 IEP failed to adequately integrate the student's related services with his academic instruction, vocational training, and independent skills development. As discussed below, the hearing record does not support the parent's assertion.

In this case, the May 2012 CSE recommended that the student receive his related services of speech-language therapy and counseling in a "separate location/provider's location" (see Dist. Ex. 3 at pp. 9-10, 12). Although the student was to receive his related services in a separate location, the hearing record shows the student was to receive speech-language therapy in a group, as well as receiving one session of his counseling services in a group, with his peers to improve social skills (see Dist. Ex. 3 at p. 9).[9] The district special education teacher testified that the related

[8] The district is cautioned, however, that it cannot continue to disregard its legal obligation to include parent counseling and training on a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

[9] The district special education teacher testified that the recommendation for "individual" speech-language therapy sessions in the May 2012 IEP was a typographical error, and further clarified that the student was to receive his speech-language therapy sessions in a small group, which was further corroborated by the notes reflected in the May 2012 CSE meeting minutes (see Tr. pp. 67-69; see Dist. Exs. 3 at p. 9; 11 at p. 4; 12 at pp. 4; 22 at p. 5). In M.H. v. New York City Dep't. of Educ., the Court found that although the district failed to reflect a related services recommendation on a student's IEP, "it would exalt form over substance to hold that the IEP was inappropriate simply because a recommendation, omitted from the IEP because of a clerical error—but which

services' recommendations in the May 2012 IEP reflected a commensurate level of related services the student received at Cooke (see Tr. p. 67; compare Dist. Ex. 3 at p. 9, with Dist. Ex. 4 at p. 1). The hearing record also indicates that the student received his related services—both speech-language therapy and counseling—in a separate location while he attended Cooke (see Parent Ex. J at p. 6). In addition, the hearing record demonstrates that the student performed well, both academically and socially, while at Cooke (see Dist. Ex. 4).

Based on the above, the hearing record supports a finding that the recommendations to provide the student's related services in a separate location as a pull-out service, as opposed to perhaps a push-in model for a more integrated approach, would not have prevented the student from demonstrating progress in academics, counseling, and speech-language therapy and was reasonably calculated to enable the student to receive educational benefits.

B. Challenges to the Assigned Public School Site

For the reasons detailed below, I decline to "reassess the logic" of whether the assigned public school was appropriate when the student did not attend the assigned public school site during the 2012-13 school year.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L, 2012 WL 4891748, at *14-*16; Ganje 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 at 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, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ.,

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appeared in the CSE meeting minutes, and was reflected in the conduct of the parties—failed to appear within the four corners of the IEP" (M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [internal quotations and citations omitted]).

2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587, at*4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of a 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., 2013 WL 5438605, at *17; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Dep't of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. 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 "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, 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'" (id., quoting R.E., 694 F.3d at 187 n.3).

In view of the forgoing, the parent cannot prevail on claims that the district would have failed to implement the May 2012 IEP at the assigned public school site because a retrospective

analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the May 2012 IEP containing the recommendations of the May 2012 CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. D at pp. 1-2; E at pp. 1-2). 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 parent 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]).

However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parents to challenge the May 2012 IEP through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's May 2012 IEP at the assigned public school site when the parents rejected it and unilaterally placed the student.

VII. Conclusion

Having determined that the evidence in 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 unilateral placement at Cooke was appropriate or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

IT IS ORDERED that upon reconvening at this particular student's next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training in the student's IEP and, thereafter, shall provide the parent with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
March 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER