The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-031

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**
Susan Luger Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Lowell School 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, psychologists, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

## III. Facts and Procedural History

During the 2010-11 school year (second grade) the student attended a district integrated co-teaching (ICT) class (Tr. p. 162).[1] The parents believed that the ICT class did not address the student's academic and social/emotional needs, and they obtained a private evaluation to determine his educational needs (Tr. pp. 163-64; Parent Ex. C). The district held a CSE meeting in January

[1] State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]).

2011 and again in March 2011, and at the parents' request, did not develop a final IEP until after the parents had been able to provide the CSE with the results of a private evaluation they were arranging for the student (Tr. pp. 14-16). The parents provided the evaluation to the district in April 2011 (Tr. p. 164). The parents signed an enrollment contract with the Lowell School on April 2, 2011 for the 2011-12 school year (Parent Ex. E).

On June 9, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 7 at p. 12). The CSE found the student eligible for special education programs and related services as a student with a speech or language impairment and recommend placement in a 12:1+1 special class in a community school (id. at pp. 8, 12). The CSE also recommended that the student attend an ICT class in the area of English language arts (ELA) for eight sessions per week (id. at p. 8). The CSE further recommended one 30-minute session of individual speech-language therapy per week, two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute session of individual counseling per week, and one 30-minute session of individual of counseling per week in a group of five (id. at pp. 8-9). The CSE recommended that the student be retained in second grade for the 2011-12 school year (Tr. p. 21; see Tr. pp. 15-16).

By final notice of recommendation (FNR) dated June 2011, the parents were notified of the particular school to which the student was assigned (see Parent Ex. D at p. 3).[2] The parents visited the assigned school on or about June 28, 2011 (id.). By letter dated June 2011, the parents rejected the district's offer and notified the district that if it offered an "appropriate program and/or placement" for the student "in a timely manner," they would place him in the district program; however, the parents also stated that they had signed a contract with the Lowell School in order to ensure a placement for the student "in case the [district] [did] not offer an appropriate program/placement" (id.). The district offered the parents another public school for the student,[3] and by letter dated July 5, 2011, the parents rejected the second public school seat as well (id. at pp. 5, 7). By letter dated August 15, 2011, the parents informed the district that they believed the district had failed to offer the student an appropriate placement for the 2011-12 school year and, therefore, they were unilaterally enrolling the student at the Lowell School and would seek the costs of tuition at the district's expense (id. at p. 8). The student began attending the Lowell School in September 2011 (Tr. p. 165).

**A. Due Process Complaint Notice**

In a due process complaint notice dated September 19, 2011, the parents requested an impartial hearing asserting that the student had been denied a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1). The parents asserted, among other things, that the CSE failed to consider the private evaluations, engaged in predetermination, the IEP was not

[2] The hearing record is unclear as to the exact date of the FNR for the 2011-12 school year (compare Parent Ex. D at p. 3, and Parent Ex. D at p. 5, with Parent Ex. D at p. 7). The FNR is not included in the hearing record. The only FNR included in the hearing record was dated June 8, 2010, for the student's 2010-11 school year (Dist. Ex. 2).

[3] The hearing record is also unclear as to the date of the second FNR, although it appears from the context of the hearing record to have been sent in June or July 2011 (compare Parent Ex. D at p. 3, and Parent Ex. D at p. 5, with Parent Ex. D at p. 7).

provided prior to the start of the school year, and the parents were denied meaningful participation in the CSE meeting (id. at pp. 2-3, 5). The parents also asserted that the level of related services on the IEP was inappropriate, the recommendation that the student be retained in second grade would be detrimental to the student, the IEP failed to address the student's language-based learning disability, the IEP failed to address the student's dyslexia in a way that would enable him to make "meaningful education[al] progress," and the IEP did not reflect the student's need for 1:1 reading support (id. at p. 3). With regard to the particular public school buildings to which district assigned the student, the parents asserted, among other things, that the building size, classroom size, and student-to-teacher ratio were all inappropriate (id. at pp. 3-4).[4] Further, the parents asserted that the assigned school did not provide appropriate 1:1 reading support, the teaching methodology used at the school would not address the student's dyslexia, and the student would not have been functionally grouped in the class (id. at pp. 4-5). The parents also noted that the program is not a 12-month program (id. at p. 4).

### B. Impartial Hearing Officer Decision

The impartial hearing took place on January 17, 2012, and by decision dated January 24, 2012, the IHO determined that the district's recommended program was appropriate (IHO Decision at p. 8). In doing so, the IHO determined that the district met its burden in showing that the student should repeat second grade in a 12:1+1 class in a community school (id.). The IHO also noted that both the district and the parents chose the same setting of a small class with a student-to-teacher ratio of 12:1+1 for the student; however, the district recommended a community school and the Lowell School had no general education students (id. at p. 7). The IHO determined that there was no evidence or testimony provided to demonstrate that the student could not be mainstreamed with his peers for lunch, gym, recess, and "perhaps other subject areas" (id. at p. 8). The IHO further noted that both the district and the Lowell School staff agreed that the student's reading and math skills were at the first grade level (id. at p. 7). The IHO noted that the hearing record did not show that the student was capable of doing third grade work at the Lowell School (id.). The IHO also determined that the parents did not raise the issue of the student's need for a 12-month program in their due process complaint notice, and therefore, although there was testimony relevant to that issue, it was not properly before her (id. at p. 8). The IHO denied the parents' requests for tuition reimbursement at the Lowell School and for the private evaluation (id. at pp. 8-9).

## IV. Appeal for State-Level Review

The parents appeal, asserting that the district did not offer the student a FAPE for the 2011-12 school year. Specifically, the parents assert that the IEP did not provide the student with enough reading support to address his dyslexia, that the CSE's decision to have the student repeat the second grade was not appropriate, and that the student needed a 12-month program. The parents also assert that the assigned school was not appropriate because there was no spot available for the student in the 12:1+1 class, the district did not present any evidence to show that the student would have been functionally grouped in the class, the IEP could not be implemented in the classroom,

[4] The due process complaint notice contains allegations regarding both of the school assignments offered by the district (Dist. Ex. 1 at pp. 3-5); however, since the last offered assigned school is the school in which the district would have had to implement the student's IEP, I will address only the allegations regarding that school in this decision.

the proposed class would address the student's dyslexia, and the student would have been provided with eight periods of ELA per week.

In its answer, the district asserts general admissions and denials. The district also asserts that it offered the student a FAPE for the 2011-12 school year. Specifically, the district asserts that the CSE appropriately recommended the student repeat the second grade and that the IEP provided sufficient reading support for the student. The district asserts that the IHO properly declined to address the issue of whether the student required a 12-month program as it was not raised by the parents in their due process complaint notice. In the alternative, the district asserts that the student did not require a 12-month program to receive educational benefits. The district further asserts that the assigned school and class were appropriate and that the parents' allegations regarding the assigned school are speculative. Lastly, the district contends that the Lowell School was not appropriate for the student and that equitable considerations favor the district.

**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 v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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).

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 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

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that the teaching methodology the student would have received at the assigned school was appropriate and her denial of the parents' request for reimbursement for the private evaluation (IHO Decision at pp. 7, 8). Accordingly, these determinations have 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]).

### B. Scope of Impartial Hearing

Regarding the IHO's finding that the parents did not raise in their due process complaint notice the issue of whether the student required a 12-month program, 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 IHO 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 R.B. v. Dep't of Educ. of The 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); Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' due process complaint notice, I find it difficult to disagree with the IHO's interpretation of the document, however, it might be reasonable to allow a challenge regarding the district's decision not to offer the student a 12-month program to proceed to an impartial hearing, and insofar as the district has asserted a defense to the claim in its answer, I will review the claim out of an abundance of caution (see Dist. Ex. 1 at p. 4).

**C. June 9, 2011 IEP**

**1. Reading Support**

Turning to the merits of the case, the parents assert that the IEP was inadequate because it did not provide enough reading support to the student, including a program to address his needs related to dyslexia.

The evidence in the hearing record shows that to address the student's difficulties with reading and language, the June 2011 CSE recommended a 12:1+1 special class in a community school for the student (Dist. Ex. 7 at p. 8). Additionally, to address the student's needs related to dyslexia, the CSE recommended one 30-minute session of individual speech-language therapy per week and two 30-minute sessions of speech-language therapy per week in a group of three (id.). The CSE also recommended that the student attend eight ELA sessions per week in an ICT setting to address his needs related to reading and language (id.).

Prior to the June 2011 CSE meeting, two private evaluations and one district evaluation were conducted of the student which included specific information regarding the student's difficulties in reading and language and related needs (Dist. Ex. 3; Parent Exs. B; C). In February 2011, a private audiological and auditory processing evaluation report reflected results of the Scan 3 Test for Auditory Processing Disorders in Children (SCAN 3), which indicated that the student exhibited a borderline deficit (4th percentile) including difficulty with figure ground listening and integration (Parent Ex. B at p. 4). The evaluators noted that the student's left ear advantage suggested "either a right hemisphere dominancy for language or a neurologically based learning disability" (id.). The report indicated that the student exhibited significant difficulties with tasks related to auditory/visual integration, decoding, and tolerance fading memory (id.). The evaluators concluded that an "auditory processing disorder [wa]s identified particularly in the areas of figure-ground listening, auditory closure and integration, phonemic awareness (decoding and synthesis), tolerance fading memory, auditory/visual integration and temporal integration" (id. at p. 5). Among other things, the evaluator recommended speech-language therapy, multisensory instruction with a focus on phonemic awareness, preferential seating, study guides/outlines, a

personal FM system, testing in a quiet area, directions read and clarified, extended time, and a smaller class size (id.).

The March 2011 neuropsychological evaluation privately obtained by the parents when the student was in the latter half of the second grade (2010-11) indicated that the student demonstrated overall average cognitive abilities (Parent Ex. C at p. 3). The private evaluator indicated that the student's word recognition skills were at the beginning first grade level with limited decoding skills (id. at p. 5). In the area of reading comprehension, the student's skills varied from early first grade level through mid-second grade level (id.). With respect to math skills, the student's calculation skills were at the early second grade level and his problem solving skills were at the early to mid-second grade level (id.). The student's spelling and writing skills fell below a first grade level and at an early first grade level, respectively (id.).

With respect to the 2011 neuropsychological evaluation, results of the Behavior Assessment System for Children-Second Edition (BASC-2), with the student's mother serving as informant, indicated the student exhibited difficulties with attention, shyness, and functional communication skills (Parent Ex. C at p. 5). The private evaluator noted that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) (id.). The evaluator also noted that the student exhibited difficulties regarding time management, learning rate, cognitive flexibility, and retention and retrieval of information, particularly auditory and verbal information (id. at p. 6). The evaluator indicated that the student's "greatest concern is the fact that he has a language-based [l]earning [d]isability, and can be described as being [d]yslexic" (id.). The student exhibited mild difficulty with speech articulation as well as difficulties with lexical skills, word retrieval, morhpo-syntactic production, and auditory and language processing (id.). The evaluator concluded that a 12:1+1 special class setting would not be appropriate for the student (id.). It was recommended that the student attend a smaller, highly adaptive, individualized and supportive setting to address the student's needs including his needs related to dyslexia (id.). It was also recommended that the student receive multisensory instruction in a class with students with learning disabilities with average cognitive abilities (id.).

In May 2011 the district's school psychologist conducted a psychoeducational update of the student which included, among other things, a classroom observation and a standardized academic assessment (Dist. Ex. 3). With respect to the observation of the student within his second grade ICT class, the school psychologist noted that the student followed directions with reminders and attempted to complete the class work but made several errors (id. at p. 2). The student engaged in limited social interactions with peers and was described as "very reserved" (id.). Results of the Kaufman Test of Educational Achievement-Second Edition (KTEA-2) indicated that the student's letter/word recognition and reading comprehension skills fell within the low average range and well below average range respectively (id. at p. 3). The student read and comprehended words and sentences with simple commands, but exhibited difficulty with reading a paragraph story (id.). The report reflected that the student's math skills fell within the low average to average range and his spelling skills were "limited" (id.). The report further reflected that the student's math calculation and skills were mildly delayed (id.). The student added and subtracted only single digit numbers, showed the ability the tell time, counted money, read a calendar, and recognized number patterns (id.).

The student's June 2011 IEP reflected the evaluative documents discussed above and contained specific information regarding the student's needs in the areas of reading and language,

as well as related accommodations and strategies (Dist. Ex. 7 at pp. 1-3). The June 2011 IEP described the student's needs using both standardized testing results and a narrative description (id.). Consistent with the evaluations, the IEP indicated that the student demonstrated average cognitive abilities with a visual and kinesthetic learning style (id. at p. 2). The IEP also indicated that student demonstrated delays in both decoding and reading comprehension, with reading comprehension being especially difficult for him (id. at p. 1). With respect to reading, the student read and comprehended simple words and sentences but could not read a brief paragraph (id.). The IEP indicated that the student "tended to read slowly and laboriously" and that his spelling skills were limited (id.). Moreover, the IEP reflected that the student's spelling abilities fell at the 16th percentile and that he could only spell a few basic words (id.). The IEP noted that the student exhibited delays in auditory processing, comprehension, and receptive and expressive language delays (id. at p. 2). The management needs reflected in the IEP included providing the student with positive reinforcement and encouragement to work independently (id. at p. 3). The IEP indicated that the student preferred to be seated in close proximity to an adult to allow him to ask for assistance as needed (id. at p. 2). In addition, the IEP indicated that the student also preferred to engage in "hands on" tasks (id.).

To address the student's reading and language needs, the student's annual goals related to, among other things, his needs in the areas of reading, phonemic awareness, auditory processing, following multistep directions, short-term memory, vowel sounds, sight word vocabulary, decoding skills, and written language (Dist. Ex. 7 at pp. 4-8). To remediate the student's reading and language skills related to dyslexia, his annual goals included strategies including graphic organizers, chunking, and cues (id. at pp. 4, 7).

According to the school psychologist, to address the student's needs related to dyslexia, the June 2011 CSE recommended that the student attend a 12:1+1 special class with related services of speech-language therapy and counseling (Tr. pp. 57, 63-64). Moreover, the school psychologist indicated that within a small class setting, the student would receive the reading instruction he required to improve his academic levels (Tr. pp. 63-64). The school psychologist also testified he was aware that the private neuropsychologist had diagnosed the student as having dyslexia and that the agreed with that diagnosis (Tr. pp. 60-61, 64). The student's second grade ICT teacher who attended the June 2011 CSE meeting, testified regarding the student's abilities and needs including his late-kindergarten level reading skills (Tr. pp. 30, 43). The ICT teacher also testified that the student needed a smaller class size (Tr. pp. 35, 38).

Based on the above, I find that the June 2011 CSE reviewed the student's evaluative information, including the student's diagnosis of dyslexia and his related reading and language problems, reflected the results of those evaluations in the IEP, and recommended a program, services, accommodations, and goals that would have appropriately addressed the student's reading needs and provided him with adequate support in a small class setting. Therefore, I find no reason to disturb the IHO's decision.

**2. 12-Month Program**

As discussed above, the parents allege that the student required 12-month services in order to receive a FAPE. In developing an IEP for a student with a disability, a CSE "shall include" a recommendation for 12-month services in the IEP for students who meet the eligibility requirements (8 NYCRR 200.4[d][2][x]; see 34 CFR 300.106[a][1], [a][2] [requiring districts to

"ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 300.106[b] [defining extended school year services as both "special education and related services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]). To determine eligibility, State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, if they are…" students who are not in programs as described in subparagraphs (i) through (iv) of this paragraph during the period of September through June and who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education (8 NYCRR 200.6[k][1], [v]). State regulations define a 12-month special service and/or program as a special education service and/or program provided on a year-round basis for students determined to be eligible in accordance with State regulations whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program shall operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) shall be provided with the frequency and duration specified in the student's individualized education program (8 NYCRR 200.1[eee]). The neuropsychologist who conducted the private March 2011 neuropsychological evaluation of the student did not indicate that the student required a 12-month educational program and services (Parent Ex. C). There is no evidence in the hearing record that any member of the CSE, including the parents, raised the issued of a 12-month program and services at the June 2011 CSE meeting. Although there was testimony from staff at the Lowell School that the student required a 12-month program, there is no support in the hearing record, including in the evaluations reviewed by the CSE, to support this contention (Tr. pp. 73, 103-04). Furthermore, I note that the hearing record does not indicate that the student received 12-month services at the Lowell School or anywhere else during summer of the 2011-12 school year (see Tr. p. 165).

After review of the record, I find that there is no evidence in the hearing record that at the time of the CSE meeting, there was evidence that the student would exhibit substantial regression in the absence of a 12-month educational program and services. Under these circumstances, I cannot find that the CSE erred in not recommending 12-month services for the student.

**3. Retention in Second Grade**

The parents assert that the CSE improperly recommended that the student be retained in second grade. I agree with the IHO that both the district and the Lowell School put forth that the student's reading and math abilities were at the first grade level (Tr. pp. 57, 59, 90; Dist. Ex. 7 at pp. 1-2). Specifically, the student exhibited first grade skills in the areas of decoding, reading comprehension, sight word vocabulary, and writing, as well as second grade math skills (Dist. Exs. 3 at p. 4; 7 at pp. 1-2; Parent Ex. C at p. 5). The private neuropsychologist who evaluated the student in March 2011 stated that overall the student's reading and writing skills were at the beginning first grade level, his spelling skills were below the first grade level, and his math skills were at the mid-second grade level (Parent Ex. C at p. 5). Despite this, the neuropsychologist stated that retaining the student in second grade would not be appropriate (id. at p. 6). However, the neuropsychologist also reported that at the end of the student's second grade year, he was

performing mainly at a first grade level and the parties do not dispute this (id. at p. 5). The student attended a third grade class at the Lowell School (Tr. pp. 83-84). The Lowell School did not offer a second grade classroom, and only offers classes in grades three through eight (Tr. p. 67).

I find that based on the information that the CSE had before it at the time of the June 2011 CSE meeting, it was not inappropriate for the district to retain the student in the second grade, and the parents' claim that the retention resulted in a denial of a FAPE is without merit.

**D. Assigned School**

The parents assert several claims regarding the assigned school including that the assigned school would have been able to provide the student with an appropriate amount of reading support, that the student would not have been functionally grouped in the assigned class, and that the size of the school and class was appropriate.

Federal and State regulations specify that parents have the right to participate in meetings to determine the "identification, evaluation and educational placement of the child." (34 CFR 300.501[b][1][i]; A. L. v. New York City Dep't of Educ., 2011 WL 4001074 * 11; S.F.v. New York City Dep't of Educ., 2011 WL 5419847 * 12). In A.L., the court noted however, that this right extends "only to the general type of educational program in which the child is placed." (citing Concerned Parents v. City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). In S.F., the court further clarified that parents do not have the right under the IDEA to visit a proposed school or classroom before the recommendation is finalized or prior to the start of the school year. Furthermore, while parents must be afforded the opportunity to participate in the formation of an educational program-the classes, individualized attention, and additional services- they are not entitled to determine the bricks and mortar of an actual school's location (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir.2009]). In this case, the parents were present at several CSE meetings during the 2010-11 school year, and were provided with the opportunity to obtain and provide the CSE with the results of a private evaluation at the June 2011 IEP meeting (Tr. pp. 14-16). The hearing record also shows that district provided the parents with notification of the assigned schools (see Parent Ex. D at pp. 3, 5, 7). Furthermore, although not required by the IDEA or the Education Law, the parent did visit the first assigned school offered by the district and the district subsequently offered a second assigned school based on the parents' objections after the visit (id.).[5] The hearing record shows that the district complied with, and exceeded its procedural obligations (S.F., 2011 WL 5419847, at *12). Even assuming for the sake of argument that the parents had a right to visit the assigned schools and object to them prior to the start of the school year, I would still find that the parents assertions are without merit.

In this case, a meaningful analysis of the parents' claims with regard to the assigned school would require me to determine what might have happened had the district been required to implement the student's IEP. A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the

[5] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and, at that point, have new concerns, the IDEA and the Education Law contemplate that the collaborative process for revising the IEP will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). 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 it (id.; 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 appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at the Lowell School prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, there is no evidence in the hearing record to 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. 2011 WL 4001074, at *9). Contrary to the parents' contentions, the district did not have the obligation under these factual circumstances to present evidence that it provided special education services in conformity with the student's IEP, and the parents' unsubstantiated allegations regarding what might have happened had the student attended the public school are not a basis for concluding that the district failed to offer the student a FAPE by failing to implement the student's IEP in a material or substantial way. For these reasons, I find the parents' assertions to be without merit.

**E. Other Matters**

The IHO stated in her decision that the hearing dates on November 17, 2011 and December 20, 2011 were adjourned at the request of both parties (IHO Decision at p. 2). The parents allege in their petition that neither party requested an extension of the December 2011 hearing date and that the IHO failed appear or inform anyone that she would not attend the hearing and that both parties appeared on that day. The district denies the allegation. Extensions may only be granted consistent with regulatory constraints and an IHO must ensure that that the IHO's written response regarding each extension request be included in the hearing record, even if granted orally (34 CFR 300.515; 8 NYCRR 200.5[j][[5]). In this case, I note that the IHO did not enter any documentation into the hearing record regarding the requests from the parties for extensions, her written responses to the parties, or the reasons for the extensions. In this instance, the allegation does not affect the outcome of my decision regarding the provision of FAPE to the student and it does not afford a basis for overturning the IHO's decision. However, I will exercise my discretion and refer these allegations and findings the Office of Special Education which has been designated by the Commissioner of Education to address matters regarding IHO misconduct and incompetence (8 NYCRR 200.21[b][4][iii]).

## VII. Conclusion

Having found that the district offered the student a FAPE, I need not reach the issue of whether the Lowell School was appropriate for the student or whether equitable considerations favor the parents' request and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**April 06, 2012**

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