The University of the State of New York

The State Education Department
State Review Officer
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No. 14-122

**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, Brian J. Reimels, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Richard A. Liese, 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 had developed an individualized education program (IEP) for the 2012-13 school year that was appropriate for the student but failed to establish that it could properly implement that IEP for respondents' (the parents') son, and ordered it to reimburse the parents for their son's tuition costs at the Cooke Center Academy (Cooke) for the 2012-13 school year. The parents cross-appeal from certain adverse determinations of the IHO. 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 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

The hearing record reflects that the student received a diagnosis of Down Syndrome at birth and received services through the early intervention program (EIP), after which he attended a preschool program in an integrated co-teaching (ICT) environment recommended by the

Committee on Preschool Special Education (CPSE) (Tr. pp. 193-195).[1] The student subsequently attended an ICT class in public school from kindergarten through the eighth grade (Tr. p. 195). In 2010 (ninth grade), the parents enrolled the student at Cooke, where he continued to attend through and including the 2012-13 school year, the year in dispute in this proceeding (Tr. pp. 224; Dist. Ex. 6 at p. 1).[2]

On February 2, 2012, the parents executed an enrollment contract for the student's attendance at Cooke for the 10-month 2012-13 school year (Parent Ex. N at pp. 1-2). On May 23, 2012, the parents signed an enrollment contract with Cooke for the student's attendance for summer 2012 (Parent Ex. M at pp. 1-2).

On April 17, 2012, a CSE convened to conduct the student's annual review and develop the student's IEP for the 2012-13 school year (Dist. Ex. 6). Finding the student eligible to receive special education and related services as a student with an intellectual disability, the CSE recommended a 12-month school year program in a 12:1+1 special class in a specialized school (id. at pp. 1, 12).[3] The April CSE also recommended the following related services: one 45-minute session per week of individual speech-language therapy, two 45-minute sessions per week of speech-language therapy in a group (5:1), one 45-minute session per week of individual occupational therapy (OT), one 45-minute session per week of OT in a group (5:1), one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a group (5:1) (id. at pp. 12-13). The April 2012 IEP also indicated that the student would participate in the New York State alternate assessment (id. at p. 15).

By final notice of recommendation (FNR) dated June 13, 2012, the district summarized the special education services recommended in the April 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 8). After receiving the FNR,[4] the parents visited the assigned public school site on June 20, 2012, and, in a letter dated June 29, 2012, rejected the assigned public school on the basis that it was not appropriate for the student for a number of reasons (Parent Ex. C at pp. 1-2). Accordingly, and while the parents indicated a willingness to visit "any appropriate school recommendation

[1] For clarity, this decision will refer to this placement on the continuum of services as a classroom providing integrated co-teaching (ICT) services (or an ICT class) even though the hearing record refers to the recommended placement as a "collaborative team teaching" (CTT) classroom (see Tr. p. 195; Parent Ex. C at p. 1). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an ICT class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a policy guidance document which provides more information about these services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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

[4] By letter dated June 15, 2012, the parents initially notified the district that they had not yet received the FNR for the student's placement and that, in the interim, they intended to unilaterally place the student at Cooke at public expense (Parent Ex. B at p. 1).

made by the [district]," the parents advised the district that they would maintain the student's attendance at Cooke for the 2012-13 school year and seek tuition reimbursement from the district (id.). Thereafter, by letter dated August 15, 2012, the parents advised the district that they had not received a response to their prior letter and reiterated that, based on the reasons set forth in their previous letter, the student would attend Cooke for the 2012-13 school year and they would seek public funding therefor (Parent Ex. D at p. 1).

**A. Due Process Complaint Notice**

In a due process complaint notice dated November 15, 2013, the parents requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A). Initially, the parents asserted that the April 2012 CSE was invalidly composed and none of the student's related service providers were invited to the April 2012 IEP meeting (id. at pp. 1, 3). Next, the parents asserted that the CSE failed to provide the parents with a meaningful opportunity to participate during the development of the student's April 2012 IEP (id. at p. 1). The parents also asserted that the CSE failed to evaluate the student in all areas of suspected disability and that the April 2012 CSE failed to consider sufficient current evaluative information to justify its recommendations (id.). More specifically, the parents asserted that the CSE failed to conduct or consider any current psychological testing, educational assessments, medical documentation, social history, or any of the assessments of the student related to his speech-language, OT, counseling, or vocational needs (id. at p. 2). Next, the parents contended that the CSE relied on "anecdotal estimates by Cooke staff" as well as assessments and progress reports that did not reflect the student's "functioning levels" (id.). The parents further contended that they were not provided with copies of the evaluative information reviewed by the April 2012 CSE prior to or during the CSE meeting (id. at p. 3).

Further, and with respect to the April 2012 IEP itself, the parents alleged that the IEP did not adequately reflect the student's present levels of performance or contain appropriate interventions and services to address the student's deficits (Parent Ex. A at p. 1). With respect to the annual goals, the parents argued that the April 2012 IEP did not include a sufficient number of goals, and the annual goals were inappropriate, not measurable, broad, vague, generic, and failed to include measurable benchmarks (id. at p. 3). The parents also argued that the IEP failed to include goals to address the student's issues with attention, focusing, and frustration (id.). Additionally, the parents contended that the April 2012 CSE failed to review the student's goals from the previous school year or take into account the student's progress when developing the annual goals for the April 2012 IEP (id.). The parents further argued that the CSE failed to involve the student's service providers or the parents in the development of the student's goals, which deprived them of their opportunity to participate (id.). Next, the parents asserted the recommended 12:1+1 special class placement was not appropriate because it was "too large to provide the level of individual attention" that the student required (id. at p. 4). The parents also contended that the CSE failed to take into account the student's "ability to progress academically with appropriate supports in a less restrictive environment than a District 75 program" (id. at p. 2). In addition, the parents asserted that the district failed to conduct a vocational assessment of the student (id. at p. 3), and contended that the transition plan included in the IEP was insufficient to address the student's needs, and was vague, generic, and failed to identify appropriate time-frames to achieve the student's postsecondary goals (id. at pp. 3-4). The parents further asserted that there was no transition plan to support the student's transition into the assigned public school site (id. at p. 4)

and that the assigned public school site itself was not appropriate, specifically alleging that: (1) it would not have been able to implement the student's April 2012 IEP; (2) the student would not have been functionally or socially grouped with similar peers; (3) it was too large, crowded, and noisy; (4) it did not have enough of an academic focus; and (5) the student needed more opportunity for community inclusion than was offered at the assigned school (id.).

Lastly, the parents alleged that the student's unilateral placement at Cooke was appropriate because the program addressed the student's needs and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 5). The parents also "reserve[d] the right" to raise additional issues that arose during the impartial hearing and referenced possible challenges to the qualifications of district personnel, the district's ability to maintain an appropriate student-to-staff ratio throughout the school day, and the district's ability to provide the related services mandated in the IEP (id.). As relief, the parents sought direct funding or reimbursement for the costs of the student's tuition at Cooke for the 2012-13 school year, as well as the costs of related services and transportation (id. at p. 6). The parents also requested the costs of the student's tuition pursuant to pendency to the extent applicable (id.).[5]

### B. Impartial Hearing Officer Decision

On March 11, 2014, an impartial hearing convened and, after six days of proceedings concluded on May 29, 2014 (Tr. pp. 1-361).[6] In a decision dated June 26, 2014, an IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year. Notably, the IHO found the April 2012 IEP was appropriate for the student because the April 2012 CSE "relied on the written and oral reports from the Private School, which were based on observations and assessments conducted by the Private School, who knew the Student best, when they developed the present levels of performance and goals and objectives on the IEP" (IHO Decision at p. 9). In addition, the IHO found that although it was undisputed that the district did not conduct a vocational assessment of the student, it did not rise to the level of a denial of a FAPE because a vocational assessment would have been conducted had the student attended the assigned public school site (id. at p. 10). However, the IHO found that the district failed to offer any information during the impartial hearing regarding the assigned classroom, the curriculum or whether the annual goals would have been implemented in the assigned classroom (id. at p. 9), and that as a result "the [d]istrict failed to meet its burden of proof with respect to demonstrating that the [s]tudent was offered a FAPE for the 2012-13 school year" (id. at p. 9). In addition, the IHO found that Cooke was an appropriate placement for the student and that equitable considerations favored the parents' request for relief. Accordingly, the IHO ordered the district to reimburse the parents for the entire cost of the annual tuition at Cooke (id. at p. 12).

## IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district did not offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in

[5] The hearing record contains no indication that the parents were entitled to public funding of their unilateral placement of the student pursuant to pendency (see Tr. pp. 9-10).

[6] The hearing record reflects that a prehearing conference was also held on February 11, 2014.

favor of the parents' requested relief.[7] In this regard the district argues that it had no burden to establish that it could implement the student's IEP as the student did not attend the assigned school, and that the parents did not cooperate with the April 2012 CSE nor did they consider sending the student to the assigned public school site. In addition, the district addressed a number of other issues, arguing for example that the April 2012 CSE was duly constituted, and that the April 2012 CSE had sufficient information to address the student's needs. In addition, the district asserts that the present levels of performance in the April 2012 IEP were aligned with the evaluative information available to the CSE, and that the annual goals in the IEP were appropriate and directly related to the student's needs. The district further alleges that the 12:1+1 special class placement recommended in the April 2012 IEP was appropriate for the student because the student required additional adult support given his attention issues. The district also alleges that a vocational assessment for the student was conducted, but even if a formal vocational assessment was not conducted, the CSE had evaluative information regarding the student's life skills and internship work. Moreover, the district contends that the transition plan was appropriate and that a transition plan was not required to assist the student in moving from one school to another.

In an answer the parents respond to the district's petition by admitting or denying the district's allegations and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. In addition, the parents also interpose a cross-appeal, asserting that the IHO erred in finding that the annual goals contained in the April 2012 IEP were sufficient to satisfy the IDEA, that the IEP was appropriate "to the extent it recommended an appropriate program for [the student],"[8] and that the failure to conduct a vocational assessment did not result in a denial of a FAPE.

In an answer to the parents' cross-appeal, the district argues that the April 2012 CSE recommended appropriate goals, that the district's recommendation of a 12:1+1 special class placement was appropriate given the student's management needs, and that the hearing record indicates that a vocational assessment was conducted but that even if a formal vocational assessment was not conducted, the April 2012 CSE had sufficient information to determine the student's need for vocation and transition services.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

[7] The district does not appeal the IHO's determination that Cooke was an appropriate unilateral placement for the student (Pet. ¶ 5 n.2).

[8] Specifically, the parents contend that the 12:1+1 program recommended for the student "did not provide the level of instructional support he required to make progress" (Answer at ¶ 82).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent.

Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## VI. Discussion

### A. Scope of Review

Initially, while the parents cross-appealed the IHO's determination that the April 2012 IEP was appropriate for the student, their cross-appeal is limited to the issues of annual goals, the appropriateness of a recommendation for a 12:1+1 special class, and the district's failure to conduct a vocational assessment. Although a prevailing party need not cross-appeal issues raised in its due process complaint notice and not addressed by an IHO (see, e.g., W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *15 [S.D.N.Y. Mar. 31, 2014]; J.M. v. New York City Dep't of Educ., 2013 WL 5951436, at *21-*22 [S.D.N.Y. Nov. 7, 2013]), when an IHO has reached an

adverse determination on an issue, the party must cross-appeal that determination or the issue is deemed waived (M.S., 2 F. Supp. 3d 311, ___, 2013 WL 7819319, at *11 [E.D.N.Y. 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*11 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]). Here, the IHO made findings that were adverse to the parents, including that the April 2012 IEP was appropriate for the student, and that the CSE relied upon sufficient information in formulating the IEP. Accordingly, and while the parents denied the district's affirmative allegations regarding certain matters related to these issues, they did not interpose cross-appeals on each issue decided against them. This includes issues related to the sufficiency of the data considered by the April 2012 CSE in formulating the April 2012 IEP, and certain claims relating to the April 2012 IEP itself, including claims regarding the present levels of performance contained in the IEP (which were explicitly referenced by the IHO), or the district's failure to develop a "transition plan or supports to assist [the student] to successfully transition to the recommended program and setting" (Parent Ex. A at pp. 2-4). As such, these issues are final and binding on the parties and need not be addressed.

**B. CSE Process**

**1. Parental Participation**

The parents asserted in their due process complaint notice that "upon information and belief" the April 2012 CSE failed to adequately involve the parents and a representative from Cooke in the development of the April 2012 IEP (including in the development of appropriate goals) and, thus, deprived them of a "meaningful opportunity to participate in the development of [the student's] IEP" (Parent Ex. A at p. 2). The parents further argued that the April 2012 CSE failed to provide them with copies of the evaluative information that was before the CSE (id. at pp. 2-3). These issues were not addressed by the IHO and the district, in its petition, essentially contends that the parents were provided with an appropriate opportunity to participate in the development of the April 2012 IEP. In their answer, the parents simply deny the district's contentions.

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] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district]

ultimately decides not to follow the parents' suggestions"]; see also T.Y., 584 F.3d at 420, [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In this case, the hearing record reflects meaningful and active parental participation in the development of the student's April 2012 IEP. With respect to the April 2012 CSE meeting, the parents and a Cooke representative attended the April 2012 CSE meeting in person and the student's English language arts (ELA) and history teacher from Cooke participated via telephone (Dist. Ex. 6 at p. 18; Parent Ex. T). Additional attendees included a district special education teacher, a district school psychologist, who also served as the district representative, and an additional parent member (id.). The district special education teacher testified that the student's mother participated during the CSE meeting (Tr. p. 46). Significantly, the student's father testified that during the April 2012 CSE meeting, there was a discussion regarding the student's goals, and he "agreed with what [the CSE] had to say" (Tr. p. 208; see also Tr. pp. 268-69).[9] Moreover, meeting notes, independently recorded by the Cooke representative, indicate that the "parents agreed to [the] goals" (Parent Ex. T at p. 3).[10] These meeting minutes also indicate that the parents provided information to the CSE regarding the student's interests as well as their concerns regarding the district's recommendation of a 12:1+1 special class placement (id. at pp. 3-4). Similarly, the April 2012 CSE minutes, prepared by the district special education teacher, also indicate that the parents participated during the April 2012 CSE meeting by expressing their concerns about the student's oral motor difficulties and articulation, his pragmatic language, and fine motor and balance skills (Tr. pp. 40-41; Dist. Ex. 7 at pp. 4-5). The meeting minutes also indicate that the parents provided the April 2012 CSE with information regarding the student's interests and with respect to the 12:1+1 special class placement, indicated that they thought that the "ratio is appropriate" (Dist. Ex. 7 at p. 6). Accordingly, the record demonstrates that the parents had an opportunity to participate in the creation of the student's April 2012 IEP (including in the development of goals) and that the student was not denied a FAPE in that regard.

Further, while the hearing record is ambiguous regarding whether or not the parents and Cooke staff had copies of all reports under consideration by the CSE, the hearing record reflects that both parties had knowledge of the student's deficits, understood all of the information under discussion, and had ample opportunity to ask questions and voice their concerns (Tr. pp. 53-54, 208, 228-29, 241, 268, 283; Dist. Exs. 6 at p. 2; 7 at pp. 1-6, Parent Ex. T at pp. 1-5). Additionally, the district special education teacher testified that she provided the parents with copies of the documents relied upon at the April 2012 CSE meeting and she would provide a copy of any

[9] Further, and with respect to the development of the April 2012 IEP goals, the district special education teacher testified that each goal was reviewed and discussed at the April 2012 CSE meeting, and no one indicated that any of the goals were inappropriate for the student, that any teacher at Cooke needed to be consulted firsthand, or that additional evaluative information was required (Tr. pp. 53, 64, 133-34). In addition, the hearing record demonstrates that the April 2012 CSE added two new goals with short term objectives into the IEP based on the input of the student's ELA and history teacher, who participated in the meeting by telephone for approximately 15-20 minutes (Tr. pp. 102-04, 131, 196, 225-26; Dist. Ex. 7 at p. 2). Moreover, according to the Cooke representative's testimony and meeting notes, it was the ELA and history teacher who suggested an 80 percent accuracy criteria measurement for both the new reading and writing goals (Tr. pp. 267-68; Dist. Ex. 6 at pp. 5-6; Parent Ex. T at p. 3). While the Cooke representative suggested that these new goals were too "generic," the head ELA teacher at Cooke testified that they were appropriate for the student (Tr. pp. 272-75, 289, 308-09).

[10] The student's father testified that he agreed with the goals that were set out for his son as much as he could "as a layman" (Tr. p 208).

document the parents wanted (Tr. pp. 50, 111). Moreover, none of the CSE members, including the parents, objected at the time of the meeting, requested copies of any evaluative information, or indicated that they needed additional time to review the information (Tr. pp. 1-361; Dist. Exs. 2-8; Parent Exs. A-T). Furthermore, the record indicates that Cooke, as a matter of practice, provided the parents with a copy of the March 2012 progress report either by mail or in a parent-teacher meeting (Tr. p. 264). This evaluative document, along with the supplemental verbal reports provided by Cooke at the meeting, constituted the bulk of updated information relied on by the April 2012 CSE to create the student's IEP (Tr. pp. 44-46, 53-54, 56, 228-29, 241). Therefore, and regardless of whether the CSE provided copies of all of the documentation before it to the parents and Cooke staff, the hearing record does not suggest that a failure to do so significantly impeded the parents' ability to participate in the development of the student's IEP or otherwise denied the student a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

**2. CSE Composition**

Another issue not addressed by the IHO relates to the composition of the April 2012 CSE. The parents, in their due process complaint notice, alleged that the April 2012 CSE was "improperly constituted" without clearly specifying how such was the case (Parent Ex. A at p. 1), though they did allege later in that document that the district failed to include the student's related service providers at the CSE meeting (id. at p. 3). The district, in its petition, contends that the April 2012 CSE was properly constituted (Pet. at ¶ 43), and the parents, once again, simply deny this allegation (Answer at ¶ 28).

As noted above, participants in the April 2012 CSE meeting included the parents, a district special education teacher, a district school psychologist who also served as the district representative, an additional parent member, the student's ELA and history teacher from Cooke, and the Cooke representative (Tr. pp 42-43, 196, 225-26; Dist. Ex. 6 at p. 18; Parent Ex. T). A review of the hearing record reflects that the April 2012 CSE consisted of all the legally mandated members as required by federal and State regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

Additionally, there is no requirement that related services providers be in attendance at a student's CSE meeting. Instead, the IDEA and State and federal regulations provide that in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][iii], [ix]; see 20 U.S.C § 1414[d][1][B][iii], [vi]; 34 CFR 300.321[a][3], [6]). In that regard I note that a district special education teacher participated throughout the meeting, and the student's ELA and history teacher at Cooke, as well as a Cooke representative, also participated at the meeting (Tr. pp. 45-46, 53-54, 196, 225-26, 228-29; Dist. Exs. 6 at p. 18; 7; Parent Ex. T). Additionally, the district representative testified that much of the information was presented at the meeting by the Cooke representative, including verbal updates from the student's related service providers, and as discussed above, the parents were not impeded from participating in the decision-making process (Tr. pp. 45-46, 53-54). The hearing record also contains no indication that the parents were precluded from obtaining the participation of the student's related services providers from Cooke in the April 2012 CSE meeting or, in fact, that they made any attempt to do so.

Based on the foregoing, I find that the April 2012 CSE was properly composed. Furthermore, I also find that there is no evidence in the hearing record that the lack of attendance of related service providers amounted to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415 [f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]).

**C. April 2012 IEP**

**1. Annual Goals and Short-Term Objectives**

On appeal the parents raise issues regarding the sufficiency of the annual goals contained in the April 2012 IEP. In this regard the parents contend that the annual goals and short-term objectives were too few, too broad, too vague, and too generic to meet the student's needs for the 2012-13 school year, and did not accurately reflect the student's attention and frustration needs.

State and federal regulations require that 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 CSE (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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

With regard to the measurability of the student's goals, as cited above State regulations require that each annual goal include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4[d][2][iii][b]). The State Education Department's Office of Special Education issued a guidance document in December 2010 which specifies that evaluative criteria refers to "how well and over what period of time a student must perform a behavior in order to consider it met" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 32, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). A student's performance can be measured in terms of frequency, duration, distance, or accuracy; and period of time can be measured in days, weeks, or occasions (id.). Evaluation procedures refers to the method that will be used to measure progress, such as structured observations, student self-monitoring, written tests, recordings, work samples, and behavior charting (id. at p. 33). Evaluation schedules refer to the date or intervals of time by which evaluation procedures will be used to measure the student's progress (id.).

As discussed more fully below, the annual goals together with the short-term objectives in the April 2012 IEP met the applicable standards as they were specifically designed to meet the student's needs that resulted from his disability, contained sufficient specificity to guide instruction and help the student make educational progress, and met the student's other educational needs resulting from his disability. In this case, the April 2012 IEP contained 17 annual goals, and

consistent with the CSE's determination that the student would participate in an alternate assessment, approximately 87 short-term objectives that targeted the student's identified academic, speech-language, social/emotional, motor, adaptive and vocational needs (Dist. Ex. 6 at pp. 3-12). Specific deficit areas addressed by the goals included writing, reading, math, fine and gross motor skills, visual motor/visual perceptual skills, receptive, expressive and pragmatic language, speech production, social skills including coping with frustration, activities of daily living (ADL), self and home care, travel, job awareness and work preparedness skills (id. at pp. 1-12). In addition, the April 2012 CSE developed postsecondary goals in the areas of education and training, employment, and independent living skills (id. at p. 3).

While the goals themselves lacked specificity, all contained short-term objectives related to the student's needs, by which the student's progress could be measured (Dist. Ex. 6 at pp. 3-12). Moreover, each goal included evaluative criteria (e.g., 70% accuracy), evaluation procedures (e.g., teacher observations, class activities, portfolios, teacher-made materials), and a schedule to be used to measure progress (e.g., one time per quarter) (Dist. Ex. 6 at pp. 3-12). Thus, a review of the April 2012 IEP demonstrates that, contrary to the parents' assertions, there was an adequate amount of annual goals, which when combined with their corresponding short-term objectives, contained "sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress" (Tarlowe, 2008 WL 2736027, at *9 [internal quotations omitted]; see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9-*10 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *10-*12 [E.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F., 2013 WL 4495676, at *17-*19; D.B., 966 F. Supp. 2d at 334-35; see also M.Z., 2013 WL 1314992, at *6; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *8 [S.D.N.Y. Sept. 22, 2011]; P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011], aff'd 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

With respect to the parents' contention that the annual goals did not meet the student's needs, a review of the hearing record reveals that the goals recommended by the April 2012 CSE were consistent with the student's demonstrated deficits (Dist. Ex. 6 at pp. 1-12). For example, the April 2012 IEP identified the student's academic instructional levels in reading and math at approximately second grade, and provided annual goals with corresponding short-term objectives to address his needs, including two goals for ELA and two goals for math (id. at pp. 1, 5-7, 16). The ELA goals targeted the student's need to improve his writing and reading comprehension skills (id. at pp. 5-7). The writing goal addressed the student's difficulties organizing his ideas, adding details, revising, and editing (id. at pp. 1-2, 5-6). The reading goal targeted the student's need to develop his ability to comprehend both independent and assigned texts using various reading strategies, to utilize context clues to determine the meaning of new vocabulary, and to expand his ability to recall text elements, answer questions about a text, and state the main idea (id.). Math goals addressed the student's difficulties solving context-related word problems and developing his problem-solving skills and strategies in real life applications such as measuring, exploring money, reading distances on a map, and telling time and temperature (id. at pp. 1, 6-7). To address the student's independent living needs, two goals were included to address job awareness and work preparedness skills, two goals aided the student in developing budgeting and banking know-how,

one goal furthered his travel training skills, and one goal focused on helping him safely manage self-care and home care tasks (id. at pp. 9-12).

In addition, with respect to the parents' argument (raised in their due process complaint notice) that the annuals goals did not address the student's attention, focusing and frustration, the April 2012 IEP includes a goal addressing the student's tendency to shut down when frustrated by difficult tasks, with short-term objectives to help the student identify when frustrations arise and apply appropriate coping strategies (Tr. pp. 66-67; Dist. Ex. 6 at pp. 8-9). Although the parents correctly assert that there is no goal specifically addressing the student's attention and focusing deficits, the management needs section of the IEP suggests the use of visuals, prompts, teacher cues, graphic organizers, charts, checklists, multisensory approach, and small group instruction, all strategies that can be used to redirect attention and keep the student on task (Dist. Ex. 6 at p. 2). Furthermore, 14 out of the 17 goals on the April 2012 IEP require "using a multisensory approach or scaffolding technique" for implementation, which would prove useful in capturing and maintaining the student's attention and address the student's need for a visual approach (see Tr. pp. 274-75; Dist. Ex. 6 at pp. 3-11). Moreover, the failure to address every one of a student's needs by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L., 2013 WL 625064, at *13), and it does not do so in this instance. Based on the foregoing, the evidence in the hearing record shows that the April 2012 IEP included sufficient annual goals in the student's deficit areas and does not indicate that the district denied the student a FAPE on this basis.

Turning to the development of the annual goals for the 2012-13 school year, the district representative stated that the April 2012 CSE based the student's annual goals and short-term objectives for the 2012-13 school year on the written information in the March 2012 progress report, as well as up to date verbal information provided by the Cooke representative at the meeting with the understanding that she had communicated with all of the student's teachers and service providers beforehand (Tr. pp. 45-46, 53-54, 56, 91-93, 133-34; see Tr. pp. 196, 228-29, 240-41; Dist. Exs. 5, 7). According to CSE meeting minutes prepared by the special education teacher during the meeting, the CSE discussed goals for the student in the areas of ELA, mathematics, speech-language, motor, and social/emotional skills (Tr. pp. 40-41; Dist. Ex. 7).

Although the parents argue that the April 2012 CSE did not consult with the student's related service providers during the development of the annual goals, the April 2012 IEP included goals to address the student's related service needs (Dist. Ex. 6 at pp. 1-5, 7-8). The student's speech-language deficits, for example, were addressed by two goals: one that aimed at improving the student's receptive, expressive and especially pragmatic language skills including his ability to engage appropriately in conversations with peers and develop non-verbal cues, his listening and reading comprehension, his ability to accurately answer "wh" questions, and his production of grammatically correct sentences, while the other goal addressed his speech production, intelligibility and oral motor skills (id.). In addition, the student's motor functioning was addressed by four OT goals (id. at pp. 2-5), two of which addressed the student's functional gross and fine motor skills, such as improving balance for daily activities like tying a shoe while standing, using non-dominant hand stabilization during activities such as cutting paper, writing, and holding a jar open, as well as improving the student's handgrip strength and fine pincer grasp (Dist. Ex. 6 at pp. 3-4; see Parent Ex. T at p. 2). Another OT goal targeted the student's visual motor/visual perceptual deficits, and a fourth OT goal addressed ADLs including safe meal preparation and use of kitchen utensils, shopping, and caring for personal items (Dist. Ex. 6 at pp. 4-5). Based on the foregoing,

the April 2012 CSE sufficiently addressed the student's related service needs and created appropriate individualized goals.

Turning to the parents' contention that the goals for the April 2012 IEP were simply copied from the March 2012 Cooke progress report without inquiry by the CSE regarding the appropriateness of continuing the goals and whether new goals needed to be developed for the 2012-13 school year, the hearing record shows that the goals and short-term objectives carried over from the March 2012 Cooke progress report remained appropriate for the student (compare Dist. Ex. 5, with District Ex. 6). In creating goals for the student's 2012-13 IEP, the district special education teacher testified that the CSE relied on Cooke to communicate if the student had met his benchmarks and was "moving on" to new goals, or if there were other goals he should be meeting (Tr. pp. 48-49; see Dist. Ex. 7). Further, the district special education teacher explained that the April CSE incorporated from the written progress report only the goals the student had not mastered based on the earned proficiency level assessed by his teachers using the numbers one through four, where a "four" meant that the student could demonstrate an independent understanding (Tr. pp. 57, 105-06; see Dist. Ex. 5). According to the district special education teacher, a goal was kept for the 2012-13 school year if the student still could not "do it independently" and that the CSE only focused on goals that were appropriate for the child at the time of the meeting, giving a snapshot of "where the child is and where he should be going" (Tr. pp. 106, 111).

Finally, the parents argue that in developing the student's goals for the 2012-13 school year, the April 2012 CSE only discussed goals that the student was working on "at the time of the [CSE] meeting" and not any "proposed goals" (Answer ¶ 45). For example, the parents argue that the goals the student was working on in March would not still be appropriate for the following school year. However, it must be noted that the IDEA does not require a CSE to wait until the end of the school year to develop an IEP or goals, but only that a CSE review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IEP must include a projected date for the beginning of services and modifications listed in the IEP (34 CFR 300.320[a][7]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]. In this respect, despite the fact that there were still a few months left for the child to make progress on his goals before the 2011-12 school year ended, there is no indication that the timing of the CSE meeting to conduct the student's annual review in the instant case resulted in a loss of educational opportunity for the student (see Tr. pp. 1-360; Dist. Exs. 1-8; Parent Exs. A-T).[11] I also note that the hearing record does not reflect that the parents objected to the timing of the April 2012 CSE meeting, requested to meet later in the school year to update the student's performance levels or to otherwise update the student's IEP or the annual goals, or that the district thereafter denied a request by the parents for another CSE meeting.

[11] In fact, a comparison of the goals and short-term objectives set out in the April 2012 IEP with the goals in the subsequent Cooke November 2012 and March 2013 progress reports demonstrates that the student continued to work on similar goals into the following school year including writing, reading and reading comprehension, mathematical problem solving and strategic use of tools, pragmatic conversation skills, gross motor, fine motor, and visual motor skills, safety and ADL skills, as well as work preparedness and travel training (compare Dist. Ex. 6 at pp. 3-12, with Parent Exs. I at pp. 2-7,16, 19, 21; J at p. 16).

In light of the above, I find that the annual goals in the April 2012 IEP, together with their corresponding short-term objectives, contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision. Further, as set forth above, the district special education teacher provided a reasonable explanation as to why the CSE carried over many of the annual goals and short-term objectives from Cooke's most recent progress report (Tr. pp. 57-59, 105-10, 131-34, 196, 253-54, 267-68; Dist. Ex. 7 at p. 2; Parent Ex. T at pp. 1, 3). I therefore find that there is no evidence in the hearing record to suggest that the annual goals contained in the April 2012 IEP were so generic, vague, or inappropriate in either substance or development as to constitute the denial of a FAPE to the student (N.S., 2014 WL 2722967, at *9; B.K., 2014 WL 1330891, at *12; J.L., 2013 WL 625064, at *13).

**2. 12:1+1 Special Class Placement**

The parents assert that a 12:1+1 special class placement was not appropriate for the student because the student required a higher level of individual attention and support within the classroom.[12] A review of the hearing record does not support the parents' contentions.

State Regulations provide that a 12:1+1 special class placement is appropriate for students "whose management needs interfere with the instructional process to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

With respect to the student's management needs, the student's present levels of performance—which the IHO indicated were sufficient and which are not challenged by the parents on appeal—demonstrated that the student had a significant number of learning and functional deficits that required various additional supports. For example, the student demonstrated significant delays in cognitive functioning and academic performance, expressive, receptive and pragmatic language, speech processing and articulation (apraxia), as well as deficits in gross motor, fine motor, visual-motor, and ADL skills (Tr. pp. 193-94, 292-94; Dist. Exs. 5 at pp. 2-7, 15-17; 6 at pp. 1-2; 7 at pp. 1-6; Parent Ex. T at pp. 1-2). The student also demonstrated difficulties with attention and focusing, as well as with his ability to cope with frustrating tasks, though this was reported to be improving (Tr. pp. 277-78, 292; Dist. Exs. 4 at pp. 12-13; 5 at pp. 6, 12; 6 at p. 2; 7 at pp. 2, 5; Parent Ex. T at pp. 1-2). The hearing record reflects that the April 2012 IEP identified many supports to address the student's management needs including visuals

[12] As noted above, the parents, in their due process complaint notice, also appeared to challenge the sufficiency of the program offered to the student on the basis that the April 2012 CSE "did not take into account [the student's] ability to progress academically with appropriate supports in a less restrictive environment than a District 75 program" (Parent Ex. A at p. 3). Although an initial reading of the parents' claim suggests an allegation that the student may not have been placed in an appropriate mainstream environment, this does not appear to be the case. Rather, the hearing record indicates that when referring to a "restrictive environment," the parents intended to challenge the academic and vocational program at the assigned public school site. To this extent I note that the student's father testified that during the April 2012 CSE meeting, he suggested to the CSE that they not recommend a "restrictive environment" but one that would give the student "academics and vocation" (see Tr. pp. 199, 213, 339). In any event, it is clear from the parent's cross-appeal that the basis of their challenge to the program offered to the student is that it "did not provide the level of instructional support he required to make progress" (Answer at ¶ 82).

and prompts to keep the student on task, directions presented in clear language and reread to address his language needs, small group instruction for new concepts, direct instructional modeling to reinforce new concepts, and repetition of instruction using multiple modalities to help the student learn at his own pace (Dist. Ex. 6 at p. 2; see Tr. pp. 300, 302-03, 314-16). Graphic organizers, charts, and checklists were also recommended to help the student organize his thinking and plan his writing (Dist. Ex. 6 at p. 2; see Tr. pp. 302-03; Dist. Exs. 5 at pp. 2-3, 6; 7 at p. 2). These management needs, as well as the extent to which they interfered with the instructional process, indicate that it was appropriate for the April 2012 CSE to recommend placement in a 12:1+1 special class.

Furthermore, in conjunction with the supports provided within the 12:1+1 special class, the April 2012 CSE recommended that the student receive one 45-minute session per week of individual speech-language therapy, two 45-minute sessions per week of speech-language therapy in a group of five, one 45-minute session per week of individual OT, one 45-minute session per week of OT in a group of five, one 45-minute session per week of individual counseling services, and one 45-minute session per week of counseling in a group of five (Dist. Exs. 6 at pp. 12-13; 7 at p. 6; Parent Ex. T at p. 4).

In her testimony and meeting minutes, the Cooke representative indicated that the student needed a smaller, more structured setting such as a ratio of 6:1, but a review of the hearing record reveals that all of the student's academic classes at Cooke utilized a 12 students to two adults ratio, except for his math class which consisted of seven students and two adults (Tr. pp. 236-37; Dist. Exs. 6 at p. 1; 7 at pp. 1-2, 6; Parent Ex. T at pp. 1, 4). Furthermore, the assistant head of school at Cooke, who saw the student every day, indicated that 12 students was an appropriate number of students for him to be grouped with, but that he also required small group instruction in that setting to learn new material, plus opportunities for guided practice with the teacher (Tr. pp. 146, 155-56, 173-74).[13] The student's ELA and history teacher likewise indicated that a 12:1+1 special class setting was appropriate for the student, enabling him "to receive that individual support in a small group instruction" while utilizing a multisensory approach (Tr. p. 307). Although the student's math class contained only seven students, his math teacher testified to using a similar instructional format, specifically that the student received 1:1 assistance during whole group instruction and was then placed in a small group to reinforce what had been learned with the whole class (Tr. pp. 316-17, 322, 327).[14] Furthermore, the hearing record indicates that the student was making progress within his 12:1+1 classes and was consistently described as an eager, motivated, and responsible student who enjoyed learning, came to class prepared, was organized with his materials, responded to routines and expectations, worked well in small groups, knew when he needed support, easily took the advice of peers and teachers, and was a thoughtful learner (Tr. pp. 151-52, 206-07, 302; Dist. Exs. 5 at pp. 3-17; 6 at pp. 1-2). Finally, both sets of minutes reflect that the parents agreed with the recommended 12:1+1 ratio at the time of the April 2012 CSE

[13] As noted above, the April 2012 IEP explicitly provided for "small group instruction for new concepts and skills, direct instructional modeling to reinforce key concepts, [and] repetition of instruction using multiple modalities" (Dist. Ex. 6 at p. 2).

[14] I also note that the student was in a math class of nine students for the 2012-13 school year and appeared to benefit from the same level of adult support (Tr. pp. 316-17).

meeting, and the student's father testified to understanding that it was a 12-month program in a specialized school (Tr. p. 198; Dist. Ex. 7 at p. 6; Parent Ex. T at p. 4).[15]

I do, however, note that the student's father testified that he thought that a 12:1:+1 class was "okay" as long as the student had twelve students and two teachers in the classroom (Tr. p. 208). I also note that the Cooke representative indicated an objection to a 12:1+1 special class because the extra adult in the classroom was not an assistant teacher as it would be at Cooke (Tr. pp. 236-37). However, as previously mentioned, in a 12:1+1 special class the role of the "additional adult" within the classroom is "to assist in the instruction" of students (8 NYCRR 200.6[h][4][i]). Furthermore, in a 12:1+1 special class, State regulations allow for one or more "supplementary school personnel" to be in the classroom with a teacher, which includes both teacher aides and teaching assistants, both of which can provide instructional support, though the former cannot provide direct instruction to students (see 8 NYCRR 80-5.6[a], [b]), 200.1[hh], 200.6[h][4][i]).[16] Accordingly, I am unable to find that a 12:1+1 special class in a district school would be inappropriate for the student on this basis, since the additional adult in the classroom, whether a teacher aide or teaching assistant, would have enabled the student to receive small group instruction and instructional support.

Based on the foregoing, I find that the April 2012 CSE's recommendation of a 12:1+1 special class placement in a specialized school, together with related services of speech-language therapy, OT and counseling, was tailored to address the student's individual special education needs, would have provided him with adequate instructional support, and was thus reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

**3. Vocational Assessment**

The parents assert that the district failed to conduct any "functional vocational evaluations or assessments" of the student's adaptive living skills to use in determining appropriate vocational and transition services. In addition, and as noted above, the parents cross-appeal the IHO's finding that the failure to conduct a vocational assessment did not result in a denial of FAPE. While I agree with the parent that the IHO relied on impermissible retrospective evidence to support his decision,[17] the hearing record indicates that the April 2012 CSE had obtained sufficient information about the student's adaptive living skill needs and vocational interests, such that the lack of a formal vocational assessment in this instance does not compromise the appropriateness

[15] The Cooke representative further testified that the parents were not necessarily arguing about "the size of the class, as such, in terms of ratio," but about the particular District 75 school program (Tr. p. 284).

[16] Part 200 of the Regulations of the Commissioner of Education was amended to replace the term "paraprofessional" with the term "supplementary school personnel" to align the terminology used in State regulations with the federal No Child Left Behind Act ("'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf).

[17] The IHO held that the district's failure to conduct a vocational assessment did not result in the denial of a FAPE because "the evidence shows that the [assigned public school site] would have conducted the assessment in the beginning of the school year had the student actually attended the school" (IHO Decision at p. 10). However, the Second Circuit has been clear that IEPs must be evaluated prospectively and that reliance on retrospective evidence that materially alters an IEP is not permissible (see, e.g., R.E., 694 F.3d at 185-88).

of the student's transition plan or result in a denial of a FAPE (Dist. Ex. 6 at p. 14; see Dist. Ex. 7 at p. 6; Parent Ex. T at p. 3).[18]

For example, the March 2012 Cooke progress report indicated that related to travel training skills, the student had a "good sense of his surroundings" and that he kept himself at appropriate distances needed for safe traveling (Dist. Ex. 5 at p. 9). In addition, the report indicated that the student exhibited "a great deal" of independence identifying peers he would like to spend leisure time with and in making plans (id.). According to the progress report, the student was capable of pursuing leisure activities with friends with minimal support (id.). The report also indicated that the student identified classroom support strategies he found helpful and was beginning to explore how those strategies might be useful beyond the classroom setting (id.). Regarding the student's ADL skills, the progress report indicated that the student was "working at a beginning level" on activities such as planning and preparing snacks and meals in a safe manner, following a simple recipe, using a safe/functional grasp on kitchen utensils and food packaging, and making simple purchases from the supermarket (id. at p. 17). With models or prompts, the student demonstrated personal responsibility for wearing adaptive devices (id.).[19]

In addition, the hearing record indicates that at the time of the April 2012 CSE meeting the parents opined that the student may be interested in working in an office setting where items were checked in and out electronically, on the police force, or otherwise as part of a group or team (Dist. Ex. 7 at p. 6).[20] Also at the CSE meeting, the Cooke representative discussed that the student interned in the visual arts department checking audiovisual equipment in and out, that he was "a social kid," and that he was "exploring job areas" including the police department (Parent Ex. T at p. 3). The March 2012 Cooke progress report indicated that the student had shown an increased interest in his internship at a nursing home, where his job duties included socializing with the residents and preparing for social activities (Dist. Ex. 5 at p. 11).

In conclusion, to the extent that the CSE failed to conduct a vocational assessment of the student, it otherwise obtained sufficient information about the student's adaptive living skills and interests, such that it did not rise to the level of a denial of a FAPE. Furthermore, as discussed below the coordinated set of transition activities included in the April 2012 IEP was based on current information provided by the parents and the student's teachers, and provided sufficient details regarding the student's postsecondary goals and transition services (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570 at *11 [S.D.N.Y. Mar. 19, 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]).

[18] While the district argues that a vocational assessment was conducted, the district special education teacher testified that the Cooke representative provided the CSE with information regarding the student's "interests" during the CSE meeting (Tr. pp. 72-73). However, the Cooke representative testified that Cooke works with the student in creating an "interest profile that's not a vocational assessment" (Tr. pp. 234-35). Accordingly, I cannot find that the district conducted a vocational assessment.

[19] As previously discussed, the April 2012 IEP contained annual goals and short-term objectives related to adaptive skills such as budgeting, banking, personal management within the home, and travel skills (Dist. Ex. 6 at pp. 10-12).

[20] The district CSE meeting minutes also reflect the parents' opinion that the student had "no idea of what he wants" (Dist. Ex. 7 at p. 6).

**4. Transition Plan**

The parents in their answer suggest that the transition plan in the April 2012 IEP was insufficient (Answer at ¶¶ 52, 77-81),[21] and alleged in their due process complaint notice that the transition plan in the April 2012 IEP was vague and generic, based on inadequate and insufficient information regarding the student, was insufficient to address the student's need for successful transition to post-secondary education and independent living, and failed to identify the time frame for both "high school completion" and when he would achieve the stated goals (Parent Ex. A at pp. 3-4).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

IEPs must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),[22] as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

The April 2012 IEP contained post-secondary goals for the student, including that within two years of graduating from high school he would complete a course in an area of interest, gain experience in a part time job related to the audiovisual equipment checkout at a local library, and access relevant services from the Developmental Disabilities Program and maintain contact with his case worker (Dist. Ex. 6 at p. 3). As previously discussed, the IEP also included annual goals and short-term objectives related to the student improving his awareness of job areas and making choices in his work life, such as identifying key work activities, personal skills, likes and dislikes, and job-related skills, abilities and needs (id. at p. 9). The IEP also contained an annual goal and short-term objectives related to the student's ability to learn and practice personal work

[21] The basis of this assertion appears to be that the April 2012 CSE lacked sufficient information about the student's vocational and/or post-secondary needs. However, and for the reasons discussed above, I do not agree.

[22] These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

preparedness skills, such as exhibiting appropriate attire and personal grooming, timeliness, and conversational skills in a work environment; identifying behaviors and attitudes affecting job retention, and moments when he needs assistance; and accepting constructive criticism and altering his work performance accordingly (id. at pp. 9-10).

In addition, the April 2012 IEP transition plan identified the needed activities to facilitate the student's movement from school to post-school activities (Dist. Ex. 6 at p. 14). In the area of instruction, the IEP indicated that the student would participate in work study, and receive instruction in life skills activities in the school and community, travel readiness, budgeting, and money management (id.). Related services identified in the IEP included counseling to provide opportunities for the student to participate in small group activities to develop awareness of common job areas and related work activities and skills, and self-awareness as related to work-study life (id.). Speech-language therapy provided the student with participation in small group activities to develop and practice social interactions with unfamiliar adults, and the use of social scripts or role play to communicate with key members of the community (id.). The IEP provided OT services to allow the student to practice household routines and procedures, provide instruction in adaptive living skills and how to work safely in a household setting, conduct task analysis of various household routines associated with home, community, and work skills, and offer partnerships with parents to further emphasize specific adaptive skills related to clinical goals (id.). Community experiences provided for in the IEP included practicing handling money and budgeting in a community setting, bank processes, personal finance skills, and participation in travel-related instruction (id.). In the area of developing employment and other post-secondary adult living objectives, the IEP provided the student with opportunities for participation in small group vocational activities, and work study to develop on-the-job work skills (id.). Regarding the acquisition of ADL skills, the IEP provided an ADL program to practice self-care routines, household routines and use of utilities, and participation in money handling and budgeting activities within the community (id.).

Contrary to the parents' assertion that the April 2012 transition plan was vague and insufficient, a review of the hearing record as detailed above shows that the annual and post-secondary goals contained in the April 2012 IEP, in conjunction with the transition plan, appropriately addressed the student's specific adaptive living and vocational needs (compare Dist. Ex. 6 at pp. 3, 5, 9-12, with Dist. Ex. 5 at pp. 9, 14, 17).

**D. Assigned Public School Site**

Finally, the parents set forth a number of assertions in their due process complaint notice related not to the substance of the April 2012 IEP itself, but rather to the actual school and/or building that the student had been assigned to in the 2012-13 school year. As noted above, it was based on these assertions, and none having to do with the substance of the April 2012 IEP, that the IHO found that the district failed to offer the student a FAPE. Specifically, the IHO found that because there was no testimony regarding the class that the student would have attended, no testimony regarding the curriculum or "any information" as to whether the student's goals and objectives could be implemented in the proposed class, and no evidence presented regarding the "abilities" of the other students in the proposed class, that the district "failed to meet its burden of proof with respect to demonstrating that the [s]tudent was offered a FAPE for the 2012-2013 school year" (IHO Decision at p. 9). On appeal, the district contends that it was not required to put forth such evidence.

As a general matter, while the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]); see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 887-89 [D. Ariz. Mar. 21, 2013]). 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). A denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). Challenges to an assigned public school site are usually relevant to whether the district properly implemented a student's IEP, which is generally speculative when a student has never attended a recommended placement.

Along these lines, the Second Circuit Court of Appeals has held that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must generally be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at *6).[23] Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at *6, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

[23] It is important to note that the Second Circuit recently issued a decision in which the court acknowledges that certain assigned school claims may "challenge the substantive adequacy" of the student's IEP (Reyes v. New York City Dep't of Educ., 60 F.3d 211, 219 [2d Cir. 2014]).

In light of the above, two general principals are clear: (1) that the sufficiency of a special education program offered to a student must generally be based on the IEP which is offered to the student, and that (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. Accordingly, I am unable to find, as the IHO did, that the lack of evidence regarding a proposed school or classroom, alone, is sufficient to support a finding of a denial of FAPE, for to do so would both require that I (a) look past the April 2012 IEP in assessing the sufficiency of the program offered to the student, and (b) speculate—due to a lack of evidence—that the district would not adequately adhere to the April 2012 IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

Likewise, I am unable to find, as the parents assert, that a district is required to prove that a school to which a student is assigned is "capable of appropriately implementing the student's IEP" since, again, this would require looking past the April 2012 IEP itself and speculating, absent any evidence to the contrary, that the district would not adequately adhere to the IEP. In this regard, while I realize that 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 (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.K., 2014 WL 1330891, at *20-*22; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O., 2014 WL 1257924, at *2; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B., 2013 WL 5438605, at *17; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; 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., 2014 WL 2722967, at *12-*14 ["Absent 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]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; 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]).

Further, the parents cite to R.E. (694 F.3d at 191-92) and T.Y. (584 F.3d at 220), which respectively indicate that districts must assign students to schools that can implement their IEP and that districts do not have "carte blanche" to assign students to schools that cannot satisfy their IEP requirements, to suggest that districts are required to prove that an IEP can be implemented in order to show that a FAPE has been provided. However, neither case explicitly holds as much, and such an interpretation of these statements would be inconsistent with the Court's other holdings (including those made in R.E.) which require the appropriateness of a special education program be based on the sufficiency of the IEP itself, and which bar unilateral placements based solely on speculation that a district will not adequately adhere to an IEP. This is especially true since the

Court has expressly held that, with respect to the latter, "the appropriate forum for such [claims] 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, 195 [emphasis added]). Accordingly, I am unable to find that the above-described statements mean what the parents suggest. Rather, and when read together with the totality of the Second Circuit's statements on "assigned school" issues, these statements are more reasonably read as simply acknowledging that districts must implement the IEPs that they create, while the Court's other holdings provide that to the extent that they do not, they may be held liable in a "later proceeding" in which a district's alleged failure to implement that IEP may be a basis for finding that a student was denied a FAPE.

Finally, the parents suggest that the Second Circuit's recent decision in Reyes v. New York City Dep't of Educ. (760 F.3d 211 [2d Cir. 2014]) requires a different result. In Reyes, the Court noted that the plaintiff raised several claims, including a claim that the school that the student was assigned to was incapable of addressing the student's sensory needs, which constituted a challenge to the "substantive adequacy" of the student's IEP (id. at 219). Accordingly, and consistent with prior Second Circuit precedent, Reyes appears to focus the relevant inquiry in matters such as this to the "substantive adequacy" of a student's IEP. Further, the fact that Reyes may have treated the allegation that the assigned school could not address the student's sensory needs as a challenge to the "substantive adequacy" of the IEP does not, by itself, suggest that the Court "was willing to consider placement testimony" as the parents assert. Rather, and though not explained by the Court, this finding may suggest that claims related to a student's needs—irrespective of how they are pled—relate to a student's IEP in that, to the extent that such needs exist, an IEP would be required to address them. In fact, this would be consistent with previous Second Circuit holdings which have found that to the extent that students need specific program elements or supports in order to receive an educational benefit, these must be explicitly provided for on an IEP (see, e.g., R.E., 694 F.3d at 194 [suggesting that where evidence suggests that a particular methodology is required for a student, the IEP should provide for such]). Accordingly, I decline to find that Reyes imposes an obligation on districts to prove that an otherwise adequate IEP would have been properly implemented where, as here, the district was not given an opportunity to implement it.

Notwithstanding the above, I recognize that there are district court cases suggesting that a parent may rely on evidence outside of the written plan which is known to the parent at the time the decision to unilaterally place a student is made (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R., 910 F.Supp.2d at 677-79). While the Second Circuit recently left open the question as to whether one such case (B.R.) "properly construes R.E." (see F.L., 553 Fed. App'x at 6), the Court has not explicitly addressed this issue. Accordingly, I will address each of parent's allegations related to the district's recommended school in light of what they may have known.

**1. Functional Grouping**

To the extent that the parents allege in their due process complaint notice that the recommended public school site would not have provided the student with a suitable peer group because the cognitive level of the students in the assigned school were below the student's level, I find that this claim does not provide a basis for the student's unilateral placement. Again, the Second Circuit has made clear that, where a parent chooses not to place a student at an assigned public school site prior to the time the district is required to implement the IEP, the sufficiency of

the district's offered program must be determined on the basis of the IEP itself, and mere speculation that an IEP would not have been properly implemented is not an appropriate basis for unilateral placement (F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E. 694 F.3d at 195). To that extent, I initially note that "functional grouping" does not directly relate to a student's IEP, and is rather a requirement imposed upon school districts by State regulations (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). Furthermore, and to the extent that this issue is related to the implementation of a student's IEP, since there is no indication in the hearing record regarding how the student would have been grouped at the assigned school, and further since the student never enrolled at the district's recommended school, the parents' claim that the student would not have been appropriately grouped is entirely speculative, especially since the grouping of students in classrooms is something which may change over time (see, e.g., M.S., 2013 WL 7819319, at *16 n.10; Application of the Dep't of Educ., Appeal No. 13-220),[24] I, therefore, cannot find that the parents' "grouping" claim is sufficient to support the parents' unilateral placement of the student in this matter (see, e.g., M.S., 2 F. Supp. 3d at ___, 2013 WL 7819319, at *16 n.10; R.B., 2013 WL 5438605, at *17; N.K., 961 F.Supp.2d at 588-89; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. 2013]).

**2. Size of Assigned Public School Site**

With respect to the parents' claims that the assigned public school site would have been too large, crowded, confusing and noisy, the hearing record indicates that the child wanted to interact with peers and adults, "was very friendly and open," enjoyed large group activities such as team sports, and was able to adjust to routines and expectations (Tr. p. 194; Dist. Exs. 6 at p. 2; 7 at pp. 1, 6). Furthermore, in a letter to the district dated June 29, 2012, the parents indicated that the assigned school was not appropriate precisely because the student was able to independently move through his then-current private school and follow a schedule, whereas he would receive an unnecessary amount of supervision in the district-chosen school (Tr. p. 211; Parent Ex. C at p. 2). Furthermore, the student's father testified that the student was ready for the challenge of navigating a larger and more demanding environment and stated that this issue, as raised in the due process complaint, "was not necessarily important" for the student (Tr. pp. 211-12; see Parent Ex. C at p. 2). Accordingly, this claim is speculative in that the student did not attend the assigned school and there is no evidence in the hearing record to support a finding that the student would have reacted adversely to the size of the school and, thereby, been precluded from receiving educational benefits (see, e.g., N.K., 961 F. Supp. 2d at 591-92).

**3. Academic and Vocational Program**

In addition, the parents argue that the student required a balanced academic and vocational program, and that academics in the assigned school would be geared toward work activity as opposed to a general academic curriculum (Tr. pp. 159-160, 199, 210, 237; Parent Ex. C at p. 2). However, there are a significant number of academic goals and short term objectives in the 2012 IEP that would necessitate academic instruction in areas such as reading comprehension, vocabulary development, writing, mathematical problem solving in real life contexts using unit tools of measurement, as well as budgeting and banking (Dist. Ex. 6 at pp. 5-11). To accomplish

[24] To this extent, I note that, according to the program coordinator for the assigned school, when the student's father visited on June 20, 2012 he was seeing classrooms from the current school year and not the students or groupings that would necessarily exist for the following academic year when the student would attend (Tr. pp. 25-26; Parent Ex. C at pp. 1-2).

these and other goals, the IEP required the assigned school to provide an instructional frequency of 35 periods per week or 7 periods per day, and there is nothing in the hearing record to indicate that the assigned school would not have been able to meet those conditions (id. at p. 12). Accordingly, I find that this argument is impermissibly speculative and cannot support an award of tuition reimbursement. Furthermore, I note that the program coordinator at the assigned school site and the district special education teacher each testified that the program would have provided the student with both vocational programming and an opportunity to work on academic skills (Tr. pp. 26, 81-82). Accordingly, I find that this argument also lacks merit.

**4. Opportunities for Community Inclusion**

Finally, the parents contend that the student required more opportunities for community inclusion than was offered by the assigned school so that he might model his behavior against generally accepted social norms and learn independent living skills. In this respect, the April 2012 IEP specifically provides for educational opportunities within the broader community by including student goals and transition activities such as practicing money handling, budgeting, and banking in a community setting, participating in travel-related instruction, and learning how to communicate appropriately with supervisors and co-workers (Dist. Ex. 6 at pp. 9-12, 14). Accordingly, as there is no evidence in the hearing record that indicates that the assigned school would not have been able to implement the aforementioned opportunities for community inclusion as indicated in the April 2012 IEP, and further since I am unable to find that such opportunities were inappropriate for the student, this assertion is speculative and unable to support an award of tuition reimbursement.[25]

## VII. Conclusion

Having determined that the IHO erred in determining that the district denied the student a FAPE for the 2012-13 school year, it is not necessary for me to consider whether equitable considerations support the parent's claim for tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated June 26, 2014 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2012-13 school year and awarded the parents reimbursement for the costs of the student's tuition at Cooke.

**Dated:** **Albany, New York**
**October 9, 2014**

**HOWARD BEYER**
**STATE REVIEW OFFICER**

[25] Moreover, even if the community inclusion opportunities in the IEP were inappropriate in some respect, there is no basis on this record to find that this alone would have rendered the entire IEP so deficient so as to deny the student an educational benefit.