



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-105

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the
XXXXXXXXXXXXXXXXXXXXXXXXXX**

Appearances:

Law Offices of Neal Howard Rosenberg, attorneys for petitioner, Alexandra Hindes, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Churchill School (Churchill) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

With regard to the student's educational skills, the student demonstrated difficulties with academics, processing speed, working memory skills, fine motor skills, attention, and impulsivity (Tr. pp. 39-42, 48-53, 55-57, 59-60, 233, 298; Dist. Exs. 6-11). The hearing record further reflects that at the time of the impartial hearing, the student was functioning in the low average to average range academically; his strengths included his abilities to verbally express the meanings of words and to understand conventional social rules, while short-term recall of

numbers, feelings of vulnerability to perceived external stressors, and some resultant underlying anger and anxiety were identified as his primary deficits (see Tr. pp. 55, 64-70, 232-33, 289, 298; Dist. Exs. 7; 8 at p. 5). According to the parent, although her son had received special education services for four years, he had never attended a public school (Tr. pp. 298-300, 328). At the time of the impartial hearing, the student was enrolled in a 10-month special education program, including a 12:2 special class and related services consisting of occupational therapy (OT) and group counseling at Churchill, an ungraded school for students with language based learning difficulties who typically have received classifications of a learning disability or a speech or language impairment, and he had been enrolled at the school since the 2010-11 school year (Tr. pp. 42, 231-35, 259-61, 263-64, 280-82, 298-300). Churchill is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (Tr. p. 232; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not at issue in this proceeding (Tr. p. 39; Dist. Ex. 3 at p. 1; 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

On March 18, 2011, the parent signed an enrollment contract with Churchill and remitted a nonrefundable deposit of \$5,000 reserving the student's seat in the school for the 2011-12 school year (Tr. pp. 319-22; Parent Ex. F). According to the hearing record, the parent remitted a second payment of \$13,000 toward the student's 2011-12 tuition at Churchill on an unspecified date prior to May 2, 2011 (Tr. pp. 322-23; see Parent Ex. F at p. 1).

On May 3, 2011, the CSE convened for the student's annual review to develop his educational program for the 2011-12 school year (Dist. Exs. 3; 14). The May 2011 CSE found the student eligible for special education as a student with a learning disability and recommended, among other things, a 10-month special education program including a 12:1 special class in a community school and related services consisting of OT, once per week for 30 minutes per session in a group of 6, and counseling services, once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group of 6 (Dist. Exs. 3 at pp. 1-2, 6, 17-19; 14 at p. 1).

In a July 19, 2011 final notice of recommendation (FNR) sent to the parent, the district summarized the May 2011 CSE's recommendations and notified the parent of the particular school to which the student was assigned (assigned school 1) for the 2011-12 school year (Dist. Ex. 4).

By letter to the district dated August 5, 2011, the parent requested additional information regarding assigned school 1 and indicated that she had been unsuccessful in her efforts to schedule a visit to the school (Tr. pp. 309-12; Parent Ex. C at p. 1). She further "express[ed her] strong concerns with the [May 2011] IEP and the way [in] which the [May 2011] IEP meeting was [run]," disagreed with the district's 12:1 special class recommendation, contended that the student required a classroom with more adult support, and expressed concern with the district's functional grouping of the student in the proposed 12:1 special class and the "large community school activities he would be a part of" (Parent Ex. C at p. 1). She maintained that the May 2011 CSE "took much of the pages and information created by [the student's] teachers at Churchill, but then failed to follow their final recommendations for placement in a special education

school," that the CSE "incorporated Churchill's goals which were written to be utilized in a special education setting with two teachers ... without [providing] the support he needs to reach them," and that the CSE "did not appropriately consider the opinions and information as presented by myself and those working with [the student]," as allegedly demonstrated by the CSE's failure to consider maintaining the student's placement at Churchill for the 2011-12 school year (id.). The parent also asserted that because the recommended program had previously been determined inappropriate for the student by an IHO for the 2010-11 school year (see Parent Ex. B at pp. 5-6, 8), "it is evident that a 12:1 [special class] certainly fails to meet [the student's] needs" for the 2011-12 school year (Parent Ex. C at p. 1). Although the parent rejected the student's May 2011 IEP and the recommendation of assigned school 1 pending receipt of additional information—including a profile of the assigned 12:1 special class¹—she advised the district of her intentions to visit assigned school 1 and to enroll the student at Churchill to begin the 2011-12 school year at public expense and seek reimbursement of the student's tuition at Churchill "if the [May 2011] IEP and [recommended] program continue to remain inappropriate" for her son (id. at pp. 1-2).

In a second FNR sent to the parent dated August 5, 2011, the district again summarized the May 2011 CSE's recommendations and notified the parent of a different school (assigned school 2) to which the student was assigned for the 2011-12 school year (Dist. Ex. 5).

By letter to the district dated August 12, 2011, the parent acknowledged receipt of the August 5, 2011 FNR, and reiterated her concerns as previously set forth in her August 5, 2011 letter (Tr. pp. 312-13; compare Parent Ex. C, with Parent Ex. D at p. 1). The parent again formally rejected the May 2011 IEP and also rejected assigned school 2 as inappropriate for the student and advised the district of her intentions to visit assigned school 2 and to enroll the student at Churchill to begin the 2011-12 school year at public expense and seek reimbursement of the student's tuition at Churchill if an appropriate program and placement were not offered by the district (Parent Ex. D at p. 1).

By letter to the district dated September 19, 2011, the parent informed the district that, despite not receiving any response from the district to her previous letters, she nevertheless visited both assigned schools (Tr. pp. 312-19; Parent Exs. A at p. 2; Ex. E at p. 1).^{2, 3} She formally rejected assigned school 2,⁴ asserting that had the student attended the school, he would

¹ Although a class profile may be a useful tool for demonstrating how a student has been grouped, the Second Circuit has determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 [2d Cir. 2005]).

² The hearing record does not indicate the specific date(s) of the parent's visits to the assigned schools; however, the parent's impartial hearing testimony suggests that the visits occurred between her August 12, 2011 and September 19, 2011 letters to the district (see Tr. pp. 313-14, 316; Parent Exs. C at p. 1; D at p. 1).

³ The hearing record contains two copies of the parent's due process complaint notice, which were admitted into evidence by the IHO as both Parent Ex. "A" and Dist. Ex. "1" during the impartial hearing. For the purposes of this decision, I refer only to the former when referencing the due process complaint notice.

⁴ The district's August 5, 2011 FNR, which assigned the student to assigned school 2, superseded the district's July 19, 2011 FNR and thereby rendered the July 19, 2011 FNR a nullity (see Answer ¶ 37). Therefore, the district neither was obligated to establish the appropriateness of assigned school 1 during the impartial hearing,

have been inappropriately grouped for instructional purposes in the assigned 12:1 special class, based upon the class's gender composition and the students' functional levels; she also objected to assigned school 2's "exceptionally large group lunch and recess, as well as other activities that would overwhelm him" (Parent Ex. E at p. 1).⁵ She also advised the district that it was her intention to maintain the student's placement at Churchill for the 2011-12 school year at public expense (id.).

A. Due Process Complaint Notice

On September 26, 2011, the parent filed her due process complaint notice, alleging, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year (Parent Ex. A at pp. 1-2). Specifically, the parent alleged that: the May 2011 CSE was improperly composed; the May 2011 CSE "failed to appropriately review and consider the evaluative data presented at the [annual review] meeting as well as the reports of those working with [the student];" the annual goals and short-term objectives contained in the May 2011 IEP were inappropriate for implementation in the district's recommended 12:1 special class setting, but rather were more suitable for implementation in the student's special class setting at Churchill, which included two teachers; and the district's recommendation of a 12:1 special class setting in a community school was inappropriate for the student because it failed to provide him with the requisite level of individualized adult support, because it failed to address his need for a small class with two teachers in a specialized school, and because said recommendation had previously been determined by an IHO to be inappropriate for the student for the 2010-11 school year (id.; see Parent Ex. B at pp. 5-6, 8).⁶ The parent also argued that assigned school 2 was

nor is it obligated to defend the appropriateness of assigned school 1 against parent's allegations in this appeal, and I do not reference assigned school 1 further in this decision.

⁵ The parent alleged that at the time she visited assigned school 2, the assigned 12:1 special class consisted of six students, one boy and five girls; the classroom teacher of the assigned 12:1 special class (assigned classroom teacher) testified that at the beginning of the 2011-12 school year, her class consisted of seven students, two boys and five girls (compare Parent Ex. A at p. 2, with Tr. pp. 165, 203). Regarding the parent's argument that the gender composition of the assigned 12:1 special class was inappropriate for the student, neither federal nor State regulations require that students be grouped by gender (see 200.1[ww][3][i], 200.6[a][3], [h][2], [3]; see also Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 1256 [E.D. Va. 1992]; Bales v. Clarke, 523 F. Supp. 1366, 1371 [E.D. Va. 1981]). Moreover, the hearing record does not support the parent's argument that the gender composition of the proposed district class would have rendered the placement inappropriate for the student; instead, the hearing record reflects that overall, the student related well to his peers regardless of their genders (see Dist. Exs. 6; 7 at p. 4; 8 at p. 1; 10 at p. 3; 11 at p. 1).

⁶ I find the parent's argument is unavailing in this case. There is no requirement that an SRO or IHO be bound by the decision of a prior IHO who rendered a determination concerning a different school year. Thus, a determination that a particular educational program is inappropriate to provide a student with a disability a FAPE for one school year is not relevant in evaluating the appropriateness of the same educational program in a different school year, nor should a district's decision not to appeal such a determination be construed as an admission with respect to claims for a different school year, insofar as claims for different school years are analyzed separately (see generally Dalrymple v. United Servs. Auto. Ass'n, 40 Cal.App.4th 497, 523 [Cal. Ct. App. 1995] [holding that a party's decision not to appeal was not an admission of any lack of merit of its previous position]; Florence v. Gabinski, 1985 WL 2503 [N.D.Ill. Sept. 11, 1985] [holding that a party's decision not to appeal may be made for a variety of reasons and that such a decision is not an admission]; see also M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009

inappropriate for the student because it would have been unable to provide the intensive reading support that he required, because the school's large group social activities, including lunch and recess, would have been "completely overwhelming" for the student, and because her son would not have been suitably grouped for instructional purposes in the assigned 12:1 special class (Parent Ex. A at p. 2). The parent sought an interim order on pendency from an IHO continuing the student's placement at Churchill for the 2011-12 school year for the duration of this proceeding pursuant to a prior IHO decision applicable to the student's 2010-11 school year (see Parent Ex. B) and an order from an IHO directing the district to provide tuition reimbursement and direct funding to Churchill for the balance of the student's tuition, related services, and transportation for the 2011-12 school year (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

On November 3, 2011, an impartial hearing convened in this matter, and concluded on March 27, 2012, after five days of proceedings. On November 7, 2011, the IHO issued an interim order on pendency, ordering the district to continue to fund the student's current placement at Churchill pending completion of this proceeding (Tr. pp. 1-9; IHO Interim Order on Pendency; see Parent Ex. B).

On April 12, 2012, the IHO issued a decision, finding, among other things, that the district offered the student a FAPE for the 2011-12 school year and it was therefore unnecessary to determine whether Churchill was appropriate for the student for the 2011-12 school year or whether equitable considerations supported the parent's claims (IHO Decision at pp. 11-15). Specifically, the IHO found that the May 2011 CSE was duly constituted and that the May 2011 IEP was appropriate for the student because its annual goals and short-term objectives were appropriate, the student's special education needs could be met in a 12:1 special class setting, and there was no evidence contained in the hearing record suggesting that the student could only receive educational benefits in a program offering two classroom teachers or one classroom teacher and one "assistant" (*id.* at pp. 11-13). Relative to the appropriateness of assigned school 2, the IHO also found that the parent's concerns regarding the number of students at lunch and recess overwhelming the student were "simply speculation, as [the s]tudent has never been placed in an educational environment other than a small, private school setting" (*id.* at pp. 14-15); however, assuming for the sake of argument that the student had attended assigned school 2, the IHO also determined that the student would have been suitably grouped for instructional purposes in the assigned 12:1 special class (*id.*). Consistent with these findings, the IHO dismissed the parent's due process complaint notice (*id.* at p. 15).

WL 3246579, at *9-*10 [D.Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 12-007; Application of the Dep't of Educ., Appeal No. 11-124). Here, I note that the determination in the 2010-11 proceeding was made by a different IHO after considering the evidence in a different hearing record that was not before the IHO in this proceeding. Although the prior IHO's decision has become final and binding on the parties relative to the student's 2010-11 school year, the prior decision is not binding on the IHO or SRO's consideration of the merits of this case, which relates to the 2011-12 school year, and does not in and of itself provide a basis for a finding that the district failed to offer the student a FAPE.

IV. Appeal for State-Level Review

The parent appeals from the IHO decision, alleging, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that Churchill was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported the parent's claim. Specifically, the parent argues that: the May 2011 CSE failed to properly review and consider evaluative data presented during the CSE meeting, including the input of the parent and two Churchill representatives participating telephonically, and that this failure significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; the annual goals and short-term objectives contained in the May 2011 IEP were inappropriate because they were not suited for implementation in the 12:1 special class setting recommended by the district; and the 12:1 special class setting recommended by the district was inappropriate for the student. The parent also asserts that assigned school 2 was inappropriate for the student because it did not use the Wilson reading program (Wilson) methodology,⁷ which was purportedly "mandated" in the student's May 2011 IEP⁸ (Answer ¶ 29) and because the student would have been inappropriately grouped in the assigned 12:1 special class.

The parent also argues that Churchill was appropriate for the student for the 2011-12 school year, because the student made reasonable academic progress over the course of the 2011-12 school year and because Churchill provided the student with the supports he needed (counseling, OT) to enable him to make social/emotional progress as well, and that equitable considerations supported the parent's claims, because she cooperated with the CSE during the review process and because she was amenable to accepting an appropriate public school placement for her son. The parent requests that the IHO decision be reversed and that she be awarded reimbursement for her son's tuition at Churchill for the 2011-12 school year.

The district answers the parent's petition, countering, among other things, that it offered the student a FAPE for the 2011-12 school year and would have been able to properly implement the student's IEP in assigned school 2, that Churchill was inappropriate for the student for the 2011-12 school year, and that equitable considerations favored the district. Specifically, the district asserts that the parent was not denied the opportunity to meaningfully participate in the development of the student's IEP during the May 2011 CSE meeting, that the hearing record lacks evidence establishing that the student required two teachers in his classroom in order to receive educational benefits, and that the district's recommended 12:1 special class was the student's LRE. Relative to assigned school 2, the district maintains that any determination as to the appropriateness of assigned school 2 to address the student's unique special education needs during the 2011-12 school year was speculative, insofar as the student did not attend the

⁷ Wilson is defined in the hearing record as "a multisensory reading program ..." that "teaches students how to look at individual word parts. So it starts off by looking at just the sounds of words and diagraphs --, and then it moves on to the level of the syllable and of root words, prefixes, and suffixes" and "teaches students how to again blend in segment words," and "it does encompass both the decoding aspect and the spelling or encoding aspect ..." (Tr. p. 243).

⁸ The parent's contention is not supported by the hearing record, insofar as there is no reference to the Wilson methodology in the student's May 2011 IEP (Dist. Ex. 3; see Dist. Ex. 14).

school—however, assuming for the sake of argument that the student had attended assigned school 2, Wilson was available to address the student's phonics goals, and the student would have been suitably grouped for instructional purposes in the assigned 12:1 special class.

The district also asserts that Churchill was not an appropriate placement for the student for the 2011-12 school year because it was overly restrictive and provided him with only half of the level of counseling services recommended in his May 2011 IEP, and that equitable considerations favored the district because the hearing record lacks evidence demonstrating that the parent complied with the IDEA's 10-day notice requirement. The district seeks for the IHO decision to be upheld in its entirety and requests dismissal of the parent's petition.

V. Applicable Standards

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

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

WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Scope of Review

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's finding that the May 2011 CSE was properly constituted (IHO Decision at p. 11). Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. New Issues Raised on Appeal

For the first time on appeal, the parent now alleges that assigned school 2 was not appropriate for the student for the 2011-12 school year in part because had the student attended, he would not have received reading instruction utilizing Wilson methodology. With respect to this contention, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see B.M. v. New York City Dept. of Educ., 2014 WL 2748756 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 188 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 249-50 [2d Cir. 2012]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098,

at *4 [N.D.N.Y. Feb. 28, 2013]; J.L. v. City Sch. Dist. of City of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013]; D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *11 [S.D.N.Y. Jan. 22, 2013]; Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *11 [S.D.N.Y. Nov. 16, 2012]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *6 [S.D.N.Y. Dec. 8, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Upon review of the parent's due process complaint notice, I find that the complaint may not be reasonably read to raise the issue that assigned school 2 was inappropriate for the student because it did not offer the student Wilson methodology (see Parent Ex. A). Moreover, the hearing record does not suggest that the district agreed to expand the scope of the impartial hearing to include this issue (Application of the Bd. of Educ., Appeal No. 10-073), as there is no indication in the hearing record that the parent raised this argument during the impartial hearing.

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file a second amended due process complaint notice, I decline to review it. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 WL 4914722 *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

I further note that the IHO understandably did not reach this issue and find that this contention has been raised for the first time on appeal and is outside the scope of my review and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).⁹

⁹ Assuming for the sake of argument that the parent had properly raised the issue of the availability of Wilson methodology at assigned school 2 in her due process complaint notice, the evidence contained in the hearing record leads to the opposite conclusion than that argued by the parent. The assigned classroom teacher testified

B. May 2011 CSE Process

1. Consideration of Evaluative Data

The IHO did not address the parties dispute regarding whether the May 2011 CSE failed to properly review and consider the evaluative data presented during the CSE meeting and the input of the parent and two Churchill representatives when formulating the student's 2011-12 IEP and that this failure significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (see IHO Decision at pp. 8-15). I note that neither party on appeal contends that the May 2011 CSE did not have adequate evaluative information available to it to develop an educational program for the student's 2011-12 school year; rather the parties disagree regarding whether the CSE gave adequate consideration to the evaluative information, including the input of the parent and Churchill personnel, and disagree regarding the CSE's proposed program (see Parent Ex. A at pp. 1-2; Pet. ¶¶ 17-19; Answer ¶¶ 31-34). For the reasons articulated below, I find that the parent's argument is not supported by the hearing record.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general

that although she herself did not utilize Wilson in her classroom, there was another reading group at assigned school 2 taught by another classroom teacher that did use Wilson, and that the student's phonics goal could have been implemented in that reading group, if necessary (Tr. pp. 194-95). Moreover, the classroom teacher further testified that: she provided her students with differentiated instruction based on their skill levels; her students received reading instruction during five 90-minute sessions per week in a group of five to seven students; her students participated in a balanced reading curriculum and a reading and writing workshop that assisted the students to develop strategies and become more effective in reading; and that she assessed her students in reading on both daily and monthly bases (Tr. pp. 168-69, 177-78). She also testified that she provided her students with environmental modifications and strategies including routines, structure, reminders, positive reinforcement, check-ins for attention, breaks, multisensory instruction, and graphic organizers, and stated that based upon her review of the student's May 2011 IEP, she could have successfully addressed his reading needs within the assigned 12:1 special class (Tr. pp. 186-90, 196-97). In view of this evidence, I find that the hearing record supports the conclusion that, assuming for the sake of argument the student had attended assigned school 2 for the 2011-12 school year, the district was capable of addressing his reading needs through his IEP.

education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR § 300.324[a]; 8 NYCRR 200.4[d][2]). Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn.]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

In this case, according to the hearing record, the May 2011 CSE reviewed a June 19, 2010 psychoeducational evaluation (Dist. Ex. 8), a December 8, 2010 classroom observation checklist (Dist. Ex. 6), a January 1, 2011 teacher report (Dist. Ex. 9), a January 26, 2011 social history (Dist. Ex. 10), a January 2011 counseling update (Dist. Ex. 11 at p. 1), a January 2011 OT progress report (id. at p. 2), and a February 7, 2011 psychological evaluation (Dist. Ex. 7) (Tr. pp. 34-36, 56-58, 95-99; see Dist. Ex. 2 at pp. 2-3).¹⁰

During the June 19, 2010 psychoeducational evaluation, which included parent and student interviews and standardized testing, the parent reported that her son exhibited difficulties with reading, math, and writing and that he participated in organized sports outside of school; the student stated that overall, he related well with his peers, except for occasional verbal or physical arguments (Dist. Ex. 8 at p. 1). Behaviorally, evaluating psychologist noted that the student cooperated and exhibited motivation during the evaluation, but sometimes did not answer verbal questions and asked for several questions to be repeated (id. at p. 2).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded standard scores of 110 (high average) in verbal comprehension, 98 (average) in perceptual reasoning, 74 (borderline) in working memory, 85 (low average) in processing speed,

¹⁰ The school psychologist testified that the May 2011 CSE also reviewed "a draft of the IEP" during the CSE meeting (Tr. pp. 35-36), which she testified was provided to the CSE by the student's classroom teacher at Churchill, and which consisted of "what we call the page 3 and 4, which is the academic and social-emotional functioning, along with those management needs," as well as "the page 5, which would be the health and physical characteristics of the student and any needs; and then what we call the page 6's, which are the annual goals" (Tr. pp. 62-63; see Tr. pp. 107-08, 128, 144-45; Dist. Ex. 1 at pp. 3-6). The copy of the student's May 2011 IEP contained in the hearing record contains both typewritten and handwritten information, and although the hearing record does not contain an independent copy of the "draft IEP" referenced by the school psychologist, her testimony suggests that the typewritten portions of the student's IEP were drafted by Churchill personnel and ultimately integrated into the final version of the student's 2011-12 IEP, while the handwritten portions, including revisions to Churchill's "draft," were inserted into the final version of the IEP by the district representative, who dually served as the special education teacher on the May 2011 CSE (see Tr. pp. 108-16, 128, 144-45; compare Dist. Ex. 1 at pp. 1-4, 6, 8, 17-18, with Dist. Ex. 1 at pp. 3-5, 7, 9-16).

and a full scale IQ of 92 (average), revealing strengths in verbal expression and comprehension of conventional social rules and relative weakness in the short-term recall of numbers (Dist. Ex. 8 at pp. 2-3, 5). According to the results of the Bender-Gestalt test, although the student exhibited no deficits in graphomotor functioning, he experienced difficulties with planning and organization (id. at p. 4). Administration of the Woodcock Johnson III Tests of Achievement (WJ-III: ACH) the following yielded standard scores: in reading, 94 (3.3 grade level equivalent) in letter-word identification and 82 (2.1 grade level equivalent) in passage comprehension; in spelling, 88 (2.6 grade level equivalent); and in math, 89 (2.9 grade level equivalent) in calculation and 94 (3.1 grade level equivalent) in applied problems (id. at p. 4). Relative to social/emotional functioning, although the evaluation identified "some feelings of vulnerability to perceived external stressors" and "some ... underlying anger and anxiety," the evaluating psychologist noted that "[t]here are no indications of severe emotional disturbance" (id. at pp. 4-5).

On December 8, 2010, the district representative conducted a 2.5 hour classroom observation of the student in his classroom, science lab, and social studies classes at Churchill (Tr. pp. 56-58, 95-99; Dist. Ex. 6; see Dist. Exs 3 at p. 2; 14 at p. 1). The resultant classroom observation checklist indicated that the student was easily engaged and cooperative with peers and adults, that his activity level was "slightly high" but that he demonstrated average attention skills, that he communicated using "smooth complex sentences on a spontaneous basis," and that he understood directions and responded to visual cues (Dist. Ex. 6 at p. 1). The checklist also described the student as "friendly and pleasant" and noted that he reacted positively to teacher redirection (id.). The district representative noted that: during science class, the student's teacher separated the student's seat from other students due to his "talking, not listening," in response to which the student expressed frustration; during social studies class, the student was a "good listener" and worked "nicely with his group;" the student worked independently with some prompting and redirection; the student followed class procedures and related well with peers; and that although he required some 1:1 attention, including asking questions when needed, he tried his best to work independently (id. at p. 2).

The student's classroom teacher at Churchill described the student's functioning and progress in a January 1, 2011 teacher report (Dist. Ex. 9). In math, she reported that the student achieved instructional and independent grade equivalents of 3.5 and 3.0, respectively, and demonstrated knowledge of addition and subtraction facts and added and subtracted fractions with common denominators; however, the teacher report also indicated that the student's impulsive behavior, which resulted in his rushing through his work, making careless errors, and becoming frustrated with his performance, negatively affected his progress in math (id. at p. 1). According to the teacher report, the student benefited from a small class size, a seat in close proximity to the teacher, direct teaching of new concepts, visual supports, hands-on experience, and frequent review (id.). Relative to reading, the student functioned at grade equivalents of 3.0 and 2.5 for instructional and independent levels, respectively, and he exhibited difficulty with reading fluency and benefited from structure, "chunking" of concepts, and practice (id.). With regard to language skills, the classroom teacher noted that the student understood directions but sometimes struggled with completion of tasks due to his distractibility and impulsivity, and that the student expressed himself in a clear and concise manner (id. at p. 2). Relative to writing, she reported that the student demonstrated "great ideas for writing tasks" and wrote complete

sentences, but required assistance regarding the pre-planning process (id.). She indicated that the student demonstrated age appropriate gross and fine motor skills, and that socially, he exhibited a low frustration tolerance which sometimes negatively affected his interactions with peers, but that he remained well liked by them (id. at pp. 2-3). The teacher report enumerated several strategies employed by Churchill in educating the student, including breaking down tasks, visual supports, modeling, repetition, clear/precise language, cues, repetition, positive reinforcement, frequent breaks, structured transitions, and routines (id. at p. 3).

The January 26, 2011 social history, with the parent serving as informant, included developmental, family, medical, and educational histories of the student, together with a description of his current functioning and identification of parental concerns (Dist. Ex. 10). The parent reported that she first noticed the student experiencing reading difficulties when he reached first grade, described the student as "very social" and having many friends, and expressed concern over the student's lack of self-esteem stemming from his reading difficulties (id. at p. 3).

In January 2011, the student's counselor at Churchill completed a counseling update of the student which indicated that the student received 30 minutes of group counseling once per week, described the student as "sensitive" and "perceptive," and noted that he related well with classmates and participated well in group discussions and activities by sharing his concerns, problem solving with peers, and reflecting on his feelings and past behavior (Dist. Ex. 11 at p. 1). The student's counselor recommended that the school initiate a 45-minute session of counseling once per week in a 6:1 setting in order to enable him to "[d]evelop [an] increased understanding of [him]self as a learner" (id.).

In January 2011, the student's occupational therapist at Churchill completed an OT progress report, which indicated that the student received OT once per week for 30 minutes per session in a 6:1 setting, that his OT sessions addressed fine motor skills in the areas of scissor skills, in-hand manipulation, finger isolation, fine motor praxes, bilateral coordination, print handwriting, visual perceptual/visual spatial skills, and keyboarding, that the student demonstrated "excellent" progress in keyboarding and handwriting skills, described the student as "cooperative and hard-working," and noted that he responded well to movement breaks (Dist. Ex. 11 at p. 2). The student's occupational therapist recommended maintaining the student's current level of OT (id.).

According to the February 7, 2011 psychological evaluation, behaviorally, the student demonstrated motivation, cooperation, stable eye contact, average emotional affect, clear speech, and average task persistence (Dist. Ex. 7 at p. 1). Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded standard scores (percentile ranks) of 88 (21) in fluid reasoning, 91 (27) in knowledge, 97 (42) in quantitative reasoning, 88 (21) in visual spatial, 89 (23) in working memory, and a full scale IQ of 89 (23) (id.). The report reflected that the student demonstrated average verbal reasoning skills and low average nonverbal reasoning skills, and according to the student's performance on the Bender Gestalt Visual-Motor test, he exhibited difficulties in the area of visual-motor integration (id. at p. 2). Administration of the WJ-III: ACH yielded standard scores of 88 (low average) in letter-word identification, 71 (low) in calculation, 88 (low average) in spelling, 82 (low average) in reading comprehension, 89 (low

average) in applied problems, 102 (average) in writing samples, 82 (low average) in word attack, 130 (superior) in picture vocabulary, 112 (high average) in oral comprehension (id. at p. 3). Relative to the student's social/emotional functioning, the psychological evaluation indicated that he possessed the ability to interact appropriately with peers and adults on a 1:1 basis and demonstrated age appropriate social skills id. at p. 4).

The school psychologist testified that the May 2011 CSE, "[had] adequate information concerning [the student] to formulate an IEP that would have addressed his needs," that all members of the CSE, including the parent and both Churchill representatives, participated for the entire meeting, and that the May 2011 CSE discussed the student's needs in the areas of academics, including math, reading, and writing, as well as processing speed, working memory skills, attention, impulsivity, and fine motor skills (Tr. pp. 36- 42). She further testified that as a result of its discussion of the student's academic and social/emotional needs, the May 2011 CSE recommended several environmental modifications and human/material resources in the May 2011 IEP to compensate for his difficulties with attention and executive functions and thereby enable him to access educational benefits, including focusing, guided practice and review, multisensory and interactive learning, graphic organizers, prompting, frequent check-ins, teacher modeling, a language-based curriculum, a self-contained, highly structured environment with small classes and individualized attention, and counseling services to address his social/emotional concerns (Dist. Ex. 3 at pp. 3-4, 6; Tr. pp. 41, 43, 51). Furthermore, review of the student's May 2011 IEP indicates that the CSE developed present levels of performance consistent with the evaluative information available to the CSE, and that the documents reviewed by the CSE accurately described the student's functional levels and identified his needs in the areas academics, social/emotional functioning, and motor skills (compare Dist. Ex. 3 at pp. 3-8, with Dist. Exs. 6-11). I also note that there is no contention that the present levels of performance in the student's IEP were in any way inaccurate. Based on the foregoing, I find that the May 2011 CSE appropriately considered the information before it when developing the student's 2011-12 IEP.

2. Parent Participation

However, even if the May 2011 CSE appropriately considered the documentary information before it in developing the student's 2011-12 IEP, the parent asserts that the CSE failed to properly consider her input as well as that of the two Churchill representatives during the CSE meeting, effectively excluding her and the Churchill representatives from deliberations, and that this failure significantly impeded her opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and ultimately resulted in a program recommendation inappropriate to address his unique special education needs.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to

participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 12-047; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's May 2011 IEP and a willingness among the CSE members to consider different program options for the student. The parent and an additional parent member attended the May 2011 CSE meeting, while Churchill's admissions director and the student's classroom teacher at Churchill participated in the meeting telephonically (Tr. pp. 37-39, 302; Dist. Exs. 1 at p. 2; 14 at p. 1). The school psychologist, who served on the May 2011 CSE, described the levels of participation of the parent and the Churchill representatives during the CSE meeting as "excellent" and testified that "mom said from the very beginning that she was concerned about [the student's] reading, and how his reading was affecting his other areas, his other academics" (Tr. p. 52). The CSE meeting minutes contained in the hearing record reflected the parent's concern relative to her son's short term memory (Dist. Ex. 14 at p. 2; see Tr. pp. 100-03). The school psychologist further testified that the parent disagreed with the CSE's 12:1 special class recommendation because "[s]he felt that he needed the support of the extra teacher in the classroom" (Tr. p. 91; see also Tr. p. 141).

When describing the participation of the student's classroom teacher from Churchill, the school psychologist testified that she "talked about some of the gaps in his reading ... And she also talked about the fact that while he had mastered some things in math ... they still hadn't even begun to address division and multiplication;" and that "she also talked about writing and how the writing process overall was difficult for him. And also, how with the spelling he is able to spell words in isolation, but isn't able to take the patterns that he learns when decoding and

apply it to spelling," and that "the [classroom] teacher mentioned several times about his impulsivity, and attentional issues, and executive functioning, and how that adversely impacts his academic functioning" (Tr. pp. 52-53). The school psychologist also testified that both Churchill representatives disagreed with the 12:1 special class recommendation as well, and that the admissions director "thought that [the student] needed the level of support that Churchill had. The two teachers in the classroom," that the student's classroom teacher also "felt that he needed the extra teacher in the classroom," and that both Churchill representatives "were mostly concerned about [the student's] attentional difficulties, and his level of distraction, and, also, his skill level, his academic skill level in reading, writing, and math" (Tr. pp. 93-94). These concerns were also reflected in the CSE meeting minutes, which noted that "[t]he parent and school feel that the student needs more than [a] 12:1 sp[ecial] class. They feel he is fragile and needs a second teacher" (Dist. Ex. 14 at p. 2).

The student's mother testified that during the May 2011 CSE meeting, the Committee discussed "a lot of different things. We talked a lot, kind of high level about the goals ... They talked about how [the student] seemed to still be struggling. They talked about some of the scores that he was receiving – that he had received from the testing that they had administered. But overall, they indicated that he was still struggling" (Tr. p. 303). She further testified that "I contributed my thoughts or my feelings," and that the student's classroom teacher "would ... speak and say well when I'm in the classroom I see this frustration or ... I see this impulsivity ..." (Tr. p. 304). She also testified that she, Churchill's admissions director, and her son's classroom teacher each "contributed" to the May 2011 CSE meeting and that each "expressed concern about the [program] recommendation" in the student's 2011-12 IEP (Tr. pp. 329, 336-37).

The hearing record demonstrates that the May 2011 CSE considered recommending a 12:1 special class in a community school without related services, but ultimately rejected this option as insufficient to address the student's academic, social/emotional, motor, attention, and organizational needs, and that it also considered and rejected a 12:1+1 special class with related services, ultimately determining that it would be too restrictive for the student (Tr. pp. 82-83; Dist. Ex. 3 at p. 18). The school psychologist testified that although the CSE "adopted much of what Churchill recommended for the [student's] related services," the district disagreed with the Churchill representatives that the student could not access educational benefits in a general education setting and that he required a second teacher in the classroom, because the student presented a "profile that I have seen throughout my years that [was] very similar [to] the type of [student] who benefits from a 12-to-1 setting in a community school" (Tr. pp. 86-87, 129, 133-36).

The parent also argues that the May 2011 CSE ignored her request to maintain the student's placement at Churchill for the 2011-12 school year. However, the school psychologist testified that the CSE did not recommend Churchill as the student's 2011-12 placement because "we're required to recommend the least restrictive placement," but added that in reaching these conclusions, the May 2011 CSE "consider[ed] the views of the parent and the staff from the Churchill school" (Tr. p. 87, 138-40). Furthermore, as discussed above, 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., 569 F. Supp. 2d at 383; Sch. for

Language and Communication Development, 2006 WL 2792754, at *7; Paolella, 2006 WL 3697318 at *1). Moreover, the Second Circuit recently held that "[i]n light of the district's broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective, we cannot simply assume that the decision to rely heavily on a single method or style of instruction is necessarily inappropriate" (M.H. v. New York City Dep't of Educ., 2012 WL 2477649, at *35 [2d Cir. 2012]). Based on the foregoing, I find that the evidence in the hearing record establishes that the district properly considered the evaluative data, including teacher reports and input from the parent and the Churchill representatives, when formulating the student's 2011-12 IEP, and further shows that the parent meaningfully participated in and contributed to the development of the student's IEP during the May 2011 CSE meeting.

C. May 2011 IEP

1. Annual Goals and Short-Term Objectives

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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

On appeal, the parent alleges that annual goals and short-term objectives contained in the May 2011 IEP were inappropriate for implementation in the district's recommended 12:1 special class setting because they were designed for implementation in the student's classroom setting at Churchill, which utilized two teachers. The district counters that the IHO's determination that the annual goals and short-term objectives contained in the May 2011 IEP were appropriate for the student (IHO Decision at p. 11) was correct and should be upheld because the district was capable of successfully implementing these annual goals and short-term objectives in the 12:1 setting of the recommended special class.

Initially I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether said goals and objectives are consistent with and relate to the needs and abilities of the student (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]). In this case, the May 2011 IEP contains annual goals and short-term objectives targeting the student's needs in the areas of reading comprehension, decoding, math problem solving, math computation, writing, study skills, executive functions (including organization and initiation), listening, frustration tolerance, fine motor skills, and social/emotional functioning (Dist. Ex. 3 at pp. 9-16). Although the parent testified that during

the CSE meeting, "I felt like the people who were reviewing really weren't sharing specifics relating to the goals ..." or "explain[ing] how they thought certain goals would apply for him or be appropriate for him," the hearing record reflects that several of the student's annual goals and short-term objectives contained in the May 2011 IEP were previously developed by Churchill staff and adopted by the CSE, while some academic and counseling annual goals and short term objectives were integrated into the student's IEP from the February 7, 2011 psychological evaluation (Tr. pp. 62-64, 116-18, 124-28, 304; compare Dist. Ex. 3 at pp. 9-11, 15-16, with Dist. Ex. 7). The school psychologist testified that in her opinion, the annual goals in the student's IEP could be implemented in a 12:1 educational setting, stating "there was really nothing to lead me to think that this cannot be addressed using one teacher and that two teachers are absolutely necessary" and that "[t]here's nothing in the goals that indicates the necessity of a second staff member" (Tr. pp. 70-71). She also testified as to how the annual goals and short-term objectives "address[ed] the academic needs that the student ha[d] and provide[d] strategies in order for the student to make meaningful progress," and stated that there was no disagreement voiced during the CSE meeting by any member regarding appropriateness of the student's annual goals and short-term objectives (Tr. pp. 63-75). Moreover, the special education teacher of the assigned 12:1 special class also reviewed the student's annual goals and concurred with the school psychologist that they could have been successfully addressed within her class (Tr. pp. 191-96). In consideration of the foregoing, I find that the IHO's determination that annual goals and short-term objectives contained in the May 2011 IEP were appropriate for the student is supported by the evidence contained in the hearing record, and I see no reason to modify the IHO's finding.

2. Recommended 12:1 Special Class Placement

Next I address the parent's contention that the May 2011 IEP was inappropriate because the district's placement recommendation of a 12:1 special class would not have been appropriate for the student given his significant attention difficulties. The IHO determined that the district's recommended 12:1 special class placement was appropriate to address the student's special education needs, and that the hearing record lacked evidence suggesting that the student could only receive educational benefits in a program offering two classroom teachers or one classroom teacher and one "assistant" (id. at pp. 11-13). For the reasons discussed more fully below, I find that the CSE's recommendation of a 12:1 special class was appropriate to address the student's needs as identified in the evaluative data available to the May 2011 CSE.

As discussed above, the evaluative information available to the May 2011 CSE identified the student's delays in academics, attention, impulsivity, working memory, frustration tolerance, social/emotional functioning, and motor skills (Tr. pp. 39-42, 48-53, 55-57, 59-60, 233, 298; Dist. Exs. 6-11). Consistent with the student's needs as described above, the May 2011 CSE recommended placement in a 12:1 special class in a community school and, targeting the student's needs in the areas of social/emotional functioning and motor skills, recommended related services consisting of OT, once per week for 30 minutes per session in a group of 6, and counseling services, once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group of 6 (Tr. pp. 39-40, 43-46; Dist. Exs. 3 at pp. 1-2, 6, 17-19; 14 at p. 1). The May 2011 also CSE recommended that the student fully participate with

nondisabled peers during lunch, recess, art, music, and physical education (Tr. pp. 80-81; Dist. Ex. 3 at p. 19).

Testimony by the school psychologist supports a finding that the CSE's recommendation of a 12:1 special class was based on the student's needs as portrayed in the evaluations before it and which were reflected in the resultant IEP (Tr. pp. 34-36, 39-41, 43, 57, 75). The hearing record also reflects that the CSE considered recommending a 12:1 special class without related services for the student, but determined that such a placement would be insufficient to support the student with respect to his academic, social/emotional, fine motor, and organizational needs, and that the CSE also considered and ultimately rejected a 12:1+1 special class with related services for the student because it concluded that the program would be too restrictive for the student (Tr. pp. 82-83; Dist. Ex. 3 at p. 18). However, the school psychologist testified that both the parent and the two Churchill representatives disagreed with the 12:1 special class recommendation because they believed that the student required instruction in an educational setting with two teachers, and that the May 2011 CSE ultimately adopted the 12:1 special class recommendation because "when there's disagreement among the [CSE] members, according to the standard operating procedural manual, the final decision is up to the [d]istrict rep[resentative]. ... She made the final decision, and I agreed with her" (Tr. pp. 91, 93-94, 139-42; see also Tr. pp. 306-09; Dist. Ex. 14 at p. 2).

Although the hearing record indicates that the student demonstrated difficulties with academic skills, including reading, math, and organization, and as well as attention, anxiety, frustration, impulsivity, processing speed, and working memory skills (Tr. pp. 39-42, 48-57, 59-60, 233, 298; Dist. Exs. 6-11), the hearing record also reflects that: the student worked cooperatively with peers and adults; that his activity level was slightly high but that he was capable of maintaining his attention with redirection; that he understood directions, responded to visual cues, and reacted positively to teacher redirection; that he worked independently with some prompting and redirection; that although he required some 1:1 attention, including asking questions when needed, he attempted to work independently; and was generally "cooperative and hard-working" (Dist. Exs. 6; 11 at p. 2).

The school psychologist testified that the May 2011 CSE recommended a 12:1 special class placement in a community school for the student because "he is functioning on—well, below grade level. We felt that a [g]eneral [education] setting was too large for him. And with the attentional issues and executive functioning issues, [it] would be difficult for him to manage in a larger group setting," and that "we listened very closely to what the [classroom] teacher said and the parent's concerns that he needed a smaller class setting. At the same time, it didn't seem to us that he needed more than one adult in the classroom because he's socially appropriate" (Tr. pp. 77-79). She further testified that "[y]es, he has some self-esteem issues, and some anxiety, and anger management, but not to the point where it was totally disruptive to himself as a learner or to those in his environment," and that "it seemed based on all the information that we had in front of us, to be the LRE in which he would be able to function and make meaningful progress academically" (Tr. p. 79; see Tr. pp. 53-54). When asked why the May 2011 CSE recommended a community school versus a nonpublic school setting for the student, the school psychologist testified that "again, going back to ... his social-emotional functioning ... he's, for the most part, socially appropriate. There [were] also indications, too, that out in the community—I know [the

parent] talked about him being on the hockey team, which shows he's interacting with more typically-developing peers" and that a community school placement "just seemed like a way for him to have that opportunity to interact in a [g]eneral [education] setting, to be with more typically-developing peers and role models" (Tr. pp. 79-81).

Furthermore, the hearing record also demonstrates that the district's recommended 12:1 special class placement afforded the student individualized instruction and 1:1 support to address his academic and social/emotional management needs as identified in the May 2011 IEP (Tr. pp. 74-75, 86; Dist. Ex. 3 at pp. 3-7). The school psychologist testified that the December 8, 2010 classroom observation suggested that "for the most part, [the student] didn't seem to require any more one-to-one attention than any of the other students in the class ...;" however, the classroom teacher of the assigned 12:1 special class (assigned classroom teacher) testified that students in the assigned 12:1 special class received individualized attention and whole and small group instruction (Tr. pp. 57, 169, 190-91; see Dist. Ex. 6). Additionally, the May 2011 IEP provided for one 30-minute session of counseling in a 1:1 setting per week, and included individualized attention as one of several environmental modifications to address the student's academic management needs (Dist. Ex. 3 at p. 4). I also note that the student's classroom teacher at Churchill testified that the student was able to successfully function within an 11:1 classroom environment during intervals in which she was out of the classroom working with another student (Tr. pp. 283-84), and that collectively, the hearing record lacks evidence indicating that the student could only progress or access educational benefits in a classroom having more than one teacher.

Based on the foregoing, I find that the evidence contained in the hearing record supports the IHO's determination that the district's May 2011 IEP, which recommended a 10-month educational program including a 12:1 special class in a community school and OT and counseling services, was appropriate to address his special education needs as identified in the evaluative information before the May 2011 CSE and was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Consequently, in view of the foregoing evidence, I also find that the parent's claims that the May 2011 IEP was deficient to offer the student a FAPE for the 2011-12 school year are without merit.

D. Challenge to the Assigned Public School Site—Functional Grouping

I will next address the parties' contentions regarding the district's choice of assigned school. The parent contends that had the student attended assigned school 2 for the 2011-12 school year, the district would have been unable to suitably group the student in the assigned 12:1 special class with students of similar needs and abilities.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the

IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *3-*4 [E.D.N.Y. June 10, 2014] [finding that the parents were denied the "right to evaluate" the assigned public school site]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [same]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]).

I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New

York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).¹¹

As recently explained, "[i]t would be inconsistent with R.E. to require the [district] to proffer 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 (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

¹¹ The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

In view of the foregoing, I find that the parent cannot prevail on her functional grouping claim regarding an unimplemented IEP under the circumstances of this case (R.B., 2013 WL 5438605 at *17). Here, the parent rejected the May 2011 IEP and reenrolled the student at Churchill prior to the time that the district became obligated to implement the IEP (Parent Exs. C-F). Thus, while the district was required to establish that the May 2011 IEP was appropriate during the impartial hearing, the district was not required to establish that the IEP was successfully implemented in accordance with any grouping requirements in the proposed classroom, nor was it required to establish alone that the alleged prospective failure to adhere to grouping requirements resulted a deviation from the student's IEP that was neither material or substantial.¹²

In the alternative, even assuming for the sake of argument that the student had attended the district's recommended program, as further discussed below, the speculative evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 2012 WL 1058225, at *3 [S.D.Fla. Mar. 29, 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the

¹² In New York State, policy guidance offers an explanation of the steps that must be taken to ensure the implementation of an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 60-61, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of a Student with a Disability, Appeal No. 12-044; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the hearing record reflects that at the time of the May 2011 CSE meeting, the student was functioning at the following instructional levels/independent levels:¹³ relative to reading, 3.0/2.5 in decoding, 3.0/2.5 in reading comprehension, and 4.0/3.5 in listening comprehension; relative to math, 3.5/3.0 in both computation and problem solving; and relative to writing, 4.0/2.0, based upon teacher estimate/informal observation (Dist. Ex. 3 at p. 4). By comparison, the assigned classroom teacher testified that at the beginning of the 2011-12 school year, her class consisted of seven students, two boys and five girls, who had received classifications of either a learning disability, a speech or language impairment, or an other health impairment; the students' reading and math instructional levels ranged from first through fourth grade levels, with the majority of the students functioning between second and third grade levels (Tr. pp. 165-168, 202-04). The classroom teacher also testified that based upon the student's demonstrated performance levels, he would have "fallen in line" with the other students in the assigned 12:1 special class (Tr. p. 190).

When describing the criteria according to which she grouped students in the assigned 12:1 special class for instructional purposes, the classroom teacher testified that "[d]epending again on the actual levels that the students are able to work on, as well as their ability to interact socially, I form groups for them ... [and] those groups change depending on the progress that they're making. And they are able to sit and work through problems together" (Tr. p. 172). She also testified that "we'll start with students who might have the same understanding or the same grasp of what the concept is and we'll sit together and figure out how did you come up with that. ... We'll look at where they're performing at currently, sit them together, and then see how they're able to work through one particular area at a time ..." and indicated that "sometimes, again, it depends on what it is I'm teaching, it'll take the motivation of a student who has already mastered that to be in a group to help this group get to that level as well" (Tr. p. 173). In consideration of the foregoing, I find that the hearing record demonstrates that had the parent elected to place the student in the assigned 12:1 special class, the district was capable of grouping the student with other students of similar needs and abilities.

¹³ In describing the student's current levels of academic functioning, the May 2011 IEP listed both "instructional level" and "independent" level (see Dist. Ex. 3 at p. 4). According to the testimony of the school psychologist, "[i]ndependent' means what the [student] can do by himself. 'Instructional' means where you're able to teach the [student]" (Tr. pp. 60-61).

In sum, assuming that the district had been required to implement the student's IEP and upon consideration of the totality of the evidence contained in the hearing record, I find the parent's concerns regarding the assigned 12:1 special class and the ability of assigned school 2 to suitably group the student with students of similar needs and abilities is not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). The evidence does not support the conclusion that upon implementation the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822).

VII. Conclusion

In summary, I find that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year based upon the evidence contained in the hearing record, and I see no reason to disturb the IHO's April 12, 2012 decision.

Having reached this determination, it is not necessary to reach the issues of whether Churchill was appropriate for the student or whether equitable considerations support the parent's claims and the necessary inquiry is at an end (Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 12-005; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that it is not necessary to consider them in light of my determinations herein

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 23, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**