



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-106

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

Appearances:

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

Law Offices of Lauren A. Baum, PC, attorneys for respondent, Scott M. Cohen, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Cooke Center (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's determination insofar as it failed to address several of her claims. The appeal must be sustained. 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

With regard to the student's educational history, the hearing record shows that the student attended a 12:1+1 special class in a district public community school with a 1:1 health paraprofessional from kindergarten through fifth grade (Tr. p. 242; Dist. Ex. 5 at p. 2). The student attended Cooke during the 2010-11 and 2011-12 school years (Tr. pp. 242-43).

On February 16, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 29). Finding the student eligible for special education and related

services as a student with multiple disabilities, the February 2012 CSE recommended a 12-month school year program in a 12:1+4 special class placement in a specialized school with the following related services: one 40-minute session of individual speech-language therapy per week; one 40-minute session of speech-language therapy per week in a group of two; three 40-minute sessions of individual physical therapy (PT) per week; three 40-minute sessions of individual occupational therapy (OT) per week; and one 40-minute session of counseling per week in a group of three (id. at pp. 1, 24-26, 28).^{1, 2} The February 2012 IEP further recommended a full-time "group" health and ambulation paraprofessional, as well as the following assistive technology devices and services: an adaptive chair and desk and adaptive physical education for "all gym periods" (id. at pp. 24-25).³ In addition, the February 2012 IEP included supports for the student's management needs and 28 annual goals (id. at pp. 4-23).

In a final notice of recommendation (FNR) dated June 6, 2012, the CSE summarized the 12:1+4 special class, health paraprofessional services, and related services recommended in the February 2012 IEP and identified the particular school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 9).

In a letter to the district dated August 16, 2012, the parent indicated that she had received the FNR "too late to visit" the assigned public school site (Parent Ex. D at p. 1). The parent additionally informed the district that the student had recently undergone surgery and, therefore, the parent would "visit the recommended program in September and advise [the district] of [her] response . . . at that time" (id.). In the "interim," the parent stated that she would enroll the student at Cooke and seek the costs of the student's tuition from the district (id.).

On September 20, 2012, the parent signed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (Parent Ex. K at pp. 1-2).

In an undated letter submitted to the district submitted by facsimile transmission on November 7, 2012, the parent explained the reasons underlying her delayed visit to the assigned public school site, detailed her eventual visit, and set forth her concerns with the February 2012 IEP and especially with the proposed classroom (Parent Ex. E at pp. 1-2). Regarding the February 2012 IEP, the parent asserted that the CSE failed to include "transition supports" to assist the student in "transfer[ring] to a new school environment" (id. at p. 1). Next, the parent offered several reasons why, based upon her observations of a classroom, the assigned public school site was inappropriate for the student (id.). The parent averred that the students in the classroom

¹ The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

² The February 2012 IEP identifies the classroom configuration as "12:1+(3+1)" (Dist. Ex. 3 at p. 24). It appears from the hearing record that this formulation came about as a result of the district's computer system and that both parties understood this recommendation to refer to a 12:1+4 classroom configuration (see Tr. pp. 126-28).

³ Though the February 2012 IEP identified the paraprofessional as a group service, contemporaneous meeting minutes indicate the student's need for a full time paraprofessional "to go from class to class and to help in the bathroom" and do not mention the paraprofessional as a group service (Dist. Ex. 4 at p. 1; see Dist. Ex. 3 at pp. 4, 24). Further, the district representative who attended the February 2012 CSE meeting testified that the identification of the paraprofessional as a group service on the February 2012 IEP was a "clerical error" (Tr. pp. 69-70; see Dist. Ex. 3 at p. 31).

"function[ed] on a much lower level" than the student, which would have deprived the student of an opportunity to "make academic [and] . . . social progress" (id.). The parent detailed the activities of some of the students in the classroom, concluding "that the range of disabilities, behaviors, and functioning levels of the students in the class [wa]s too diverse" and the student would not "receive the level of individual attention and support she needs" (id.). The parent further contended that she "went to the [district's] website," which indicated that "a number of students were still waiting" for related services (id.). Therefore, the parent was "concerned" that the assigned public school site would be unable to implement the related services prescribed by the February 2012 IEP (id.). The parent indicated that she "remain[ed] willing to consider [an] appropriate placement" but would "continue to send [the student] to . . . Cooke" and seek the costs of the student's tuition from the district (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated September 27, 2013, the parent contended that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1-8).

Regarding the procedure by which the February 2012 IEP was developed, the parent alleged that the CSE was improperly composed (Parent Ex. A at p. 1). The parent additionally alleged that the CSE did not have sufficient evaluative material to ascertain the student's needs in all areas of disability (id.). In this respect, the parent alleged that the CSE failed to conduct necessary evaluations, notwithstanding its representations that the student needed and the district intended to conduct such evaluations (id. at p. 2). The parent further argued that the February 2012 CSE did not consider the evaluative material before it (id. at pp. 1, 2). Specifically, although the February 2012 IEP mentioned a 2009 evaluation, the parent contends that this reference was added to the IEP outside of the CSE meeting (id. at p. 3). The parent additionally claimed that she and the "faculty" from Cooke were not afforded the right to participate in the February 2012 CSE meeting (id. at p. 3). In support of this allegation, the parent argued that she and the Cooke faculty were not provided with copies of the evaluative material relied upon by the February 2012 CSE or a copy of a draft IEP, the student's prior goals were not discussed, and much of the IEP was drafted before or after the CSE meeting (id.).

As for the February 2012 IEP, the parent argued that its present levels of performance were incomplete and inadequate (Parent Ex. A at pp. 3-4). Specifically, the parent alleged that the present levels of performance did not address the student's reading comprehension; failed to mention the student's diagnoses of cerebral palsy and "mild mental retardation"; and did not describe or discuss the student's cognitive, academic, social/emotional, expressive/receptive language, OT, and PT needs or functioning levels (id. at pp. 3, 4). The parent also alleged that the February 2012 IEP's annual goals were inappropriate for the following reasons: the IEP contained no reading comprehension, self-regulation, or attending goals; the annual goals did not include the student's "proficiency in a number of areas and objectives"; many annual goals and short-term objectives did not include appropriate benchmarks, baselines, and levels of independence/support; several annual goals were copied from the student's prior IEP and did not reflect the progress she achieved; and the annual goals did not provide an "appropriate recommendation of services necessary for their achievement" (id. at pp. 3, 4).

With further respect to the February 2012 IEP, the parent alleged that the IEP failed to provide the student with an adequate level of individual attention and support; that its management needs were inadequate; that it did not identify promotional criteria; that it failed to provide transition supports and services; that it did not include the results of a vocational assessment or interview; and that it changed a prior IEP recommendation of 1:1 paraprofessional service to "group" paraprofessional services without justification (Parent Ex. A at pp. 2-5).

The parent further alleged that the assigned public school site could not implement the February 2012 IEP and was otherwise inappropriate for the student (Parent Ex. A at pp. 5-6). The parent detailed a visit to the assigned public school site and alleged that, based upon her observations, the observed classroom was inappropriate for the following reasons: the classroom students were non-verbal and otherwise lower functioning than the student; students in the classroom were not functionally grouped; the classroom was loud, distracting, and unstructured; the class "did not have" a 12:1+4 ratio; the classroom could not address the student's sensory regulation issues; the classroom was not "departmentalized"; and the classroom did not foster independence (*id.* at pp. 5-6). Additionally, the parent averred that an administrator at the assigned public school site told the parent that the student could instead be placed in a 12:1+1 classroom, which the parent asserted would be improper (*id.* at p. 6).

The parent further argued that copies the February 2012 IEP and the FNR were not provided to her in a timely manner, arriving three and four months respectively after the February 2012 CSE meeting (Parent Ex. A at p. 5)

The parent contended that Cooke was an appropriate unilateral placement because it met the student's needs (Parent Ex. A at p. 6). Additionally, the parent argued that no equitable considerations would diminish or preclude an award of tuition reimbursement because she was cooperative throughout the CSE process, willing to accept a public school placement, and provided timely notice "that no appropriate placement had been offered" (*id.* at pp. 6-7). In this respect, the parent further alleged that she visited the assigned public school site "as soon as [she] was able" given the student's recuperation from surgery performed in the summer of 2012 (*id.* at p. 5). For relief, the parent sought the costs of the student's education at Cooke for the 2012-13 school year as well as funding/reimbursement for "costs and fees," relatives services "including a full-time, 1:1 health paraprofessional" and "special education transportation" (*id.* at p. 7).

B. Impartial Hearing Officer Decision

An impartial hearing was held in this matter on May 12, 2014 (*see* Tr. pp. 1-305). In a decision dated June 13, 2014, the IHO found that the district failed to demonstrate that it offered the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that no equitable considerations affected the parent's request for the costs of the student's education (IHO Decision at pp. 45-53).

Initially, the IHO expressed his disagreement with the district's practice of bifurcating the CSE's development of the student's IEP from the district's process of selecting the particular public school site at which such an IEP would be implemented. The IHO noted that this process resulted in the CSE's "isolat[ion] from the public school placements" and, in the present case, resulted in the CSE's lack of knowledge "about the existing programs within the public school continuum"

(IHO Decision at p. 45). Relatedly, the IHO noted that the district representative who served on the February 2012 CSE "acknowledged that he had no experience with a [district specialized school] program since 2001," which the IHO found contrary to federal regulations that state the necessary qualifications of a district representative (id. at p. 46). The IHO also identified a further consequence of this "bifurcation" to be that the resulting IEP that was "so sparse and limited that it fail[ed] utterly to describe an individually tailored program," citing, in particular, the lack of specificity in the February 2012 IEP with respect to the vocational component of the program, the cognitive capacity of the students in the academic portion of the program, and the implications of the student's social/emotional needs relative to the size and organization of the assigned public school site (id. at p. 48).

In addition, the IHO found that the district failed to meet its burden to show that it offered the student a FAPE for the 2012-13 school year by not calling a witness at the impartial hearing to testify about the assigned public school site (IHO Decision at p. 49). The IHO reasoned that the district's burden under State law required it to present evidence regarding the assigned public school site; thus, the district's failure to do so resulted in a finding that it did not offer a FAPE to the student (id.). The IHO further found that the due process complaint notice was, contrary to the district's argument, "replete with explicit challenges" to the assigned public school site (id. at p. 50). The IHO further found that the district submitted the FNR to the parent on June 6, 2012, a "dilatatory production and transmission . . . [that] rais[ed] an explicit need for witness testimony" (id.). The IHO further dismissed the district's argument that Second Circuit law relieved it of its responsibility to defend the assigned public school site, "disagree[ing] with the district's reading of [the relevant case law]" (id. at p. 51). Relying instead on district court authority, the IHO held that the district denied the student a FAPE by "den[ying] . . . the family's right to participate meaningfully in the decisions made by the district" regarding the assigned public school site (see id. at pp. 47-48, 51-52).

With respect to the parent's unilateral placement, the IHO found that Cooke was an appropriate placement for the student (IHO Decision at pp. 52-53). The IHO noted the testimony of a Cooke administrator who spoke to the specially designed instruction offered to the student, including instruction to address the student's academic needs, vocational internship opportunities, small group instruction, and related services (id. at p. 53). The IHO further credited the opinions of the parent and the student's providers that she made progress at Cooke (id.). The IHO additionally found that equitable considerations "favor[ed] continuing placement in the unilateral placement" (id. at p. 5).

The IHO found that the parent "amply documented in the [hearing] record" her inability to pay the costs of the student's tuition at Cooke (IHO Decision at pp. 53-54). Therefore, the IHO ordered the district to pay "any as yet unpaid portion of the cost of the child's . . . placement" at Cooke for the 2012-13 school year (id. at p. 54).⁴

⁴ The IHO also attached an addendum to his decision determining that various State Regulations promulgated by the Board of Regents were null and void (IHO Decision at pp. 57-72)

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parent's request for relief. First, the district argues that the IHO exceeded the scope of his authority by ignoring the allegations in the parent's due process complaint notice and, instead, engaged in a protracted discussion of "the current state of special education law" (Pet. at p. 6). The district argues that the IHO ignored the facts of the specific case at hand and, moreover, exceeded his jurisdiction by addressing issues outside of the scope of the parent's due process complaint notice, citing in particular the IHO's finding that the district representative who served on the February 2012 CSE was unfamiliar with the assigned public school.

The district further contends that the IHO erred by finding that the district denied the student a FAPE by electing not to call a witness to offer testimony about the assigned public school site. The district avers that it was not obligated to present evidence as to the assigned public school site's capacity to implement the February 2012 IEP because the student did not attend this school and these issues are speculative as a matter of law. In addition, the district argues that it offered the student a FAPE, addressing many of the allegations set forth in the parent's due process complaint notice that were not addressed by the IHO. With respect to equitable considerations, the district asserts that the parent provided the district with insufficient and untimely notice of her intention to unilaterally place the student.

In an answer and cross-appeal, the parent responds to the district's petition by admitting or denying the allegations raised thermo and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of awarding the parent the costs of the student's tuition. The parent also interposes a cross-appeal, arguing that the IHO erred in failing to reach several issues raised in the parent's due process complaint notice. With regard to the process by which the IEP was developed, the parent argues that CSE did not possess sufficient evaluative material and the parent was not afforded participation in the CSE meeting. As for the February 2012 IEP, the parent contends that it did not address the student's transition or vocational needs; its present levels of performance were incomplete; the goals were inappropriate; it did not met the student's need for individual attention; and its placement recommendation of a 12:1+4 classroom was inappropriate.

In an answer to the parent's cross-appeal, the district argues that the parent failed to "clearly indicate" the grounds upon which the IHO erred in contravention of State regulations. Accordingly, the district argues that these claims should not be considered. In the alternative, the district denies the parent's allegations and, for the reasons described in its petition, argued that it offered the student a FAPE for the 2012-13 school year.

V. Applicable Standards

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

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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][iii]; 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. Preliminary Matters

1. Sufficiency of IHO Decision

First, I address the district's contention that the IHO's decision was legally insufficient insofar as it failed to address most of the issues identified in the parent's due process complaint notice.

An IHO is required to issue detailed findings on the discrete issues identified in a party's due process complaint notice, a process that entails detailed factual and legal analysis (34 CFR 300.511[c][1][iv] [an IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice"]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). The IHO's disposition of the parties' claims in this case fell short of this standard. Specifically, the IHO failed to address the bulk of the issues raised in the parent's due process complaint notice; namely, the composition of the February 2012 CSE; the sufficiency of the evaluative material before the CSE; the CSE's consideration of evaluative material; the extent the parent was afforded participation in the CSE meeting; the IEP's lack of a vocational assessment; the appropriateness of the IEP's paraprofessional services and, relatedly, whether the IEP provided sufficient 1:1 support; the accuracy of the student's present levels of performance; the sufficiency of the IEP's goals and objectives; the adequacy of the IEP's management needs; and the lack of promotional criteria and transition services within the IEP (Parent Ex. A at pp. 1-7). Of particular concern is the fact that the IHO's decision spans 72 pages, but only 10 pages, at most, pertain to the issues specific to the student (see IHO Decision at pp. 1, 45-54). Instead of addressing the parent's claims, the IHO instead issued findings based upon disagreements with his perception of the district's broader policies, which were not raised by the parent in her due process complaint notice (id. at pp. 45-49).⁵

Although it is one possible option, I find it inappropriate to remand this case to the IHO at this juncture (see *T.L. v. New York City Dep't of Educ.*, 2013 WL 1497306, at *16 [E.D.N.Y. Apr. 12, 2013]; *F.B. v. New York City Dep't of Educ.*, 2013 WL 592664, at *15 [S.D.N.Y. Feb. 14, 2013]). Because the hearing record in this proceeding is sufficient for a determination as to the issues the parent continues to assert on appeal, I will exercise my discretion to retain this appeal. By no means should this decision be interpreted as endorsement of the IHO's conduct in this case—essentially skipping over most of the critical issues that the parties placed before him in favor of communicating his personal views of how policy matters should be addressed.

2. Sufficiency of Cross-Appeal

Next, the district argues that, in cross-appealing issues not addressed by the IHO, the parent failed to "clearly indicate" the grounds upon which the IHO erred in support of her allegations.

⁵ However well-intentioned the IHO's discussion, it is questionable whether a hearing officer, or SRO for that matter, has any jurisdiction over systemic policies, which is a matter best left to LEA, SEA and federal authorities with the policy making responsibility and oversight roles envisioned under the by the IDEA and its implementing regulations; moreover, one need not reach those questions in order to resolve the parties' dispute in this case.

State Regulations governing practice before the Office of State Review require that a "petition for review . . . clearly indicate the reasons for challenging the [IHO's] decision" (8 NYCRR 279.4[a]). I do not agree with district's contention in this instance and therefore proceed to address the parties' claims below.

B. February 2012 CSE

1. Parent Participation

The parent argues that the February 2012 CSE failed to adequately provide the parent and the Cooke faculty with a meaningful opportunity to participate in the development of the student's IEP. 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 & Communc'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]).

First, with regard to the parent's participation, the hearing record reflects that the parent was allowed to attend and participate in the CSE meeting. The parent as well as a Cooke supervisor physically attended the February 2012 CSE meeting (Dist. Ex. 3 at p. 32). Additionally, the student's math and science teacher at Cooke participated in the CSE meeting by telephone (id.). Contemporaneous meeting minutes reveal substantial input by the parent and teacher (see Dist. Ex. 4 at pp. 1-4). These meeting minutes further indicate that the parent consented to the student's math and science teacher participation in only a portion of the CSE meeting (id. at p. 2).⁶ While the parent testified at the impartial hearing that certain evaluations were not discussed during the CSE meeting, the weight of the evidence in the hearing record indicates that the CSE engaged in a comprehensive discussion of the student's needs at the meeting (see Tr. pp. 244-47; Dist. Ex. 4 at pp. 1-4). I find that this evidence was sufficient to meet the requirements, since the parent had reasonable input into the development of the IEP, does not appear to have been prevented from raising concerns for consideration, and federal and State regulations do not otherwise specify a requisite threshold level of participation that must be achieved by parents at a CSE meeting.

Next, the parent alleges that she was not provided with a copy of a February 2012 classroom observation and, further, that two evaluations relied upon by the February 2012 CSE

⁶ The parent's allegation that Cooke personnel were denied participation in the CSE meeting must be rejected as neither the IDEA or State law bestow rights upon nonpublic school personnel to attend or participate in CSE meetings under these circumstances (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]; compare with 20 U.S.C. 1412[a][10][A][1]; 34 CFR 300.137[c][2] and Educ. Law 3602-c[2][b]).

were not available at the meeting. The evidence in the hearing record is unclear as to whether the district provided the parent with the February 2012 classroom observation. According to the parent, the CSE did not provide her with a copy of this classroom observation prior to, or during, the CSE meeting (Tr. pp. 244-47). The parent further testified that she did not request copies of any evaluations from the district at the CSE meeting (Tr. p. 268).⁷ The district representative testified that it was his usual practice to ensure that the members of the CSE had copies of all evaluations and materials before the CSE (Tr. p. 32). The district representative further indicated that, upon parental request at the CSE meeting, his practice was to copy any evaluations before the CSE and provide copies to the parents (Tr. p. 32). Therefore, while it is unclear whether the parent received a copy of the February 2012 classroom observation, I would not find that that this rose to the level of a denial of a FAPE to the student under these circumstances (Dist. Ex. 6 at p. 1).⁸

As for the November 2009 psychological evaluation and November 2009 psychosocial evaluations, the parent testified that she was familiar with these evaluations, but could not "recall" whether they were available at the February 2012 CSE meeting (Tr. pp. 246-47). Contemporaneous meeting notes, however, indicate that these evaluations were considered by the February 2012 CSE (Dist. Ex. 4 at p. 1). Indeed, the February 2012 IEP explicitly identifies the November 2009 psychological evaluation and identified the results of testing administered as part of this evaluation (Dist. Ex. 3 at p. 1). Therefore, weighing the stronger documentary (and contemporaneous) evidence in the hearing record against the parent's weaker equivocal testimony on this issue, I conclude that the February 2012 CSE considered the November 2009 psychological and psychosocial evaluations.

2. Sufficiency of Evaluative Material

Next, the parent asserts that the February 2012 CSE failed to obtain sufficient evaluative material on the student, thus failing to assess the student in all areas of suspected disabilities. The district argues that the February 2012 CSE considered current evaluative material including district evaluations, a Cooke progress report, and input from the student's then-current teacher at Cooke.

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]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant

⁷ Therefore, this is not a situation where the parent requested information pertaining to the student and was denied access to the student's educational records (20 U.S.C. 1415[b][1]; 34 CFR 300.501[a]; see 34 CFR 300.613[a]).

⁸ On appeal, the parent does not articulate, as required by the IDEA, how the district's alleged failure to provide a copy of the February 2012 classroom observation 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 benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to 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).

The hearing record reflects that the evaluations and reports available to the February 2012 CSE included a November 2009 psychological evaluation, a November 2009 psychosocial evaluation, a November 2011 Cooke progress report, and a February 2012 classroom observation (see Tr. pp. 29-30; Dist. Ex. 4 at p. 1; see generally Dist. Exs. 5-7).⁹

Within the November 2009 psychological evaluation report, the examiners stated that the evaluation was conducted in order to establish the student's eligibility for services through the Office of Mental Retardation and Developmental Disabilities (OMRDD) (Dist. Ex. 5 at p. 1).¹⁰ The examiners noted that, at the time of the evaluation, the student was reported to be in good health, had not suffered from any illness, and was not taking any medication (id.). The examiners also indicated that although the tone of the student's voice was well regulated, her voice level was low and at times her speech was difficult to understand (id. at p. 3). Cognitive assessments administered as part of the November 2009 psychological evaluation revealed the student's overall intellectual functioning to be classified as moderately delayed, with the student's nonverbal ability classified as moderately delayed and verbal ability classified as mildly delayed (id. at pp. 3-4).

Administration of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) yielded scores which indicated that the student's adaptive behavior in the domains of communication, daily living skills, and socialization was moderately low (Dist. Ex. 5 at pp. 5-6). From an index which conveys the degree of maladaptive behavior an individual displays compared with peers, the student's overall score was classified as average (id. at p. 7). The examiners found that, after the student achieved a level of comfort with the examiners, she engaged in small talk, consistently made eye contact, and smiled often (id. at p. 2). The examiners also noted that the student was attentive, cooperative, and compliant throughout the evaluation (id.). The examiners noted that the student was easily distracted and required consistent redirection, yet they found that the student could be redirected with prompting (id. at pp. 2-3, 7). The parents reported to the examiners that the student had few close friends and minimal opportunities to socialize with peers outside of school and daycare and felt that the student would benefit from a social skills group and

⁹ In addition, the district special education teacher testified that "as a matter of practice" the CSE usually reviews the student's prior year IEP (Tr. p. 30; see Parent Ex. C).

¹⁰ This office has since been renamed the Office for People with Developmental Disabilities.

a recreational program to further her social development (id. at p. 2). The report indicated that the parents "expressed significant concerns" regarding the student's independent and daily living skills as the student often required assistance fastening buttons, tying a bow, and zipping a zipper (id.).

The November 2009 psychological evaluation report further indicated that the student met the criteria for a diagnosis of mild mental retardation, noting the student displayed "sub-average intellectual functioning" (Dist. Ex. 5 at p. 7). In addition, the examiners found that the student presented with significant impairments in her adaptive functioning in her use of community resources and functional academic skills (id.). Also, the examiners identified significant delays in the student's communication, self-care, social/interpersonal skills, play/leisure, and health (id.). The examiners recommended that the student continue with her then-current services and further indicated that she would benefit from a recreation program and residential habilitation (id. at pp. 7-8). Further, the examiners recommended that the parents receive in-home respite and join a support group (id. at p. 8).

According to the November 2009 psychosocial evaluation report, the student was referred to the evaluator in order to determine the student's eligibility for Medicaid and OMRDD services (Dist. Ex. 5a at p. 1). The evaluator described the student as verbal and ambulatory (id. at pp. 1, 3). The evaluator reported that the student knew her telephone number, address, and birthdate as well as the phone number to call in case of an emergency (id. at p. 3). The evaluator reported that the student knew colors, could count, had some concept of money value and coins, could write her name, and could read up to the second grade level and, occasionally, the fifth grade level (id. at pp. 3-4). The evaluator indicated that the student showed emotions and was friendly, yet got upset when she did not get her way and did not ask for permission when using things that belonged to others (id. at p. 4). The evaluator further reported that the student was not aggressive and did not exhibit inappropriate behavior (id.). The evaluator noted the student still required assistance for her activities of daily living (id. at p. 3). The 2009 psychosocial report further indicated that the student could prepare simple foods which did not require using an oven, use a microwave and toaster, and help with simple house chores (id.). The evaluator recommended, among other things, that the student continue to receive her then-current services and service coordination as well as residential rehabilitation (id. at p. 4).

The November 2011 Cooke progress report described the student as a sweet, friendly, and socially-motivated student who persevered with regard to challenging tasks, was highly motivated to perform academic assignments and therapeutic activities, and endeavored to be independent (Dist. Ex. 7 at p. 1). Some concerns outlined by the teacher include the student's difficulties with expressive and receptive language, distractibility, decreased safety awareness, and self-care (id.). The November 2011 report described the student as having a subordinate/shared role in completing most instructional tasks, though in writing and math the report indicated that often the student took on a primary role in completing the tasks (id. at pp. 3-12). In the area of reading, the report stated that the student was working at a primer level and noted that instruction would be supplemented with modeling, support strategies, and kinesthetic activities (id. at p. 3). In the area of writing, the report indicated that the student was performing at a K-1 level and that instruction would focus on the writing process supplemented with support strategies and with kinesthetic based projects (id. at p. 4). The report stated that the teacher determined the student to be working at a second grade level in math and would supplement instruction with a multisensory mathematics program called Stem Arithmetic (id. at p. 5).

In speech-language therapy, the November 2011 Cooke progress report identified "opportunities for improvement" in the areas of listening skills, words and their relationships, phonemic awareness, articulation and phonation, and pragmatic skills (Dist. Ex. 7 at p. 8). In counseling the report indicated that the student would work on self-expression, socialization skills, coping when feeling anxious, and flexibility during times of conflict (*id.* at p. 9). For OT, the report identified goals of improving gross motor skills, fine motor skills, handwriting, sensory processing skills, and self-help skills (*id.* at pp. 10-11). Lastly, in PT, the report identified goals of improving balance, overall endurance and strength, and range of motion (*id.* at p. 12).¹¹

The February 2012 classroom observation was conducted as part of the re-evaluation process to assess the student's progress at the student's then-current placement (Dist. Ex 6 at p. 1). The report indicated the student's classroom at Cooke was composed of eight students with four adults (including the student's 1:1 paraprofessional) and that the student was receiving PT, OT, and speech-language therapy (*id.*). The observer stated that, upon entering the classroom, the student sat on her perch chair and her paraprofessional sat next to her (*id.*).¹² The report indicated that during the lesson the student listened, answered questions and was engaged in the lesson (*id.* at pp. 1-2). The report also noted that the student was "friendly" in offering a seat to a morning visitor (*id.* at p. 2). The student's paraprofessional provided reminders in response to the student calling out in class and when the student placed her fingers in her mouth (*id.* at p. 1). The student further relied on support from her paraprofessional when reading out loud to the class and when gathering her belongings at the end of class (Dist. Ex. 6 at p. 2).

Based on the evidence above, the hearing record shows that the evaluative data considered and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop an appropriate IEP (see *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]; *E.A.M. v. New York City Dep't. of Educ.*, 2012 WL 4571794, at *9-*10 [S.D.N.Y. Sept. 29, 2012]).¹³

3. Present Levels of Performance

The parent argues on appeal that the IHO erred by failing to address her claim that the IEP did not accurately reflect the student's present levels of performance. In particular, the parent asserts that, despite the student's significant delays, the February 2012 IEP did not include a description of her reading comprehension abilities or functioning levels or her specific fine motor, graphomotor, and gross motor functioning levels, or a complete description of her capabilities with regard to what she was working on in OT and PT at the time of the meeting. Moreover, the parent

¹¹ The report also indicated that the student received instruction in drumming and visual arts (Dist. Ex. 7 at pp. 13-14).

¹² The report described the perch chair as an adapted seat with a forward tilt (Dist. Ex. 6 at p. 1).

¹³ It is unclear whether the parent continues to pursue her claim that the district indicated to the parent that the student needed, and the district intended to conduct, new evaluations prior to the February 2012 CSE meeting (see Parent Ex. A at p. 2). Even assuming that the parent continues to seek relief on this basis, I would not find this claim persuasive in light of the above analysis that the February 2012 CSE possessed sufficient functional, developmental, and academic information about the student and her individual needs.

alleges that the February 2012 IEP inappropriately failed to mention the student's diagnoses of cerebral palsy and mild mental retardation. Contrary to the parent's assertions, a review of the evidence in the hearing record shows that the present levels of performance included in the February 2012 IEP reflected the evaluations and reports available to the CSE and largely described the student's particular areas of need identified by the parent (compare Dist. Ex. 3 at pp. 1-4, with Dist. Exs. 5-7; see also Parent Ex. C).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The February 2012 IEP's present levels of academic performance reflected the November 2009 psychological evaluation and indicated that the student's cognitive abilities fell in the moderately delayed range, with her nonverbal IQ in the moderately delayed range and verbal IQ in the mildly delayed range (Dist. Ex. 3 at p. 1, see Dist. Ex. 5 at pp. 3-4). The present levels of academic performance reflected the results of the Vineland-II, which indicated impairments in adaptive functioning and found the student's adaptive behaviors in the domains of communication, daily living, and socialization to be in the moderately low range (Dist. Ex. 3 at p. 1, see Dist. Ex. 5 at pp. 5-6).

The February 2012 IEP also indicated that, according to the student's teacher at Cooke, the student had increased her recognition of sight words within context, could identify initial sounds with support, had letter sound recognition, could blend two letters and was able to recognize five to ten high frequency words in a novel text (Dist. Ex. 3 at p. 1). According to the IEP, the teacher stated that the student was working on decoding consonant vowel consonant (CVC) words and was missing long and short vowel (middle sounds), silent e at the end of the word and word endings (id.).

In the area of listening comprehension, the February 2012 IEP indicated that the student answered "wh" questions when the story was summarized, identified characters and used simple words to describe them, made predictions, and described the setting (Dist. Ex. 3 at p. 1). Areas of need identified in the IEP included sequencing, generating ideas, and identifying the main idea (id.). The IEP also noted that the student benefitted from having stories broken down, the inclusion of illustrations, sentence starters, response options, and prompting to initiate work (id.). The IEP further reflected that the student had difficulty sustaining attention (id.).

In writing, the February 2012 IEP indicated that the student could write a paragraph of five to seven sentences with verbal prompts, write words with initial sounds, and add sentences with prompts (Dist. Ex. 3 at p. 2). The IEP further indicated that the student enjoyed speaking about her personal experiences and could give details when writing about these topics (id.). Additionally, the IEP reported that the student had improved her ability to generate ideas and used inventive

spelling (id.). The IEP identified the following as areas of need: writing topic sentences, spelling, and consistently using basic punctuation and capitalization (id.).

Regarding mathematics, the February 2012 IEP indicated that the student could skip count to 100 by twos, fives, and tens, compare and order numbers up to 1000, and identify key words for addition word problems (Dist. Ex. 3 at p. 2). The IEP further noted that the student knew the process for triple digit addition with regrouping and double digit subtraction (id.). The IEP also indicated that the student was inconsistent with some skills—such as solving double digit subtraction problems, and naming coins and their corresponding values—and benefitted from prompts as well as the use of graph paper for alignment and computation charts (id.). Given this information, the IEP identified adding the value of money as a need for the student (id.).

The February 2012 IEP identified the following areas as "opportunities for improvement" in speech-language therapy: listening skills, words and their relationships, phonemic awareness, articulation and phonation, and pragmatic skills (Dist. Ex. 3 at p. 2). Additionally, the IEP noted that the student would work on improving speech intelligibility, speech fluency, and vocal volume (id.). Next the present levels of performance reflected reports that the student had significant cognitive and receptive and expressive language delays (id.; see Dist. Exs. 5 at p. 7; 7 at p. 1). The IEP further indicated that the student had difficulty understanding concepts and articulating the letter "r" (Dist. Ex. 3 at p. 1).

In the area of social development, the February 2012 IEP reflected the November 2011 Cooke progress report that indicated the student was a diligent worker who persevered with regard to challenging tasks and was very motivated to perform academically and become independent in terms of mobility (Dist. Ex. 3 at p. 2, see Dist. Ex. 7 at p. 1). The February 2012 IEP further reflected the student's then-current teacher's input and described the student as sweet, friendly, and socially motivated, and as one who worked well with her peers (Dist. Ex. 3 at p. 2, see Dist. Exs. 4 at p. 3; 7 at p. 1). The present levels indicated that the student had improved her ability to self-advocate and, though she could be embarrassed due to looking different than her peers, a teacher report indicated that the student was not overly anxious in this regard (Dist. Ex. 3 at p. 2). The IEP recommended counseling to improve the student's coping skills (id. at p. 3).

Next, the February 2012 IEP stated that the student presented with decreased muscle control and body alignment which impaired her standing, balance, coordination, and ambulating skills and caused limited range of motion and poor posture (Dist. Ex. 3 at p. 3). The IEP also stated that the student wore braces on both legs, a brace on her left wrist, and required a barrier free school (id.).

The February 2012 IEP further reflected the November 2011 Cooke progress report regarding progress and needs in the areas of OT and PT (Dist. Ex. 3 at p. 3, see Dist. Ex. 7 at pp. 10-12). The IEP indicated that, in OT, the student worked toward the goals of improving gross motor skills, fine motor skills, handwriting, sensory processing skills, and self-help skills (Dist. Ex. 3 at p. 3). The IEP also noted that the student showed signs of regression over the summer in self-help skills and the occupational therapist indicated her intention to continue to address this goal in the 2012-13 school year (id.). Further, the IEP stated that the student would continue to focus on skills addressed in the previous year with the additional skills of identifying safety hazards, handwriting, and flexor core strength (id.) In PT, the IEP stated that, based on informal

assessments, clinical judgment, and parental input, the student's goals were improving balance, overall endurance and strength, and range of motion (*id.*).

Contrary to the parent's claim that the IEP should have stated the student's diagnoses of cerebral palsy and mild mental retardation, federal and State regulations do not require the district to set forth students' diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]). As discussed above, the district accomplished this by gathering sufficient evaluative information about the student's needs and the February 2012 IEP adequately described the student's cognitive, academic, and physical needs arising from these diagnoses.

Thus, a review of the information considered by the February 2012 CSE shows that the district utilized the available evaluations and the input provided by CSE members during the meeting to reflect the student's present levels of academic achievement and functional performance in an IEP that indicated the student's special education needs arising from his disability (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]).¹⁴ Specifically, the IEP accurately detailed the student's present levels of performance in the areas of OT and PT (Dist. Ex. 3 at p. 3). Even though, as the parent correctly asserts, every one of the student's deficits was not described in minute detail in the IEP, in light of the information that was included any such omission did not constitute a violation in this instance (see P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *11 [S.D.N.Y. July 22, 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that "addresses those issues"]).

4. Management Needs

The parent also asserts that the February 2012 IEP failed to recommend particular supports for the student's management needs, such as the use of positive reinforcement and encouragement, verbal cues and reminders for self-care, and repeated exposure to certain words. Management needs are defined by State regulations 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]).

¹⁴ As for the parent's argument that the IEP did not "describe or provide the extent or intensity of direct, individual support from a teacher that [the student] required to make . . . progress", the February 2012 IEP accurately reflects the student's needs as described above (Ans. and Cross-Appeal at p. 19). Moreover, this evaluative information does not suggest that the student required "direct individual support from a teacher" in order to benefit from instruction. In any event, the February 2012 IEP would have provided the student with 1:1 paraprofessional services (Dist. Ex. 3 at pp. 24-25; see Tr. pp. 69-70).

Although the February 2012 IEP did not use the specific language set forth by the parent on appeal, the IEP included appropriate supports for the student's management needs. Consistent with information recorded in the CSE meeting minutes, the February 2012 IEP reflected supports for the student's management needs including the use of visual aids, provision of vocabulary words when writing, and reminders to slow down to watch for obstacles in hallways (Dist. Ex. 3 at p. 4; see Dist. Ex. 4 at p. 4). In addition, the IEP recommended additional supports and strategies including verbal and visual prompts; modeling; repetition of directions and questions; checks for understanding; graphic organizers; a scribe for longer assignments; manipulatives; reminders; refocusing and redirection; structure and routine; and the use of an adaptive chair made especially for the student that was light enough to transport from class to class (Dist. Ex. 3 at pp. 1-4). Each of these supports addressed the student's needs as identified in the IEP's present levels of performance (see id.). With regard to positive reinforcement, the IEP otherwise addressed this need by including goals to improve self-confidence and develop coping skills through learning to take pride in achievements (id. at pp. 5-6). Furthermore, to assist the student with self-care needs, the February 2012 CSE recommended 1:1 paraprofessional services (Dist. Ex 3 at pp. 24-25; see Tr. pp. 69-70). Therefore, the parent's claim in this regard is without merit.

5. Vocational Assessment

On appeal, the parent argues that the February 2012 CSE erred by failing to conduct a vocational assessment of the student and to incorporate the results of this assessment into the student's IEP.¹⁵ At the time of the CSE meeting, the student was 13 years old. State regulations require the district to ensure that students who are 12 years old receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes, and interests (8 NYCRR 200.4[b][6][viii]). Therefore, a vocational assessment should have been completed prior to the February 2012 CSE meeting. The only evidence in the hearing record pertaining to this issue is testimony from the district representative that he could not recall whether or not one was completed (see Tr. p. 86). Therefore, the district's failure to present any evidence suggesting that it met the student's vocational needs constituted a procedural violation of the IDEA. However, even if the district did not conduct such an assessment as required by State regulation, the parent has not alleged any resultant harm, and the CSE is not required to develop transition services to address these areas prior to the first IEP that will be in effect when the student is 15 years old (see 8 NYCRR 200.4[d][2][ix]).¹⁶ Therefore, the district's failure to demonstrate that it conducted a vocational assessment for the student at age 12, although a procedural violation of State regulations, would not rise to the level of a denial of FAPE in this instance.

¹⁵ The parents also contend that the district erred by failing to support the student's transition from a non-public school into a public school. While such "transition" services may be beneficial, the IDEA and State law do not require districts to offer these services as part of their obligation to provide a FAPE.

¹⁶ Although it is within a CSE's discretion to develop these supports for a student younger than 15, there is no evidence in the hearing record, and the parent does not point to any, that this would have been appropriate or necessary for the student in this instance (see 20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

6. Annual Goals

Next, the parent asserts that the February 2012 IEP's goals are inadequate because they do not address all the student's areas of need, do not include appropriate benchmarks, baselines, and levels of independence/support, and several are copied from the prior IEP (Parent Ex. A at p. 4). The February 2012 IEP contains 28 annual goals and, consistent with the CSE's determination that the student participate in the alternate assessment, numerous corresponding short-term objectives to address the student's social/emotional, fine and gross motor, activities of daily living skills (ADLs) and speech-language needs and academic needs in the areas of English language arts (ELA) and math (Dist. Ex. 3 at pp. 3-23).¹⁷

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Courts within the Second Circuit have held that deficiencies in an IEP's annual goals, standing alone, do not ordinarily compel a finding that a student was denied a FAPE (P.K. v. New York City Dept. of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011], aff'd 526 Fed. App'x. 135 [2d Cir. 2013]; see also Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *3 [N.D.N.Y. June 19, 2009]).

Meeting minutes from the February 2012 CSE reveal that the CSE discussed the student's needs in the areas of decoding, listening comprehension, language, writing, math, social/emotional, counseling, speech and OT (Dist. Ex. 4 at pp. 2-4). The district representative further testified that the goals included on the February 2012 IEP were discussed and agreed upon at the February 2012 CSE meeting (Tr. pp. 88-89, 95-96).

As discussed above, in the area of ELA the February 2012 IEP's present levels of performance reflected the student's needs in decoding consonant-vowel-consonant (CVC) words and middle vowel sounds; story sequencing; generating ideas; providing the main idea; developing topic sentences; spelling; and using basic punctuation and capitalization (Dist. Ex. 3 at pp. 1-2). The February 2012 IEP included goals addressing the following areas: recognizing and producing letter sounds; decoding and encoding CVC and CV syllables; increasing sight/high frequency words; listening comprehension (including answering questions about the main idea and story sequencing from read texts); the writing process (including brainstorming, spelling, mechanics and grammar usage); expanding vocabulary; and paragraph writing (including topic sentence and punctuation) (id. at pp. 7-13).

To address the student's identified math needs in the areas of increasing consistency in solving double digit subtraction problems and adding the value of money, the February 2012 IEP

¹⁷ Some of the annual goals included in the February 2012 IEP are duplicative (see Dist. Ex. 3 at pp. 5-23). The parent does not assert, and I would not find, that this resulted in a denial of FAPE to the student.

included goals in solving multi-step problems, recognizing coins and assigning values, and problem solving (Dist. Ex. 3 at pp. 2, 13-15).

In the area of speech and language, the February 2012 IEP identified the student's areas of need as listening skills, words and their relationships, phonemic awareness, articulation and phonation, pragmatic skills, speech intelligibility and fluency, and vocal volume (Dist. Ex. 3 at p. 2). The February 2012 IEP included goals involving answering questions related to a "listening experience", words and their relationships (improving the student's ability to classify and identify nouns), and improving functional language use (including maintaining conversation topic, turn taking, speech intelligibility and fluency, and phonological awareness skills) (id. at pp. 22-23).

As detailed above, the February 2012 IEP's present levels of social development indicated needs in the areas of self-advocacy, social and peer interaction, and coping skills (Dist. Ex. 3 at pp. 2-3). The February 2012 IEP includes counseling goals which addressed the student's need to improve her self-confidence and communication with peers and adults, coping skills to learn to negotiate assertively in social situations with peers, and coping skills to relax and employ effective problem solving strategies (id. at pp. 5-6).

The February 2012 IEP also included OT and PT goals to improve gross motor skills, fine motor skills, handwriting, ADLs, balance, ambulation, range of motion and flexibility, and strength to address the student's physical development needs (Dist. Ex. 3 at pp. 3-4, 16-22). For example, one goal states that, with the support of her paraprofessional, the student will ambulate safely when traveling to and from class and during transitions with her class materials (id. at p. 7).

On appeal, the parent asserts that the February 2012 IEP failed to include reading comprehension goals. The November 2011 Cooke progress report indicated that the student's reading instruction would focus on skills typically associated with a primer level (Dist. Ex. 7 at p. 3). As described above, the February 2012 IEP noted that the student's then-current teacher identified the student's reading needs as decoding CVC words, long and short vowel (middle sounds), and word endings (Dist. Ex. 3 p. 1). The IEP included goals in recognizing and producing letter names and sounds, decoding CVC and CV syllables, increasing sight words, participating in discussions and questions regarding teacher read passages, and answering questions relating to a listening experience (id. at pp. 7-9, 22). The IEP also included an annual goal for the student to expand her vocabulary to, among other things, understand and use "in her comprehension of reading literature" (id. at p. 12). Given the student's primer reading level, identified reading needs, and the goals included in the February 2012 IEP that address those needs, the CSE's failure to include specific reading comprehension goals on the IEP did not result in a denial of FAPE to the student.

Additionally, the parent asserts that the February 2012 IEP did not include any goals to address the student's self-regulation or attending issues. Consistent with the evaluative information available to the February 2012 CSE, the February 2012 IEP indicated that the student had difficulty sustaining attention and was easily distracted (compare Dist. Ex. 5 at pp. 2-3, and Dist. Ex. 7 at p. 1, with Dist. Ex. 3 at p. 1). Also consistent with the evaluative information, the IEP indicated that the student was diligent, highly motivated, persevered with regard to challenging tasks, and responded well to cues and prompts (compare Dist. Ex. 5 at p. 7, and Dist. Ex. 7 at p. 1, with Dist. Ex. 3 at p. 2). Although not explicitly labeled as "self-regulation" goals, the IEP

provided annual goals and short-term objectives to improve the student's self-confidence by clearly communicating her needs and feelings, developing coping skills in uncomfortable social situations, identifying triggers for anxious/angry feelings, learning relaxation strategies for when feeling anxious/angry, and constructively communicating feelings when angry or anxious (Dist. Ex. 3 at pp. 5-6). While the parent is correct that the IEP did not contain an annual goal specifically addressing the student's attention needs, two annual goals related to improving listening comprehension skills required the student to attend to auditory information to answer questions (*id.* at pp. 9-10, 22). Further, to address the student's self-regulating and attending issues, the IEP identified several management needs to assist the student including verbal and visual prompts, visual aids and modeling, repetition of directions and questions, and refocusing and redirecting to the task as needed (*id.* at p. 4).

The parent also contends on appeal that many of the goals and short-term objectives from the February 2012 IEP did not provide appropriate, measureable, and separable benchmarks upon which to measure the student's progress. The parent further argues that the IEP failed to provide baselines and levels of independence and support from which the student's progress should be measured. The hearing record does not support the parent's claims; a review of the February 2012 IEP shows that the annual goals all specify the evaluative criteria (e.g., 4 out of 5 trials, at all times, 90 percent), the evaluation procedures (e.g., observation, work samples, examinations), and the evaluation schedule (e.g., one time per quarter, every four weeks) for determining whether the goal had been achieved by the student (Dist. Ex. 3 at pp. 5-23).¹⁸ Many of the goals go further and identify the particular supports that the teacher or provider should utilize in order to help the student achieve the particular goal (e.g., using multisensory methodology and scaffolding, modeling, with fading teacher assistance) (*id.* at pp. 5-23). Further, all of the goals on the February 2012 IEP included short-term objectives, which provided measurable intermediate steps between the student's present level of performance and the measurable annual goal (*id.* at pp. 5-23). For example, an annual goal relating to solving multi-step math problems included the short-term objectives of defining key words indicating the salient vocabulary, and determining the formula or methodology to be used (*id.* at pp. 13-14).

The parent further contends that many of the annual goals and short-term objectives included in the February 2012 IEP were improperly copied from the student's prior IEP. A review of the February 2012 IEP reveals that it does, in fact, include a number of goals from the student's prior IEP from May 2011 (compare Dist. Ex. 3 at pp. 5-23, with Parent Ex. C at pp. 12-26). However, the district representative testified that if the goals were copied from the prior year IEP, the goals were probably not met (Tr. p. 99). A comparison of the IEPs substantiates the district representative's testimony. For example, a math goal of recognizing coins and making values was included on both the February 2012 IEP and May 2011 IEP (compare Dist. Ex. 3 at p. 14, with Parent Ex. C at p. 12). The February 2012 IEP's present levels of performance revealed that this goal remained relevant because the student's ability to name coins was inconsistent and she was not able to add the value of money (Dist. Ex. 3 at p. 2). Further, in electing to carry over this annual goal into the February 2012 IEP, the CSE increased the achievement criteria for this annual goal from 80 percent to 90 percent (compare Dist. Ex. 3 at p. 14, with Parent Ex. C at p. 12). In

¹⁸ A travel/paraprofessional goal, which involved ambulating safely when traveling and using bathroom, does not include an evaluation procedure (Dist. Ex. 3 at pp. 6-7).

other instances, goals were retained but altered to reflect the student's progress toward these goals (compare Dist. Ex. 3 at pp. 5-23, with Parent Ex. C at pp. 12-26). For example, the PT goal regarding balance was retained, yet the short-term objective's mastery level increased from completing the balance task with "one hand held" to completing the balance task "while engaged in a dynamic activity" (compare Dist. Ex. 3 at p. 19, with Parent Ex. C at p. 19). In another example, the ELA goal regarding sight/high frequency words was retained, yet the achievement criteria was increased from 80 percent to 90 percent (compare Dist. Ex. 3 at p. 9, with Parent Ex. C at p. 18). Therefore, although some goals were retained from the prior year's IEP, the hearing record reflects that the goals on the February 2012 IEP were designed to meet the student's needs presented in the present levels of performance and as identified in the assessments and reports considered by the February 2012 CSE.

Therefore, a review of the hearing record reveals that the February 2012 IEP's goals and management need strategies sufficiently addressed the needs of the student as presented in the present levels of performance in the IEP and identified in the evaluation reports, assessments and other information considered by the February 2012 CSE (Dist. Exs. 3; 5; 5a; 6; 7).

C. Assigned Public School Site

Finally, the district argues that the IHO erred by basing his decision solely on considerations related to the assigned public school. The parent contends that the IHO's findings in this respect were proper and, further, that the assigned public school site was inappropriate for the student and could not implement the February 2012 IEP. 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., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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"]).

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., 526 Fed. App'x 135, 141 [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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). 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]).¹⁹ When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the February 2012 IEP because a retrospective analysis of how the district would have implemented the student's February 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 instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the February 2012 IEP (see Parent Ex. B). 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. 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 a 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 in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony

¹⁹ While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y., 584 F.3d at 420 [the 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.

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., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the February 2012 IEP and the IHO's findings on this issue must be annulled.²⁰

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation; that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).²¹

VII. Conclusion

A review of the evidence in the hearing record reveals that the February 2012 IEP was reasonably calculated to enable the student to receive educational benefits; therefore, it is not necessary to reach the issue of whether Cooke was appropriate for the student or whether equitable

²⁰ While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

²¹ While I agree with the district's interpretation of the applicable law, the district's refusal to comply with the IHO's reasonable directive that the parties submit briefs at to this issue was inappropriate (Tr. pp. 286-301; see IHO Decision at pp. 6-8, 49). The district is cautioned that future refusals to abide by an IHO's reasonable requests may result in more severe remedial measures.

considerations support the parent's claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; D.D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's corrected decision dated June 13, 2014 is modified by reversing those portions which ordered the district to pay for the cost of the student's tuition at Cooke for the 2012-13 school year.

Dated: **Albany, New York**
 October 15, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER