



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-154

**Application of the [REDACTED]  
[REDACTED] for review of a determination of a hearing  
officer relating to the provision of educational services to a  
student with a disability**

### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner,  
Neha Dewan, Esq., of counsel

The Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, Jesse Cole  
Cutler, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School for the 2011-12 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

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

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

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

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

### **III. Facts and Procedural History**

In the present case, the student demonstrates delays in the areas of receptive, expressive, and pragmatic language as well as academics, self-regulation, attention, motor skills, and social/emotional functioning (Tr. pp. 39-42, 169-70; May 14, 2012 Tr. pp. 192-93; Dist. Ex. 2; 4-6; 8-9; Parent Ex. O).<sup>1</sup>

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<sup>1</sup> There is an irregularity in the pagination of the hearing transcript. The transcripts of the hearings conducted on February 6, 2012 and April 4, 2012 are consecutively paginated from 1 through 370; however, the transcript

The parents first noticed the student exhibited developmental delays when the student was two months old (May 14, 2012 Tr. p. 160). The student received early intervention (EI) services of speech-language therapy, occupational therapy (OT), and "play services" (id.).<sup>2</sup> The student then attended a preschool program and continued to exhibit delays in pre-academic, attention, and social skills (May 14, 2012 Tr. p. 161). The student received services under the auspices of the Committee on Preschool Special Education (CPSE) consisting of special education itinerant teacher (SEIT) services for 15 hours per week, two 45-minute sessions per week of individual OT services, three 45-minute sessions per week of individual speech-language services, and two 45-minute sessions per week of individual counseling (id.; Dist. Ex. 2 at p. 1). Beginning with the 2008-09 school year, the student attended the Aaron School, where she continued to attend through the 2011-12 school year (May 14, 2012 Tr. pp. 164-74, 177; Parent Ex. L at pp. 1-2).<sup>3</sup>

On February 11, 2011, the CSE convened for the student's annual review and to develop her IEP for the 2011-12 school year (Parent Ex. C at p. 1). The CSE continued to find the student eligible to receive special education and related services as a student with a speech or language impairment (id.).<sup>4</sup> To address the student's needs, the CSE recommended a 12:1+1 special class together with related services of one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group (3:1), one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group (3:1), and one 30-minute session per week of counseling in a group (3:1) (id. at p. 22). In addition, the CSE recommended a modified promotion criteria of 70 percent regarding both third grade ELA and math standards as measured by student work, teacher observations, and student assessments/grades (id. at p. 23). To address the student's academic, social/emotional, and physical management needs, the IEP also contained numerous accommodations and supports (id. at pp. 3-7). The February 2011 CSE also recommended several accommodations related to the student's participation in State and local assessments (id. at p. 22).

By letter dated February 11, 2011, the district provided the parents with a "Notice of Recommended Deferred Placement" indicating that the February CSE developed the IEP for the 2011-12 school year and it was in the best interest of the student to defer her placement in the recommended program until September 6, 2011 (Parent Ex. I). By final notice of recommendation dated June 11, 2011, the district notified the parents of the public school site to

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for the hearing conducted on May 14, 2012 begins at page 153 and ends at page 273. Citations to the May 14, 2012 transcript in this decision are identified by date.

<sup>2</sup> In examining the hearing record, it appears play services refers to special education instruction/counseling services (Tr. pp. 160-61).

<sup>3</sup> The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>4</sup> The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

which the student was assigned and at which her IEP would be implemented for the 2011-2012 school year (Parent Ex. D).

By letter dated July 19, 2011 from the student's father to the district's placement officer, the student's father informed the district that he lacked certain information about the assigned public school site and could not make an informed decision about the school without visiting the school, and that he would visit the school when classes recommenced in September 2011 (Parent Ex. E). By letter dated August 24, 2011, the parents informed the district of their concerns with the February 2011 IEP and the assigned public school site identified in the June final notice of recommendation and notified the district of their intention to unilaterally place the student at the Aaron School for the 2011-12 school year (Parent Ex. A).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated October 13, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year and requested reimbursement for the costs of the student's tuition at the Aaron School for the 2011-12 school year (Parent Ex. B). Specifically, the parents alleged that (1) the February 2011 IEP was developed too long before the start of the 2011-12 school year; (2) the February 2011 CSE lacked a general education teacher; (3) the additional parent member of the CSE was not present for the entire CSE meeting; (4) the CSE failed to rely upon necessary evaluations; (5) the parents were denied a meaningful opportunity to participate in developing the student's IEP; (6) the CSE failed to consider adapted physical education for the student; (7) the CSE failed to consider assistive technology for the student; (8) the IEP's annual goals and short-term objectives failed to provide a grade level baseline; (9) the social/emotional short-term objectives were insufficient; (10) the 12:1+1 placement recommendation was inappropriate; (11) the CSE failed to recommend parent training and counseling; (12) the student would have been "distracted during lunch and recess" at the assigned school; and (13) the assigned school would not have provided a suitable peer grouping for "instructional and social/emotional" purposes (id.).

In a response to the due process complaint notice dated October 31, 2011, the district denied the parents' assertions, specifically stating that the IEP contained annual goals for academics and related services, that all members of the CSE had an opportunity to participate in the meeting, and that staff from the student's private school were in attendance (Dist. Ex. 4).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on February 6, 2012 and was completed on May 14, 2012, after three hearing dates (Tr. pp. 1-370; May 14, 2012 Tr. pp. 153-273). In a decision dated June 28, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year, the Aaron School was an appropriate placement, and equitable considerations did not preclude an award of tuition reimbursement as relief (see IHO Decision at pp. 21-27). Specifically, the IHO found that the district failed to offer the student a FAPE because although the "absence of updated evaluations would generally not constitute a denial of FAPE . . . in this case the CSE sought to change the [student's] program" and "an evaluation was

needed to ascertain whether the program change adequately addressed the changes that had been noted in the [student]" (IHO Decision at p. 23). Further, the IHO found that—absent up-to-date evaluations—the recommended 12:1+1 special class was inappropriate and inadequate to address student's needs and the student needed more support than the placement would provide (*id.* at pp. 23-24). The IHO also found that the CSE failed to review goals during the February 2011 CSE meeting and that a single goal for counseling was insufficient to address the student's severe social and emotional issues (*id.* at p. 23). The IHO also found that the parents' arguments regarding the assigned public school site were not speculative and that the assigned school was not appropriate for the student because the student did not have the skills needed to interact with normally developing students in a large school environment and could not have made progress in a community school (*id.* at pp. 23-24). However, the IHO rejected the parents' arguments that the district denied the student a FAPE based on flaws in the IEP development progress, finding that the allegations that the CSE meeting was held several months prior to the start of the school year, that the additional parent member arrived late to the CSE meeting, and that there was no general education teacher at the CSE meeting, did not result in a denial of FAPE, in light of the parents' "actual participation in the meeting and the substance of the concerns they raised" (*id.* at p. 22). The IHO also dismissed the parents' arguments regarding the CSE's alleged failure to consider adapted physical education, assistive technology, and parent counseling and training because there was no evidence presented at the hearing on those issues (*id.* at p. 24).

Lastly, the IHO also found that the parents' unilateral placement at the Aaron School was appropriate, that the school was the least restrictive environment for the student, and that equitable considerations did not operate to deny or reduce tuition reimbursement (*id.* at pp. 24-26). Accordingly, the IHO ordered the district to pay or reimburse the parents for the student's tuition at the Aaron school for the 2011-12 school year (*id.* at p. 27).

#### **IV. Appeal for State-Level Review**

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE, that the unilateral placement at the Aaron School was appropriate and that equitable considerations supported reimbursement. Specifically, the district asserts that the IHO erred in her FAPE determination because (1) the evaluations were sufficient and an updated evaluation was not necessary; (2) the counseling goal contained in the February 2011 IEP was sufficient to address the student's needs; (3) the IEP addressed all the student's needs and the CSE thoroughly reviewed the student's goals during the February 2011 CSE meeting; (4) the 12:1+1 program recommendation was appropriate and provided sufficient support; and (5) the assigned school was appropriate and accommodations could be made to address the student's distractions in a large school environment. The district next asserts that the IHO correctly determined that no evidence was presented as to the parents' arguments regarding the CSE's alleged failure to consider adapted physical education, assistive technology, and parent training and counseling in developing the student's IEP. The district additionally asserts that the IHO correctly determined that various procedural violations did not result in a failure to offer the student a FAPE.

The district also contends that the Aaron School was not appropriate for the student because it was not a "therapeutic school," it offered insufficient related services, was overly

restrictive, and that evidence of progress in the unilateral placement is not sufficient. Lastly, the district contends that equitable considerations weigh against reimbursement because the actions of the parents demonstrate that they did not truly consider accepting the public school placement recommended by the CSE. The district requests that the IHO's decision be overturned.

In an answer, the parents respond to the district's allegations and seek to uphold the IHO's decision in its entirety.<sup>5</sup> Specifically, the parents assert that the IHO was correct in finding that CSE lacked up-to-date evaluations and allege that a district witness changed her testimony about when a new evaluation was required, that a psychologist on the "review team" requested an updated psychological evaluation for the 2011-12 school year, that the CSE required an evaluation for the 2011-12 school year, that no determination pursuant to State regulation was made that the existing evaluations were sufficient, that the student's program was changed from 12:1 to 12:1+1, and that the district failed to appeal the IHO's finding that the CSE team should have evaluated the student due to changes observed in the student between the 2010 and 2011 classroom observations.<sup>6</sup> The parents admit that the IEP goals were "current and appropriate" at the time of the February 2011 CSE meeting but assert that they were out of date by the time the IEP would have been implemented in September 2011. They assert that the CSE failed to determine—as required by State regulations—if the annual goals from the student's IEP for the 2010-11 school year were being achieved, and assert that only literacy and math goals were discussed at the CSE meeting. Regarding the 12:1+1 special class placement, the parents assert that the student needed additional teacher support in class, not just "adult" support, that not all adults in a classroom may provide instruction, and that the IEP does not describe the student's need for mainstreaming and the CSE did not discuss it. Regarding the assigned public school the parents assert that the school environment was not appropriate for the student, that the accommodations for the student's management needs described in testimony were not sufficient or were temporary, and that peer grouping in the assigned class was inappropriate and disregarded State regulations.

The parents next contend that their unilateral placement of the student at the Aaron School was appropriate because the student received all mandated related services, the Aaron School is a therapeutic school, the student made progress therein, and the Aaron School provides appropriate mainstreaming opportunities. Regarding equitable considerations, the parents deny the district's assertions and allege facts showing their cooperation with the district. Lastly, the parents assert that deference should be given to the IHO's credibility determinations and request that the district's petition be dismissed and the IHO decision upheld.

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<sup>5</sup> In their answer, the parents affirmatively state that they do not cross-appeal from any of the IHO's determinations that were adverse to them (Pet. ¶¶ 3-4). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, this decision will not address the IHO's determinations with regard to the parents' contentions regarding the CSE's alleged failure to consider adapted physical education, assistive technology, and parent training and counseling in developing the student's IEP, as well as the determination that various procedural violations in the development of the February 2011 IEP did not result in a failure to offer the student a FAPE.

<sup>6</sup> The parents also assert that the district failed to appeal certain of the IHO's findings pertaining to the sufficiency of the evaluations, however, a plain reading of the petition supports the conclusion that the district's appeal asserts that the February 2011 CSE considered adequate evaluations.

## 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. Mamaronck 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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]).

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. February 2011 IEP**

#### **1. Sufficiency of Evaluative Information**

I will first consider the District's contention that the IHO erred in finding that the absence of updated evaluations constituted a denial of FAPE and an evaluation was needed to ascertain whether the recommended program change adequately addressed the changes that had been noted in the student. An independent review of the information considered by the February 2011 CSE, as detailed below, reflects that the CSE had before it current evaluative information relative to the student which was sufficient to enable the CSE to develop the student's February 2011 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and the district must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

A CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005];). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*19 [S.D.N.Y. March 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at \*15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kings ton City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567).

In this case, the hearing record shows that at the February 2011 CSE considered a 2008 psychological evaluation, an October 2010 Aaron School speech and language therapy report, an October 2010 Aaron School OT plan, a November 2010 Aaron School report, a November 2010 observation report, 2010-11 Aaron School literacy goals, 2010-11 Aaron School math goals, and the student's IEP for the 2010-11 school year (Tr. pp. 37-39, 44-45; Dist. Ex. 1-2; 4-6; 8-9; Parent Ex. O).<sup>7</sup>

Over four days in March, April, June and July 2008, a private psychologist conducted a psychological evaluation of the student to assist with the development of an education and treatment program based on the student's difficulties with language processing, academics, social skills, and behavior (Dist. Ex. 2 at p. 1).<sup>8</sup> The psychologist noted that during the assessment the student was "socially interested" but presented with significant delays in language processing and expression as well as difficulties with attention, rigidity, and self-regulation (id. at p. 2).

The 2008 psychological evaluation provided the February 2011 CSE with specific information regarding the student's abilities in the areas of cognition, academics, social skills, and emotional development (Dist. Ex. 2 at pp. 1-11). As part of the 2008 psychological evaluation, the psychologist administered several standardized assessments to the student in the areas of cognition, academics, visual-motor skills, visual-spatial skills, language processing,

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<sup>7</sup> According to the district social worker who attended the February 2011 CSE meeting, a district school psychologist reviewed the 2008 psychological evaluation at the meeting; however, the social worker testified that she was unsure whether the school psychologist discussed the 2008 psychological evaluation with the other members of the February 2011 CSE (Tr. pp. 38-39).

<sup>8</sup> The evaluation report was less than three years old at the time of the February 2011 CSE meeting and therefore the district was in compliance with State regulations that mandate triennial reevaluation of students with disabilities (Dist. Ex. 2 at p. 1; see 8 NYCRR 200.4[b][4]; 34 CFR 300.303[b][1]-[2]).

social/emotional functioning, and adaptive behavior (id. at pp. 3-10). The psychologist noted that the strength of the student's performance varied depending on the area assessed and reported that the student exhibited average fluid reasoning skills and borderline visual-spatial skills (id. at pp. 2-3, 5-6, 9).

With regard to academics, the student was reported to lack basic phonological processing skills and used rote visual recall in developing reading skills "which will ultimately not be adaptive" (id.). The report reflected that the student had developed some basic rote academic skills in isolation but exhibited delayed abilities in attention, self-regulation, and language that negatively affected her reciprocity in social interactions and her ability to learn (id. at p. 5). With respect to social/emotional functioning, the report indicated that the student maintained basic conversations and her social skills continued to develop (id.). The psychologist indicated that the student tended to be distracted and inattentive but responded to structure, limit setting, and redirection (id.). The psychologist also indicated that the student demonstrated difficulties in receptive, expressive, and pragmatic language as well as articulation, sensory processing, attention, and graphomotor skills, all of which negatively affected her academic skill acquisition and socialization (id.). The report reflected that the student demonstrated overall average cognitive ability but she was unable to acquire skills at a corresponding level due to difficulties with receptive and expressive language as well as reciprocal interaction (id. at p. 6). Specifically, the student exhibited difficulties with pragmatic language including engagement in self-directed, disorganized, and circumlocutive conversations (id.). The student performed better with simple and concrete information and at times became overwhelmed when verbal material became more complex (id.).

In addition to the 2008 psychological evaluation, the February 2011 CSE reviewed the October 2010 speech-language and OT plans completed by the student's Aaron School therapists (Dist. Exs. 8, 9). According to the student's speech-language therapist, the student's goals related to language processing, attention, critical thinking skills, phonemic awareness, and problem solving skills, as well as receptive, expressive, and pragmatic language (Dist. Ex. 8 at pp. 1-2). According to the student's occupational therapist, the student's goals related to fine motor and graphomotor skills, sensory regulation, physical endurance, stamina, motor planning, and body awareness (Dist. Ex. 9 at pp. 1-2).

The February 2011 CSE also reviewed a November 2010 Aaron School progress report that described the student's academic skills, attention, class participation, fine and gross motor skills, sensory processing, and social/emotional functioning (Dist. Ex. 4 at pp. 1-6). The November 2010 report, completed by the student's Aaron School teachers and related services providers, described the student's functioning and progress as well as provided information regarding the student's educational program (id. at p. 1). According to the report, during literacy class the student received instruction using a structured, sequential, multisensory approach, to address the student's fluency, comprehension, and spelling (Dist. Ex. 4 at p. 1). The report indicated that the student enjoyed reading and readily participated in group discussions and activities (id. at p. 2). According to the report, the student's "internal and external distractions" negatively affected her completion of reading assignments within the expected time frame which often led to missing explanations and directions (id.). When provided with repeated and broken down questions and instructions, the student was able to complete tasks correctly (id.). The

student was described as an eager participant in math class and enjoyed sharing her knowledge of math but she exhibited difficulty with receiving information and directions as well as learning new concepts due to distractibility and language processing deficits (id.). The student's focus, attention, and engagement in class increased when provided with prompts, chunking of information into smaller components, and interactive activities (id.).

As indicated in the November 2010 Aaron School progress report, within her language arts class, the student sorted words by parts of speech, wrote simple sentences, and understood letter sound correspondence (Dist. Ex. 4 at p. 3). With respect to social studies and science classes, the student was most successful in class when provided with supports such as reminders to stay on task and multisensory instruction (id.). With respect to social/emotional functioning, the student developed several friendships and enjoyed engaging in social activities (id. at p. 4). When engaged with peers the student often required adult facilitation to shift from playing independently to being more collaborative (id. at p. 3). The student's impulsivity combined with delayed pragmatic language skills negatively affected her ability to remain engaged during less structured social activities (id. at pp. 3-4). The report also contained ratings of the student's progress in social skills, writing, language arts, and homeroom functioning, among others (id. at p. 6). The student exhibited emerging skills as well as executing skills with moderate or frequent support (id.).

Next the February 2011 CSE reviewed a November 2010 classroom observation that provided information regarding the student's level of class participation (Parent Ex. O at pp. 1-2). On November 15, 2010, a district social worker conducted an observation of the student at the Aaron School, during which the student sat quietly on the rug with the other students until the beginning of the lesson (id. at p. 1). The observation report reflected that although four other students required redirection and one student was highly disruptive the student did not appear distracted by this student (id.). When asked to participate in the lesson the student responded correctly (id.). As directed by the teacher, when the activity ended, the student along with the other students washed her hands and began her lunch (id. at pp. 1-2). Overall, the social worker described the student as "marginally involved in the class" (id. at p. 2).

In an undated report from the 2010-11 school year, Aaron School staff described the student's midyear progress toward her literacy goals, as well as her then current abilities (Dist. Ex. 5 at pp. 1-2). According to the report, by midyear the student demonstrated emerging skills in her ability to read stories with controlled fluency, expression, and understanding, (id.). In addition, with moderate support, the student identified word structures, segmented and blended words with up to six phonemes, constructed sentences and applied correct punctuation, identified parts of words such as syllables, base words and suffixes, located main idea and details from story, and made judgments, predications and inferences from given facts (id.). According to the report, between fall 2010 and the middle of the 2010-11 school year the student demonstrated progress in her ability to locate the main idea and details from story; identify parts of words such as syllables, base-words, and suffixes; and make judgments, predications and inferences from given facts (id. at p. 2).

A second undated Aaron School report described the student's progress and then current abilities with respect to her math goals for the 2010-11 school year (Dist. Ex. 6 at pp. 1-2). By

midyear, the student demonstrated emerging skills regarding money concepts, identification and understanding fractions, and word problems (id.). In addition, with moderate support the student exhibited several additional skills including adding and subtracting 0, 1, and 2 to a number, describing characteristics of simple shapes and lines, identifying place values of tens and ones as well as having knowledge of addition facts up to 20, recognizing odd and even numbers, telling time from the hour and half hour, and identifying missing shapes or numbers in a pattern (id.). The report indicated that compared to the student's skills in fall 2010, the student exhibited progress regarding addition facts, recognition of odd and even numbers, and knowledge of place value and time concepts (id. at p. 2).

The hearing record shows that the student's 2011-12 IEP reflected the student's needs in the areas of cognition, academics, language processing, social/emotional functioning, sensory processing, attention, and motor skills (Parent Ex. C at pp. 3-7). The description of the student's needs in the February 2011 IEP was consistent with the described needs in the evaluative information considered by the CSE (compare Dist. Exs. 2, 4-6, 8-9, and Parent Ex. O, with Parent Ex. C).

The February 2011 CSE members, including the student's then-current Aaron School teacher, discussed the student's strengths and weaknesses as well as the related annual goals (Tr. pp. 42-43). The minutes of the CSE meeting also indicate that the February 2011 CSE discussed the student's academic, social/emotional, and physical needs (Parent Ex. H at pp. 1-2). According to the district social worker, the student's Aaron School teacher discussed the student's functioning levels at the CSE meeting (Tr. p. 42). The minutes of the CSE meeting indicate that the Aaron School teacher included several additional management needs in the IEP (Parent Ex. H at p. 1). The hearing record shows that the February 2011 CSE thoroughly discussed the student's academic and social/emotional needs, including input from Aaron School staff.

At the impartial hearing, the parents asserted that the CSE included only teacher estimates in the IEP, rather than objective formal assessments to determine the student's then-current academic skill levels (Parent Ex. B at p. 3). According to the district social worker, the school psychologist believed it was not necessary to conduct a new psychoeducational evaluation prior to the February 2011 CSE meeting (Tr. p. 39).<sup>9</sup> As noted above, the hearing record shows that the July 2008 psychoeducational evaluation was conducted within three years of the February 2011 CSE meeting (see Dist. Ex. 2). Additionally, the minutes of the CSE meeting indicate that the CSE reviewed evaluative materials (Parent Ex. H at p. 1).

The IHO concluded that the February 2011 CSE recommended a change in placement from a 12:1 to a 12:1+1 special class without sufficient evaluative information (IHO Decision at p. 23). The IEP and the minutes of the February 2011 CSE meeting both indicate that the CSE considered other placements, but did not recommend those settings because they would be too large to address the student's needs (Parent Exs. C at p. 21; H at p. 2). The IEP and the minutes also both note that continuing the recommendation of a 12:1 placement was rejected as not

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<sup>9</sup> The social worker first testified that the psychologist stated that an updated psychological evaluation was needed for the 2011-12 school year but then corrected herself by stating that the psychologist stated that the psychological evaluation needed to be updated for the 2012-13 school year (Tr. p. 39).

supportive enough for the student, and a 12-month program in a special class in a special school was rejected as too restrictive (*id.*). The social worker testified that the February 2011 CSE believed that the student required an additional adult in the classroom and therefore recommended a 12:1+1 special class placement (Tr. pp. 42-43). The social worker stated that based on the student's language and academic needs she continued to require a small class setting but also required an additional adult in the classroom to assist the student to engage and address her annual goals (Tr. p. 48).

In conclusion, the hearing record reflects that the February 2011 CSE considered information describing the student's needs in cognition, attention, academics, language, social skills, motor skills, and sensory regulation. The hearing record further shows that the February 2011 CSE incorporated this information into the recommended IEP (Tr. pp. 37-39, 44-45; compare Parent Ex. C at pp. 3-7, with Dist. Exs. 1-2, 4-6, 8-9, and Parent Ex. O). I find that the February 2011 CSE considered sufficient evaluative information and note that a district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; *G.W.*, 2013 WL 1286154, at \*23; *S.F. v. New York City Dep't of Educ.*, 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]). Although concluding that there was a lack of sufficient information about the student before formulating the student's IEP, Aaron School November 2010 report contained detailed information about the student's performance, which report was provided to the CSE. A CSE is expected to consider such information from a student's private school, if available, and the IHO did not address this evidence or explain why that information, in addition to the observation and psychoeducational testing was insufficient. I find that it was sufficient and accordingly, the IHO's determination that the February 2011 CSE required additional evaluative data to develop the student's IEP must be reversed.

## **2. Adequacy of Goals and Short-Term Objectives**

Next, I will turn to the parties' dispute over the adequacy of the goals and objectives in the February 2011 IEP. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). For the reasons set forth below, I find that the goals and objectives in the February 2011 IEP were appropriate and addressed the student's educational and other needs.

The hearing record shows that the present levels of performance found in the February 2011 IEP included teacher estimates of the student's instructional levels for academics; that the instructional levels were based on information contained in the Aaron School reports, as well as input from the student's Aaron School teacher; and that the district presented a draft IEP for

review during the February 2011 CSE meeting (Tr. p. 42-45; Parent Exs. C at p. 3; H at p. 1). To assist in the development of annual goals the CSE reviewed the student's then-current Aaron School goals which, according to the district's social worker, both the parents and Aaron School teacher agreed were appropriate at the time (Tr. p. 85). The student's father confirmed that during the February 2011 CSE meeting the district special education teacher reviewed the February 2011 Aaron School report with the student's Aaron School teacher and "walked through a lot of the goals and objectives" (May 14, 2012 Tr. pp. 208-10). According to the student's father, the district's special education teacher questioned the Aaron School teacher as to how the student was performing and whether her literacy and math goals were still relevant (May 14, 2012 Tr. pp. 209-10). With the help of the student's Aaron School teacher, the CSE identified the academic goals that the student had not yet achieved and that needed to be continued (Tr. pp. 43-45; see Dist. Exs. 5; 6). In addition, the student's father testified that the team made notes on the IEP with respect to the student's "level" (May 14, 2012 Tr. pp. 209-10).

A review of the February 2011 IEP shows that to address the student's identified needs the CSE developed goals related to her deficits in language processing, academics, social/emotional functioning, motor skills, and sensory processing (Parent Ex. C at pp. 8-19). Specifically, the February 2011 IEP includes 22 annual goals in the areas of reading, math, handwriting, social skills, sensory regulation, attention, motor skills, and receptive, expressive, and pragmatic language (*id.*). Although the recommended IEP goals are written in compound form, they contain sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision, and they contain adequate evaluative criteria (*see id.*). The February 2011 IEP also indicates that the student's progress toward the annual goals would be measured over the course of a marking period or assessed at the end of the marking period and that there would be three reports of progress per year using a coding system included in the IEP (*see id.*).

I note that the IDEA and State regulations neither mandate nor preclude a CSE from developing IEP goals that are expressed in terms of a specific "grade level" or a "baseline" (*see Lathrop R-II School Dist. v. Gray*, 611 F.3d 419, 424-25 [8th Cir. 2010] [noting that a school district can not be compelled to put more in an IEP than is required by law]; *Hailey M. v. Matayoshi*, 2011 WL 3957206, at \*23 [D. Haw. Sept. 7, 2011] [rejecting the claim that goals are inadequate because they lack baseline levels or grade levels and are appropriate if they are capable of measurement and directly relate to student's areas of weakness identified in the present levels of educational performance]; *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435, 446-47 [N.D.N.Y. 2010] [noting that the CSE took into account baseline information located in the student's evaluations when developing the student's IEP]). Based on the foregoing, the annual goals were measurable and aligned with the student's needs and any alleged deficiency due to the lack of "baseline" data or grade levels did not preclude the student from the opportunity to receive educational benefits.

Turning to the parents' specific assertion that the goals relating to the student's social and emotional needs are insufficient, and the IHO's finding that the single counseling goal was insufficient, I find the IEP as a whole adequately addressed these needs.

To address the student's social emotional needs the CSE developed one counseling goal related to improving the student's interaction with peers (Parent Ex. C at p. 14). Consistent with the annual goals discussed above, the recommended counseling goal was written in compound form and identified several skills to be mastered (id.). In brief, the goal sought to improve the reciprocity of the student's peer interactions by improving her ability to initiate and maintain peer interactions for 5-10 minutes of verbal interchange, engage in a shared topic with peers for 5-7 minutes, sustain reciprocal play schemes with two peers, and use language to express her ideas and feeling when engaged in a play activity with peers (id.).

According to the student's mother, the February 2011 CSE discussed that the student continued to experience "tremendous anxiety about what was happening before or what was happening next" and that it helped the student to preview information and tell her what was going to happen (May 14, 2012 Tr. p. 188). She testified that the student's teachers would give her sensory tools to hold throughout the day and employed the use of a timer (id.). While the February 2011 IEP did not include specific goals related to the student's anxiety and fixation, the IEP did otherwise address the student's needs in these areas. As indicated in the present levels of performance, the student demonstrated a strong desire to do well but her preoccupation with doing so often distracted her from the task at hand (Parent Ex. C at p. 5). The district's social worker testified that the CSE discussed the student's anxiety and addressed it by providing the student with "another support in the class" and the tools she needed to lessen the anxiety (Tr. p. 57). The CSE meeting minutes note that the student's anxiety was not related to time constraints, rather it was related to the student's performance, her desire for predictability, and need to know the order of things (Parent Ex. H at p. 1). The present levels of performance further note that the student demonstrated anxiety and fixated on upcoming events and this was generally addressed through the use of pictorial daily schedules, monthly agendas, and written agendas for each class period (Parent Ex. C at p. 5). A review of the IEP shows that the CSE included the use of pictorial daily schedules, monthly calendars, and a written agenda for each class in the list of environmental modifications and human/material resources needed to address the student's social-emotional management needs (id.). Additional accommodations recommended by the CSE included previewing materials and expectations and the use of sensory tools (id. at pp. 4-5). With respect to the student's interaction with peers the IEP indicated that the student had difficulty maintaining interaction, as well as interpreting social cues and responding appropriately, and that she benefited from having a teacher in close proximity and teacher directives to engage constructively with peers (id. at p. 5). Again, the IEP identified these environmental modifications and human/material resources as needed to address the student's social-emotional management needs (id.). Finally, the present levels indicated that the student strayed off topic and had a hard time letting go, but that she responded to a teacher-made behavior plan management system designed to reinforce expected behavior (id.). The IEP noted the student's need for reinforcement of clear and consistent expectations, positive reinforcement and a teacher-made behavior system (id.). Based on the foregoing, the February 2011 IEP adequately addressed the student's social/emotional needs.

### 3. 12:1+1 Special Class Placement

The hearing record supports the district's argument that the IHO erred in finding that the recommendation for a 12:1+1 class was inadequate to address the student's needs and would not provide sufficient individualized support.

The evidence in the hearing record supports the February 2011 CSE's placement recommendation for the student for the 2011-12 school year. As determined above, the February 2011 CSE relied on sufficient evaluative information when developing the student's IEP. The documentary evidence before the February 2011 CSE described the student's skill levels and her educational performance at the Aaron School (Dist. Ex. 4 at pp. 1-6). The evidence shows that the student's academic skills ranged from below grade level skills through grade level skills (see Parent Ex. C at p. 3). In addition, the student exhibited difficulties with attention due to internal and external distractions and had difficulty with auditory processing but with support the student was an eager participant in group instruction (Dist. Ex. 4 at p. 2). The student demonstrated difficulty in maintaining conversations with peers but responded well to supports provided by the teacher to interact in a more meaningful manner (id. at pp. 3-4). Furthermore, within a 11:1+1 class at the Aaron School the student demonstrated progress (see id. at pp. 1-6).

In order to address the student's identified needs, the CSE recommended that she attend a 12:1+1 special class in a community school (Parent Exs. C at p. 1; H at pp. 1-2). In addition, the district offered the student related services of one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group (3:1), one 30-minute session per week of individual OT, one 30-minute sessions per week of OT in a group (2:1), and one 30-minute session per week of counseling in a group (3:1) (Parent Ex. C at p. 22).

The IEP further provided that the student be afforded numerous environmental modifications and human/material resources to address her academic management needs, as follows: directions repeated; structured, sequential, and multisensory teaching; questions and instructions repeated and broken down; verbal reminders for posture, eye contact, and listening; teacher prompting; manipulatives; chunking of information into smaller steps and phrases; positive feedback and encouragement; printed examples; teacher modeling; verbal prompts for visualization; rubber stamps for word spacing; class agendas; visual schedules; encouragement for self-advocacy; frequent check-ins; 1:1 support; consistent verbal prompts for behavior and social skills; structured activities with clear expectations; assigned job for student; preferential seating within teacher proximity; previewing materials; previewing expectations; and extended time for questions (Parent Ex. C at p. 4).

To address the student's social/emotional and health/physical management needs, the IEP included several accommodations and supports including pictorial daily schedule, monthly calendar, class agendas to regulate anxiety, teacher close proximity, facilitation in social interactions with peers, reinforcement of clear and consistent expectations, modeling, positive reinforcement, behavior system, sensory tools, and sensory input throughout the day to assist with stamina and strength (Parent Ex. C at pp. 5, 7). Consistent with the student's needs, the IEP included annual goals related to her delays in reading, math, language processing, attention, fine

motor and graphomotor development, sensory processing, and social skills (*id.* at pp. 8-19). The CSE recommended counseling to address the student's social/emotional needs and speech-language therapy to address her language processing needs (Tr. pp. 52, 54; Parent Ex. C at pp. 5, 22). To address the student's fine motor and sensory processing needs, the CSE recommended OT (Tr. p. 52; Parent Ex. C at p. 22).

While the parents assert that the student would not receive the small group and individualized instruction and attention she required within a 12:1+1 special class, I note that the student's Aaron School teachers reported that the student readily participated in class and completed assignments at times independently and other times with supports (Dist. Ex. 4 at pp. 1-6; Parent Ex. B at p. 5). The student's Aaron School teachers reported that the student functioned within a group of 11 students with one teacher and one assistant teacher during instruction in language arts, writing, social studies, science, health, social skills, computer, art, movement, music, and library (Dist. Ex. 4 at p. 1). According to the Aaron School teachers, the student socialized with other students with adult supports and responded to redirection (*id.* at pp. 1-3). Within an 11:1+1 class at the Aaron School, the student was able to participate in the curriculum with supports such as structure, verbal prompts, close proximity to the teacher, and visual cues (*id.* at p. 1). The district's recommended placement of a 12:1+1 special class in a community school with related services, while not identical, was similar to the services provided by the Aaron School, a program in which the student was demonstrating reasonable progress.

Testimony of the school social worker also supports the recommendation of a 12:1+1 special class in a community school (Tr. pp. 38, 47, 50, 55-56). According to the social worker, the CSE believed that the student required a smaller class size to address the student's academic and language needs (Tr. pp. 47, 50). The social worker testified that based on the student's needs in areas of language and academics, the teacher within a 12:1+1 special class setting would provide redirection to support the student regarding her annual goals (*id.*). The social worker testified that a 12:1+1 special class was appropriate for the student based on her needs, as indicated in the evaluative reports and the input from the student's parents and Aaron School teacher at the CSE meeting (Tr. pp. 38, 42-47, 55-56).

The CSE discussed the student's need for individual assistance and determined that the student did not require full time 1:1 assistance (Tr. p. 57). According to the social worker, the CSE members believed that within the 12:1+1 special class the student would receive 1:1 assistance at times when the student required clarification, and as noted above, the IEP called for 1:1 support and a variety of modifications to address the student's need for breaking down of instruction and repetition (Tr. pp. 57-59; Parent Ex. C at p. 4). The February 2011 CSE believed, based on the student's difficulties with attention and distractibility, the student required the assistance of an extra adult within the classroom setting which led to the recommendation of a 12:1+1 special class for the student (Tr. pp. 42-43). For example, the social worker, upon conducting the classroom observation of the student, determined that the student required additional support (Tr. p. 41).

Based on the foregoing, the evidence in the hearing record supports the conclusion that the student would receive adequate support within a 12:1+1 special class to address her special education needs. Based on the student's profile of strengths and weaknesses, and her need for

support regarding attention and directability which could be provided by a paraprofessional, I find the student did not require the assistance of two special education teachers within the classroom (see K.L. v New York City Dep't of Educ., 2013 WL 3814669, at \*5 [2d Cir. 2013]). Further, a certified special education teacher and an assistant teacher provided the student instruction at the Aaron School, which the parent alleges was appropriate (Tr. pp. 316-17, 322-23). Accordingly, the CSE's recommendation of a 12:1+1 special class, in conjunction with the recommended related services and the program accommodations, was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

## **B. Assigned Public School Site**

In her decision, the IHO also addressed some of the parents' concerns raised regarding the particular public school site to which the district assigned the student to attend during the 2011-12 school year (IHO Decision pp. 23-24). On appeal, the district contends that the IHO erred in reaching the parents' contentions about the assigned school since the student did not attend the assigned school, and alternatively, even if the IHO properly addressed these issues, the hearing record does not support her conclusions. Neither the law nor the facts of this case support the IHO's conclusions.

Initially, the district correctly argues that the IHO erred in reaching the parents' contentions about the assigned school since such analysis would require the IHO—and an SRO—to determine what might have happened had the district been required to implement the student's 2011-12 IEP. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

In this case the parents rejected the February 2011 IEP and enrolled the student at the Aaron School prior to the time that the district became obligated to implement the student's IEP (see Parent Ex. A). In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the April 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Thus, the district was not required to establish that the assigned school was appropriate, and therefore, it was error for the IHO to reach any of the parents' contentions with respect to the assigned school or how the February 2011 IEP would have been implemented at the assigned school. However, even assuming for the sake of

argument that the student had attended the district's recommended program at the assigned school, the 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 that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see V.M. v. North Colonie Cent. Sch. Dist., 2013 WL 3187069 at p. \*12 [N.D.N.Y. June 20, 2013]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

Even if I were to address the parents' specific complaints regarding the assigned public school site, the record shows, that upon implementation of the IEP, the district was capable of complying with State regulations for grouping (Tr. pp. 39-42, 102-06, 110-14, 116-17, 119-21, 169, 192; May 14, 2012 Tr. pp. 192-93, 226; Parent Exs. B at pp. 4-7; C at p. 1, 2). I understand the IHO's concern that the other students who also attend a specific classroom can have an effect upon a student, but that does not warrant finding a denial a FAPE under these circumstances, especially when it based upon testimony at the impartial hearing (C.L.K., 2013 WL 6818376, at \*13 ["[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Furthermore, the hearing record does not support the parents' concerns regarding the size of the assigned public school building (Tr. pp. 108-10, 116-18). I can sympathize with parental concerns that the district might not effectively implement an IEP, but that is not a basis for a unilateral placement (R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at \*4 [2d Cir. Oct. 29, 2014]).

## **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to consider the appropriateness of the Aaron School or to consider whether equitable factors weigh in favor of an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated June 28, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay for the costs of the student's tuition at the Aaron School during the 2011-12 school year.

**Dated:** Albany, New York  
November 7, 2014

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**