



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-130

### **Application of a STUDENT WITH A DISABILITY, by her 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:**

Kule-Korgood, Roff and Associates, PLLC, attorneys for petitioners, Andrea M. Santoro, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Jewish Center for Special Education (JCSE) 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, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

With regard to the student's educational history, the hearing record shows that after received special education services through the early intervention program (EIP) and, subsequently, through the committee on preschool special education (CPSE) (Tr. p. 229). The student began attending JCSE in September 2010 (Tr. p. 230).<sup>1</sup>

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<sup>1</sup> The Commissioner of Education has not approved JCSE as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On May 9, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for 2011-12 school year (Dist. Ex. 2 at p. 1).<sup>2</sup> Attendees at the May 2011 CSE meeting included a district special education teacher (who also served as the district representative), a district regular education teacher, a district school psychologist, the student's special education teacher from JCSE (via telephone), an additional parent member, and the parents (Dist. Ex. 2 at p. 2; Tr. pp. 34-35, 52-53, 231). Finding the student eligible for special education and related services as a student with an other health-impairment, the CSE recommended a 12:1+1 special class placement in a community school (Dist. Ex. 2 at pp. 1, 16).<sup>3</sup> The May 2011 CSE also recommended related services in the following durations on a weekly basis: three 30-minute sessions of individual occupational therapy (OT); three 30-minute sessions of individual physical therapy (PT); two 30-minute sessions of individual speech-language therapy; and one thirty-minute session of speech-language therapy in a group of three (*id.* at p. 18). The May 2011 CSE further recommended supports for the student's management needs, such as repetition and rephrasing, positive reinforcement, and occasional redirection, adaptive physical education in a ratio of 12:1+1, and 18 annual goals (*id.* at pp. 3-15).

On May 27, 2011, the parents wrote to the CSE to address a "misunderstanding" regarding a notice of recommended deferred placement form allegedly signed by the parents at the May 2011 CSE meeting (Parent Ex. D at p. 1).<sup>4</sup> The parents indicated that while they intended to agree that the student should remain in her then-current educational setting and defer implementation of the May 2011 IEP until September 2011, they did not "agree[] with the program recommendation" made by the May 2011 CSE (*id.*). The parents further explained that they had "concerns about the appropriateness of the IEP" including its "class size/staffing ratio" and that they would visit the assigned public school site as soon as one was identified by the district (*id.*). The parents further requested that the district identify the public school location where the May 2011 IEP would be implemented by June 10, 2011 (*id.*).

In a final notice of recommendation (FNR) dated July 27, 2011, the district summarized the 12:1+1 special class placement and related services recommended in the May 2011 IEP and identified the particular public school to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 8).

In an August 11, 2011 letter to the district, the parents acknowledged receipt of the FNR and indicated that they were unable to visit the assigned public school site because the FNR arrived "so late in the school year" (Dist. Ex. 3). The parents further indicated that a prior CSE identified this public school site and the parent "rejected it as inappropriate" at that time (*id.*). Nevertheless, the parents indicated that they would "visit the school in September when it open[ed]" and

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<sup>2</sup> The May 2011 IEP characterized this review as a "[t]riennial" review (Dist. Ex. 2 at p. 2; *see* 8 NYCRR 200.4[b][4] ["A [CSE] shall arrange for an appropriate reevaluation of each student with a disability . . . at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary"]).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>4</sup> The notice of recommended deferred placement alluded to in this letter was not introduced as an exhibit at the impartial hearing.

requested additional information on the school including "a class profile [and] program description" (*id.*). The parents additionally reiterated their "concerns" with the May 2011 IEP, including its recommendation of a 12:1+1 classroom ratio, which would not "provide the [student with the] individual attention, instruction[,] and support that [she] require[d]" (*id.*). The parents also indicated that the May 2011 IEP did not accurately describe the student's present levels of performance, "especially" the student's social/emotional needs and fine/gross motor skills (*id.*).

In a "follow up" letter to the district, dated August 24, 2011, the parents indicated that they did not receive the information requested in their previous letter and expressed their intention to enroll the student at JCSE for the 2011-12 school year (Parent Ex. F at p. 1).

On September 1, 2011, the parents signed an enrollment contract with JCSE for the student's attendance during the 2011-12 school year, as well as an addendum relative to the delivery of related services to the student (*see* Parent Exs. I at pp. 1-2; J).

After visiting the assigned public school location, the parents detailed their observations in a letter to the district, dated September 26, 2011 (Parent Ex. G at p. 1). The parents contended that the assigned public school site would be inappropriate for the student because the building had too many stairs for the student to navigate (*id.*). The parents additionally alleged that the social, behavioral, and/or academic grouping of the students in the observed classroom would be inappropriate for the student; an "indoor recess" period was inappropriate for the student given her "significant social and gross motor needs"; and, according to anecdotal observations, the class could not provide enough individual attention or sufficient support to the student (*id.*).<sup>5</sup> The parents also reiterated their previously expressed concerns regarding the May 2011 IEP (*id.* at p. 2). The parents indicated that the student would continue at JCSE and that they would seek public funding of the costs of the student's tuition (*id.*).

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

In a due process complaint notice dated March 13, 2012, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year and requested an impartial hearing (Parent Ex. A at p. 1). With regard to the procedure by which the IEP was developed, the parents contended that the May 2011 CSE convened "over one year" after the student's previous IEP meeting in contravention of State and federal law (*id.* at p. 2). The parents further contended that the May 2011 CSE was improperly composed as it lacked a regular education teacher (*id.*). The parents additionally averred that they were denied participation in the CSE meeting because the district did not provide them or the student's teachers with a copy of a March 2011 psychoeducational evaluation prior to the CSE meeting, nor did the CSE discuss this evaluation at the meeting (*id.*). The parents further argued that they were denied participation because the May 2011 CSE did not discuss the student's progress toward her prior IEP goals during the meeting (*id.* at p. 3). The parents also asserted that the May 2011 CSE did not possess sufficient evaluative material regarding the student, such as a "classroom observation,

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<sup>5</sup> The parent related two anecdotes whereby a student "r[an] down the stairs and was not followed by an adult" and another "receiv[ed] conflicting information from the two paraprofessionals in the [class]room" (Parent Ex. G at p. 1).

a social history," or updated speech-language, OT, or PT evaluations (*id.* at p. 2). The parents alleged that these procedural violations, considered together, denied the student a FAPE (*id.*).

With respect to the May 2011 IEP, the parents contended that its present levels of performance and management needs were inaccurate and insufficient in several areas, "particularly" with respect to the student's "writing skills, math computation, listening comprehension, social and emotional development, daily living skills, graphomotor skills, visual perceptual skills, and . . . gross motor deficits" (Parent Ex. A at pp. 2-3). The parents also argued that the May 2011 IEP failed to "indicate sufficient information regarding [the student's] gross motor deficits from a person knowledgeable in this area" (*id.* at p. 3). The parents further contended that the IEP's annual goals were inappropriate, insufficient, vague, and incapable of measurement (*id.*). Specifically, the parents alleged that the May 2011 IEP contained no annual goals to meet the student's social/emotional needs (*id.*). The parents also averred that the IEP was insufficient because it inaccurately referred to the student as "him" and failed to indicate the student's promotional criteria (*id.*). The parents further objected to the '12:1+1 special class placement recommendation, arguing that it would not provide the student with the necessary amount of individualized attention, support, or instruction (*id.* at p. 2).

With respect to the assigned public school site, the parents argued that the FNR improperly "failed to specify a particular class" (Parent Ex. A at p. 3). Moreover, the parents argued that the district's delay in sending the parents an FNR prevented them from visiting the assigned public school site before the beginning of the 2011-12 school year (*id.*). The parents also alleged that the assigned public school site was the same as that offered to the student for the 2010-11 school year and "continue[d] to be inappropriate" (*id.*). Specifically, the parents asserted that the assigned public school was too large (including its lunch room); would not appropriately group the student by age or functional level; offered a curriculum that proceeded at an inappropriate "pace"; did not offer appropriate social skills instruction or leisure time; and was unable to implement the speech-language therapy services prescribed in the student's May 2011 IEP (*id.*). The parents indicated that they wrote to the district on multiple occasions requesting information about the assigned public school site and received no response (*id.*).

For relief, the parents sought the costs of the student's tuition at JCSE for the 2011-12 school year (Parent Ex. A at p. 4). The parents further invoked the student's right to remain in her then-current placement under the IDEA's pendency (stay-put) provision (*id.*).

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

An impartial hearing was conducted on April 26, 2012 (Tr. pp. 1-275). In a decision dated May 14, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year and denied the parents' requested relief (IHO Decision at p. 9).

The IHO first summarized the evaluative information before the May 2011 CSE, the IEP's present levels of performance, and the testimony adduced at the impartial hearing (*see* IHO Decision at pp. 2-7). The IHO found that the May 2011 CSE was properly constituted, finding "no merit" in the parents' claim to the contrary (*id.* at p. 7). The IHO further found that the parents were allowed to participate in the May 2011 CSE meeting and that the CSE considered, and was receptive to, the parents' views (*id.*). With respect to the parents' claim regarding their receipt of

the district's psychoeducational evaluation on the day of the May 2011 CSE meeting, the IHO found the parents' testimony not credible, noting that the parents accompanied the student to the testing, spoke with the evaluator before and after the evaluation, and discussed the evaluation during the CSE meeting (id.). The IHO also noted that the May 2011 CSE relied on reports generated by related services providers from JCSE who "either submitted their reports and/or participated at the [CSE] meeting" (id.).

With respect to the May 2011 IEP, the IHO found that the 'present levels of performance and annual goals accurately reflected the student's needs (IHO Decision at p. 9). In addition, the IHO found that the May 2011 CSE's recommendation of a 12:1+1 special class in a community school with related services met the student's needs and constituted the least restrictive environment (LRE) for the student (id.).

Turning to the parents' contentions regarding the assigned public school site, the IHO rejected the parents' claim that the teacher from the assigned public school site could not testify about the student because she was not personally familiar with her (IHO Decision at pp. 6-7).<sup>6</sup> In this regard, the IHO found that the teacher had an appropriate educational and professional background and, moreover, testified "credibl[y]" at the impartial hearing (id. at p. 7). Regarding the student's ability to physically access the assigned public school site's facilities, the IHO found that the parent did not request a barrier free school or other accommodation (id.). The IHO further noted that the student's classroom at JCSE was on the second floor (id.). Therefore, having concluded that the district offered the student a FAPE for the 2011-12 school year, the IHO did not consider whether JCSE was an appropriate unilateral placement or whether equitable considerations supported the parents' requested relief (id. at p. 9).

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

The parents appeal, asserting that the IHO conducted the impartial hearing in a manner inconsistent with due process and issued a legally insufficient decision erroneously concluding that the district offered the student a FAPE for the 2011-12 school year. Regarding the conduct of the impartial hearing, the parents allege that the IHO: failed to conduct the hearing in a manner that was fair to both parties; exhibited bias; interfered with the parents' cross-examination; and refused to facilitate the district's compliance with a subpoena. With regard to the IHO's decision, the parents assert that it: lacks sufficient reasoning; does not include citations to the record; contains errors and inaccuracies; and failed to consider several issues raised in the parents' due process complaint notice.

The parents further contend that the IHO erred in rejecting their claims pertaining to the process by which the CSE was developed. Specifically, the parents contend that the IHO erred in finding that the May 2011 CSE was properly composed and that the parents were denied participation in the CSE meeting. Additionally, the parents appeal the IHO's determination that no harm came to the parents because they received the March 2011 psychoeducational evaluation report at the May 2011 CSE meeting. The parents also argue that the May 2011 CSE did not

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<sup>6</sup> Although the IHO and the impartial hearing transcript identify this witness as an "IEP coordinator" (Tr. p. 1; IHO Decision at pp. 6, 7), the witness identified herself as an "IEP teacher and the [special education teacher support services (SETSS)] teacher" (Tr. p. 84).

possess sufficient evaluative information about the student. As for the May 2011 IEP, the parents aver that the student's present levels of performance were inaccurate and incomplete. In addition, the parents contend that the IEP's annual goals did not address all of the student's areas of need. The parents further object to the IHO's conclusion that a 12:1+1 special class placement in a community school was reasonably calculated to meet the student's needs in the LRE.

Regarding the assigned public school, the parents assert that the IHO erred by relying on the testimony of the teacher from the assigned public school site, as she was not personally familiar with the student. Further, the parents contend that the district failed to establish how the assigned public school could implement the student's May 2011 IEP and meet her needs. The parents further aver that the district failed to introduce evidence pertaining to the functional levels of the students in the assigned public school classroom.

The parents also contend that JCSE was an appropriate unilateral placement for the student because it offered specialized instruction to meet her needs and that no equitable considerations affect their claim for tuition reimbursement.

The district answers, denying the parents' material assertions and arguing that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year. First, the district argues that the IHO conducted the impartial hearing in a manner consistent with due process and did not evince bias. As to the parents' argument regarding the ex parte extension request, the district avers that this was an unintentional error. Moreover, the district argues that the IHO's decision is legally sufficient.

In response to the parents' claims pertaining to the process by which the May 2011 IEP was developed, the district contends that the CSE was appropriately composed and that the parent participated in the CSE meeting. Regarding the IEP, the district asserts that the IHO correctly found that the IEP's present levels of performance, annual goals, and 12:1+1 special class recommendation were appropriate. As for the assigned public school site, the district argues that these claims are speculative insofar as the parents rejected the May 2011 IEP prior to the time when the district became obligated to implement the May 2011 IEP and are otherwise without merit. The district further asserts that JCSE was not an appropriate unilateral placement because it did not constitute the LRE for the student. Additionally, the district argues that equitable considerations do not weigh in favor of the parent's request for relief, as they did not provide timely notice of their intent to unilaterally place the student. Moreover, the district contends that the parents did not seriously intend to enroll the student in a public school. Finally, the district asserts that the parents were not legally obligated to pay the costs of the student's tuition at JCSE and, therefore, not entitled to relief in the form of direct funding of the student's tuition.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 206-07 [1982]).

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

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

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

Before addressing the substance of the parties' dispute, it is necessary to resolve the parents' claims regarding the process by which the impartial hearing was convened and conducted and the sufficiency of the IHO's decision.

## 1. Convening of Impartial Hearing

Turning to the parents' contention that the IHO unreasonably delayed the impartial hearing, the hearing record suggests that the impartial hearing was, in fact, delayed but that no harm befell the parties or the student as a result of these delays. The parents contend that the IHO arrived late to a hearing date dedicated to identifying the student's pendency placement, refused to go on the record, and "attempted to force the parties to enter into a written agreement regarding pendency." The parents further argue that the IHO failed to arrive to a subsequent hearing date and notified the parties' of her unavailability an hour after the agreed-upon start time. Although the available evidence in the hearing record neither supports nor refutes these allegations, the parents submitted additional evidence in the form of an affidavit from their counsel swearing to the truth of these allegations. The district denies the parents' contentions in its answer but provides no evidence in support of these denials (see Answer at pp. 2-3).<sup>7</sup>

Preliminarily, it is unclear why an evidentiary hearing on the issue of pendency was necessary in this matter. The student's pendency placement arose automatically upon the filing of the parents' due process complaint in March 2012 (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). In their due process complaint notice, the parents identified an unappealed February 2012 IHO decision regarding the 2010-11 school year as the basis of their position that JCSE constituted the student's pendency placement (Parent Ex. A at p. 4; see Parent Ex. B). This decision was issued over a month prior to the parents' March 2012 due process complaint notice (compare Parent Ex. B at p. 30, with Parent Ex. A at p. 4). The district did not contest at the impartial hearing the parents' assertion that the February 2011 IHO decision formed the basis for the student's pendency placement (Tr. pp. 15-16, 24-25). These reasons obviated the need for any evidentiary hearing regarding the student's pendency placement. Nevertheless, this error did not result in any harm to the student under these circumstances as it appears that the student remained at JCSE throughout the proceedings and received special education and related services in conformity with her pendency placement.

Turning next to the IHO's alleged delays in convening an impartial hearing, an IHO "may not accept appointment unless he or she is available . . . to initiate the hearing within the first 14 days" following written receipt of the parties' waiver of the resolution period; written confirmation that the parties did not resolve their dispute through resolution or mediation; expiration of the 30-day resolution period; or 14 days after written notification that a party has withdrawn from mediation (8 NYCRR 200.5[j][3][i][b], [iii][b]). Additionally, parties may request a specific extension of time that the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). An IHO may grant a request for a specific extension of time orally so long as "discussions are conducted on the record" and the IHO's decision is "provide[d] . . . in writing and include[d] . . . as part of the record" (8 NYCRR 200.58[j][5][iv]).

Here, the hearing record is silent as to whether the parties engaged in a resolution session or mediation and/or whether a specific extension of time was granted. Therefore, it is impossible to determine whether the applicable timelines for the commencement of the impartial hearing were

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<sup>7</sup> Counsel for the district who submitted the answer in this appeal was not the same individual as the district representative who appeared for the district at the impartial hearing.

complied with by the IHO. Nevertheless, the evidence in the hearing record generally suggests that the impartial hearing may have been improperly delayed. The IHO indicated at the impartial hearing that she was "unable to attend" a hearing scheduled on April 19, 2012 (Tr. p. 4). After accepting appointment, an IHO may not delay the commencement of an impartial hearing for reasons of personal unavailability (8 NYCRR 200.5[j][3][i][b], [iii][b]; 8 NYCRR 200.5[j][5]). Therefore, it appears the IHO's delay in this respect was not compliant, especially in the absence of any written documentation entered into the hearing record that the IHO granted an extension of time, and I caution the IHO to comply with applicable timelines for the convening of impartial hearings and the attendant documentation requirements.<sup>8</sup> Nevertheless, as noted above, because there was no harm to the student under these circumstances, as she remained in her then-current educational placement during the course of the impartial hearing—the very placement that the parents are seeking as relief in these proceedings—I find any such deviation from the hearing procedures was not so infirm as to result in denial of a FAPE to the student under these circumstances.<sup>9</sup>

## **2. Conduct of Impartial Hearing and IHO Bias**

On appeal, the parents also contend that the IHO was biased and conducted the impartial hearing in a manner inconsistent with due process. Specifically, the parents posit that the IHO failed to ensure the district's compliance with a subpoena; granted the district an ex parte extension of time to submit a closing brief; unreasonably made objections during the parents' cross-examination of witnesses; limited the parents' ability to engage in cross-examination; and, generally, evinced bias in favor of the district. The parents further contend that the IHO did not appropriately consider the evidence before her and, as a result, issued a legally insufficient decision.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without

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<sup>8</sup> I further remind the IHO that specific extensions of time, if granted, must be committed to writing and entered into the hearing record by the IHO (8 NYCRR 200.58[j][5][iv]).

<sup>9</sup> Similarly, the parents contend that the IHO improperly told the parties, the afternoon of the day before the impartial hearing in this matter that "they should have all their witnesses ready to go." However, this communication, allegedly contained in an e-mail, was neither offered as evidence at the impartial hearing nor submitted with the parents' petition on appeal. Further, because no evidence was submitted as to this claim, the extent to which the parties may have had other discussions pertaining to the scheduling of the impartial hearing that could place this communication in context are not evident from a review of the hearing record. Therefore, I decline to find that the IHO erred based upon this limited evidence.

bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]). After a careful review of the hearing record, I conclude that the IHO was unbiased and observed the procedures of due process throughout this proceeding.

First, the parents contend that the IHO improperly thwarted the parents' efforts to receive documents pursuant to a subpoena executed by the IHO. The hearing record reflects that the parents served a subpoena signed by the IHO upon the assigned public school site on April 10, 2012 (see Tr. pp. 25-26; IHO Ex. I at pp. 1-2). The subpoena demanded documents responsive to several identified categories by April 17, 2012 (*id.* at p. 1). It further appears from the hearing record that the assigned public school did not provide any documents in response to this request at the time of the impartial hearing (see Tr. pp. 25-26). When the parents raised this issue at the impartial hearing, the IHO indicated that the parents would have the ability to ask questions of a witness from the assigned public school (Tr. p. 27). The IHO further stated that, if any unanswered questions remained, she would order the district to answer these questions in writing (Tr. p. 27).

Following the direct and cross-examination of the teacher from the assigned public school site, the parents renewed their objection to the district's non-compliance with the subpoena (Tr. pp. 270-71; see Tr. p. 84). The IHO asked the parents to identify the issues they were not able to explore through cross-examination of the teacher (Tr. p. 271). After doing so, the IHO ruled that the parents were afforded an opportunity to explore these issues and refused to prolong the hearing by permitting further testimony on these issues (Tr. p. 275; see Tr. pp. 270-75). In so ruling, the IHO stated that the parents "certainly . . . had a right to get this information" through the subpoena, and that the assigned public school "had an obligation to comply with this subpoena" (Tr. p. 274).

The IHO's rulings in this respect were within her discretion and appropriate under the circumstances. Generally, enforcement of subpoenas is a matter that should be addressed prior to the impartial hearing by the party seeking the information. Furthermore, IHOs have not been granted enforcement powers under State law or regulation. Here, the IHO provided the parents with an opportunity to speak with the teacher from the assigned public school site and ask questions pertaining to the kinds of documents requested in the subpoena (see Tr. pp. 106-27). Although this witness may not have provided the parent with every piece of information she desired, the IHO allowed the parents to solicit evidence pertaining to the assigned public school site. In addition, as the subpoenaed information related to the parents' claims about assigned public school site, as discussed below, such information would not have changed the result in this instance. Accordingly, the IHO acted within her discretion in this respect (see generally 8 NYCRR 200.5[j][3][xii]).

Finally, the parents contend that the IHO improperly rejected a line of questioning as hearsay. It is well-settled that hearsay is permissible in impartial due process hearings brought

under the IDEA (see Jalloh v. D.C., 535 F. Supp. 2d 13, 22 (D.D.C. 2008); Sykes v. D.C., 518 F. Supp. 2d 261, 268 [D.D.C. 2007] [noting, in addition to case law allowing hearsay evidence in administrative hearings, that "the IDEA supports this precedent by not explicitly banning hearsay evidence from administrative proceedings held pursuant to the statute"]; Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1101 [C.D. Cal. 2000]; see also Application of the Dep't of Educ., Appeal No. 12-075, Application of a Student with a Disability, Appeal No. 12-007, Application of a Child with a Disability, Appeal No. 03-053, Application of a Child Suspected of Having a Disability, Appeal No. 93-018). A review of the testimony in question reveals that this information would most likely constitute hearsay testimony in a judicial tribunal (Tr. p. 61). Nevertheless, the IHO's ruling, apparently motivated by the desire to ensure that the evidence was sufficiently reliable, did not prejudice the parents' ability to present their case and does not warrant a corrective measure on appeal. This is especially true in this circumstance given that, as with the relevance of the documents sought pursuant to the disputed subpoena, the line of questioning pursued by the parents concerned the ability of the assigned school to implement the student's IEP, an issue that is speculative under the facts of this case as further described below.

The parents further allege that the IHO was biased as evidenced by her obstruction of the parents' efforts to elicit information on cross-examination and sua sponte objections to the parents' cross-examination of a witness. A complete review of the transcript reveals no error regarding the IHO's limitation of the parents' questioning at the impartial hearing. State regulations indicate that an IHO "shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). The IHO's interjections to which the parents object pertain to information that, as the IHO found, could be considered "irrelevant, immaterial . . . or unduly repetitious" (see Tr. pp. 68-69, 78-80). Thus, the IHO did not demonstrate bias in this respect.

Finally, the parents contend that the IHO improperly issued an ex parte extension of time to the district regarding the timeline to submit a post-hearing brief. The parties appear to agree that the IHO granted an extension request made by the district, and that the district informed the parents of this extension sometime thereafter by telephone. The district further avers that this ex parte communication was inadvertent. Although the IHO's granting of an extension of time to the district was incongruous with her denial of the parents' request for an extension of time at the impartial hearing, the hearing record does not suggest that this extension caused any harm to the student or to the parents' presentation of their case (Tr. pp. 269-70).<sup>10</sup> Therefore, this extension of time did not, under the circumstances, violate the strictures of due process.

### **3. Sufficiency of IHO Decision**

Additionally, the parents contend that the IHO failed to render a legally sufficient decision because she did not consider the information before her and failed to address several of the parents' claims in her due process complaint notice. An IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice" (34 CFR 300.511[c][1][iv]; 8 NYCRR 200.1[x][4][v]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). A review of the IHO's decision does not substantiate these allegations. The IHO

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<sup>10</sup> The hearing record does not contain a copy of the ex parte e-mail in question or the parties' post-hearing briefs.

began her decision with a summary of the pertinent evaluative material relied upon by the May 2011 CSE and the student's present levels of performance as identified in the May 2011 IEP (IHO Decision at pp. 2-4). Next, the IHO summarized the testimony presented at the impartial hearing, with specific reference to several of the claims contained in the parents' due process complaint notice (*id.* at pp. 5-7). Therefore, the IHO's decision appropriately reviewed and discussed the evidence presented at the impartial hearing, and the parents claim to the contrary is without merit. After this review and summary, the IHO concluded that the district's recommended classroom placement was appropriate for the student (*id.* at p. 9). Although the IHO's discussion pertaining to the CSE's placement recommendation is brief, the IHO's reasoning in this regard is apparent when read in conjunction with the preceding discussion of the evidence and testimony adduced at the impartial hearing (*id.* at pp. 2-7, 9). Further, a complete review of the IHO's decision reveals that she addressed each of the claims raised in the parents' due process complaint notice. Reversal of the IHO's findings on this basis is not warranted.<sup>11</sup>

### **B. Composition of May 2011 CSE**

On appeal, the parents contend that the IHO erred in determining that the CSE was properly composed because the additional parent member "didn't say anything" at the CSE meeting. At the outset, I note the protean nature of this claim, which began as an allegation that the May 2011 CSE was improperly composed because it lacked a regular education teacher and transformed into its current iteration on appeal.<sup>12</sup> Therefore, it is at least questionable whether this specific claim regarding the additional parent member, not contained in the parents' due process complaint notice, is properly presented on appeal (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; *see R.E.*, 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]).

Whether the issue is properly before me need not be resolved to determine an outcome, however, because the parents' claim(s) would be briefly disposed of even if it was properly raised. First, the May 2011 IEP, as well as the parents' testimony, reveals that a regular education teacher, in fact, attended the May 2011 CSE meeting (Dist. Ex. 2 at p. 2; *see* Tr. p. 231). Second, regarding the additional parent member's alleged non-participation, the IDEA neither specifies a requisite level of participation in which the members of a CSE must engage, nor requires districts to ensure

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<sup>11</sup> The parents' contention that typographical errors and "incomplete sentences" in the IHO's decision render it legally insufficient and warrant a reversal of the IHO's findings is without merit.

<sup>12</sup> At the time of the May 2011 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; *see J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011]). Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

that a particular level of participation is achieved.<sup>13</sup> Therefore, the parents' claim regarding a denial of a FAPE due to the composition of the May 2011 CSE is without merit and is dismissed.

### **C. Parent Participation**

Next, the parents contend that the IHO erred by finding that the parents were afforded the opportunity to participate in the May 2011 CSE meeting. Specifically, the parents argue that the district's provision of the March 2011 psychoeducational evaluation report to the parents at the May 2011 CSE meeting significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.<sup>14</sup>

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). However, the IDEA "only requires that the parents have an opportunity to participate in the drafting process" and does not permit parents to unilaterally dictate the provisions of a student's IEP (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17-\*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"], aff'd, 251 Fed. App'x 685, 2007 WL 3037346 [2d Cir. 2007]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]; Doe v. East Lyme Bd. of Educ., 2012 WL 4344301, at \*4 [D. Conn. Sept. 21, 2012]; New Fairfield Bd. of Educ., 2011 WL 1322563, at\*16 [D. Conn. Mar. 31, 2011]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; Sch. for Language and Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006]).

The hearing record reveals no impediment to the parents' ability to participate in the May 2011 CSE meeting stemming from the district's provision of the psychoeducational evaluation to the parents at the CSE meeting. Specifically, the hearing record reflects that the parents accompanied the student to the March 2011 psychoeducational evaluation (Tr. p. 249; see Dist.

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<sup>13</sup> The extent of the additional parent member's participation is not clear based on the evidence in the hearing record. While the parent asserted that the additional parent member was silent throughout the CSE meeting, the district special education teacher who attended the May 2011 CSE testified that she could not recall how much this member participated in the meeting (Tr. pp. 52-53).

<sup>14</sup> The parents also argued in their due process complaint notice that the district denied the student a FAPE by failing to provide a copy of the March 2011 psychoeducational evaluation to the student's teacher, who participated by telephone (Parent Ex. A at p. 2). The parents have effectively abandoned this claim by failing to identify it in any fashion on appeal or by making any legal or factual argument as to how it resulted in a denial of FAPE to the student; therefore, it will not be considered further (see 8 NYCRR 279.4[a] [requiring the petitioner to "clearly indicate" the relief sought before the SRO]).

Ex. 7 at p. 1). At this time, the parents testified that they "met" the evaluator (Tr. p. 249). Once the evaluation was complete, the parents testified that they discussed the test results with the evaluator (Tr. pp. 249-50). The parents further testified that they felt they were able to ask any questions of the evaluator at that time (Tr. p. 250). Following this interaction, the parents attended and participated in the May 2011 CSE meeting, where the March 2011 psychoeducational evaluation was, according to the parents, discussed (Tr. pp. 250-51). Contemporaneous meeting notes taken by the district school psychologist who served on the May 2011 CSE confirm the parents' recollection that the March 2011 psychoeducational evaluation was discussed (Dist. Ex. 10; see Tr. pp. 33-35).

On appeal, the parents complain that they were unable to review the psychoeducational evaluation report prior to the May 2011 CSE meeting but fail to elucidate how their inability to do so resulted in a denial of FAPE to the student. The parents do not contend that the evaluation is inaccurate or otherwise failed to describe the student's needs. Moreover, they failed to explain how their conversations with the evaluator were an inadequate substitute for a review of the written report. Accordingly, there is no evidence in the hearing record suggesting that the district impeded the student's right to a FAPE; significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

#### **D. May 2011 IEP**

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

On appeal, the parents contend that the May 2011 CSE did not possess sufficient evaluative information regarding the student. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant 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]; 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 student's IEP for the 2011-12 school year the CSE considered a March 2011 psychoeducational evaluation report as well as OT, PT, and special education progress reports submitted by JCSE (Tr. pp. 38-39; Dist. Exs. 4-7).

The March 2011 psychoeducational evaluation reported that the student presented as "very cooperative and compliant," consistently followed directions, and responded to redirections and positive reinforcement to keep her on task as testing progressed (Dist. Ex. 7 at p. 1). The evaluator noted that the student "possibl[y]" exhibited language and auditory processing difficulties, as she expressed some difficulty expressing her thoughts verbally and retrieving words (id. at p. 1; see id. at pp. 1-2). The evaluator also noted the student's difficulties with articulation, fine motor, and gross motor skills (id. at p. 2). Administration of the Stanford Binet Intelligence Scales-Fifth edition (SB-5) to the student yielded a full scale IQ of 91 (average); a non-verbal IQ of 105 (average); and a verbal IQ of 78 (borderline) (id. at pp. 2, 5).

According to the March 2011 psychoeducational evaluation, the student exhibited skills within the borderline delayed range in the Fluid Reasoning area, a measurement of her ability to complete tasks pertaining to analogical reasoning, attention to detail, awareness of part versus whole, concentration, and spatial reasoning (Dist. Ex. 7 at p. 2). The student's fluid reasoning skills were, according to the evaluator, one area in which the student exhibited a discrepancy between her verbal and non-verbal abilities (id.). The evaluator further reported that the student also showed scattered skills in this area since she was able to solve higher level questions after having difficulty responding to earlier, easier questions (id.). The evaluator also reported that the student successfully responded to these tasks when they were presented in a format similar to the high level questions she had been successful with, indicating "even higher potential" in this area (id. at pp. 2-3). The student's performance completing verbal tasks was in the extremely low range, suggesting difficulty with language skills (id. at p. 3).

The evaluator reported that the student's nonverbal abilities in the Knowledge Factor area, which measures learned information, development of concepts, and vocabulary stored in long term memory, were in the average range, and her verbal abilities in this area were in the low average range (Dist. Ex. 7 at p. 3). The evaluator further indicated that the student was able to use gestures and motions to describe pictures, but had difficulty providing verbal definitions; therefore, the student did not receive full credit for many of the verbal vocabulary tasks (id.). Tasks within the Quantitative Reasoning Factor area measured the student's number and numerical problem solving abilities (id.). The psychologist reported that student exhibited strengths in this area, and her overall score fell within the average range (id.). The student counted objects, identified numbers, and completed tasks using concepts such as bigger/smaller, and more/less (id.). Verbally, the student identified numbers and responded to questions such as "'how many?'" (id.).

The student's overall score in the Visual Spatial Processing area, which measured her ability to see patterns, relationships and spatial orientations, was within the low average range (Dist. Ex. 7 at p. 3). The student's score on the verbal portion of the test was within the borderline range and her score on the nonverbal portion of the test was in the average range (id.). The report indicated that the student exhibited difficulty understanding task directions involving visual-spatial

orientation and understanding directions to place items in specific spatial configurations (id.). The final area, Working Memory, assessed the student's ability to temporarily store information, transfer information into memory and then produce it in a new form (id.). The psychologist indicated this as an area of relative strength for the student as she scored in the average range (id.). The student exhibited abilities in the high average range in the nonverbal section and the average range in the verbal section of the Working Memory Index (id.).

The psychologist who conducted the March 2011 psychoeducational evaluation also administered The Kaufman Survey of Early Academic and Language Skills (K-SEALS) to the student to measure her language and pre-academic skills (Dist. Ex. 7 at p. 4). The results indicated that the student's vocabulary skills were well below average, but that her abilities to point to or name numbers, letters and words; count; show knowledge of number concepts; and solve number problems were in the average range of achievement (id.). The evaluator reported that the student achieved a standard score of 86 (16th percentile) on measures of her expressive language skills (Dist. Ex. 7 at p. 4). The report indicated that the student verbally identified pictures of objects and actions, but that she did not successfully respond when provided with definitions of common words (id.). The psychologist opined that this might have indicated difficulty with word retrieval skills (id.). The student did not add or subtract numbers, but verbally identified the numbers 7 and 20 (id.). She verbally identified all the letters in the alphabet, and counted pictures on a page (id.). On measures of the student's receptive language skills, the student achieved a standard score in the average range (id.). The psychologist reported that the student identified most of the pictures presented and all the letters in the alphabet, and recognized some words (id.).

Regarding the student's emotional functioning, the psychologist indicated that the student was a "cute, friendly, and lovable youngster," who presented as a child who tried her best, provided responses, and participated as necessary (Dist. Ex. 7 at p. 5). The psychologist noted about the student that "a rather pleasing, yet also confident attitude appear[ed] to be emerging and developing in the social realm" (id.).

In addition to the psychoeducational evaluation report, the March 2011 CSE considered a January 2011 progress report completed by the student's occupational therapist at JCSE (Dist. Ex. 5; see Tr. pp. 38-39). The occupational therapist reported that the student exhibited moderately low tone and weaknesses in her hands, which resulted in difficulty completing fine motor, graphomotor, and prewriting/writing tasks (Dist. Ex. 5 at p. 1). Despite a fair attention span, the student's decreased strength and endurance affected her level of productivity (id.). In the report, the occupational therapist indicated that the student used her body/table to assist her when handling fine motor manipulatives and exhibited difficulty manipulating small pop beads to imitate a pop bead design and copying visual designs incorporating directions and cutting around curves and turns (id.). The occupational therapist reported that the student manipulated buttons on a button board, completed 15/35 pieces of an interlocking puzzle, cut out a circle, and was beginning to work on writing five uppercase and lowercase letters (id.). Due to weakness in her upper extremities, writing was difficult for the student, described as a "slow, laborious and shaky" process by the occupational therapist (id.). The occupational therapist recommended that the student continue to receive three individual OT sessions per week (id. at p. 2).

In an undated update report considered by the May 2011 CSE, the student's physical therapist reported that student presented with low muscle tone and overall decreased muscle

strength (Dist. Ex. 6 at p. 1; see Tr. pp. 38-39). According to the report, these weaknesses made gross motor movements such as jumping, hopping and ball playing activities difficult for the student (Dist. Ex. 6 at p. 1). The physical therapist also reported that the student exhibited decreased balance skills and coordination as well as difficulty navigating stairs and obstacles (id.). Additionally, the physical therapist indicated in her report that the student had made "some progress" negotiating stairs and in her balance skills and coordination, anticipating greater improvement in these skills over the next few months (id.). The physical therapist recommended that the student continue to receive three individual sessions of PT per week (id.).

In a reported dated April 2011, the student's special education teacher at JCSE indicated that the student was a "lovable, adorable, and well adjusted," child who enjoyed answering questions during classroom discussions and was enthusiastic about completing her classroom jobs (Dist. Ex. 4 at p. 1). At the time of the report, the student complied with most teacher instructions, sat calmly and appropriately during instruction, showed improvement in making requests appropriately, and "absorb[ed]" information presented in the classroom (id.). According to the special education teacher, at times, the student required directions, repeated information, and additional time to process information (id.). The student also required encouragement to participate in most physical activities (id.). The report further indicated that the student usually preferred to play by herself even with teacher prompts and requests from friends to join a game (id.). She further reported that, at JCSE, the student was provided with situations where she worked with a peer to complete a task to increase her social interactions (id.). Although the student's articulation skills had improved, the special education teacher indicated that, at times, it was difficult to understand the student (id.).

According to the school special education teacher, the student's handwriting was "shaky" and she was learning to write letters and maintain proper line alignment (Dist. Ex. 4 at p. 2). The special education teacher also reported that the student had made significant progress in reading, was able to recognize letters and letter sounds, and was learning how to read consonant vowel consonant (CVC) words with a short "a" sound (id. at p. 1). The student could answer literal comprehension questions and was learning to answer inferential questions and make predictions (id. at p. 2). The special education teacher also reported that, in math, the student added and subtracted numbers 1-10 with manipulatives, recognized numbers 1-100, and counted by rote to 100 (id.). Additionally, the special education teacher reported that the student recognized numbers on a clock, read time to the hour, and identified pennies and nickels (id.). The report also indicated that the student had learned various science and social studies concepts and that she understood the rules for a variety of settings such as school, home, outdoors and the bus (id.).

On appeal, the parents contend that the IHO failed to address the "lack of sufficient evaluations" of the student. As discussed above, the May 2011 CSE reviewed and considered then-current information provided by the student's private school special education teacher, physical therapist, and occupational therapist, as well as the results of recent cognitive, academic, and language assessments (Tr. pp. 38-39; Dist. Exs. 4-7). While the parents correctly observe that the CSE did not consider a separate speech-language assessment or progress report, I note that the March 2011 psychoeducational report contained language assessments of the student, the results of which were incorporated into the May 2011 IEP (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 7 at p. 4). Further, as described below, the student's then-current speech therapist contributed detailed information about the student's speech-language skills and needs to the May 2011 CSE

(Tr. pp. 39-40, 161-62; Dist. Ex. 2 at p. 4).<sup>15</sup> Therefore, the hearing record indicates that the May 2011 CSE considered sufficient information about the student and her needs.

Based on the evidence above, I find that the evaluative data considered by the May 2011 CSE and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop an appropriate IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]; E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at \*9-\*10 [S.D.N.Y. Sept. 29, 2012]).

## 2. Present Levels of Performance

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

The May 2011 IEP included descriptions of the student's present levels of performance with respect to her academic, speech-language, social/emotional, and fine and gross motor skills (Dist. Ex. 2 at pp. 3-6). The hearing record shows that the IEP's present levels of performance included information from the reports discussed during the May 2011 CSE meeting and, contrary to the parents' assertions, accurately reflected the student's needs as identified in the information before the May 2011 CSE (Tr. pp. 38-42; compare Dist. Ex. 2 at p. 3-6, with Dist. Exs. 4-7).

According to the May 2011 IEP, the student exhibited more difficulty responding to items involving verbal comprehension, expression, and reasoning (Dist. Ex. 2 at p. 3). The IEP noted that the student's expressive language skills were weaker than her receptive language skills, indicating that the student understood more than she verbalized (*id.*). The May 2011 IEP further indicated that the student exhibited significant delays in both receptive and expressive language skills when completing tasks such as labeling and stating the function of pictures/objects, creating associations between objects, categorizing, comprehending various concepts such as position and time, asking/answering questions, understanding/using correct word relationships, and applying critical thinking skills to listening or speaking tasks (*id.* at p. 4). Consistent with the March 2011 psychoeducational evaluation, the IEP further noted that the student's nonverbal cognitive ability was in the average range, and her verbal ability was in the borderline range of functioning

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<sup>15</sup> At the impartial hearing, the director of JCSE reviewed the speech-language present levels of performance included in the May 2011 IEP and indicated that it "described [the student] fairly well" (Tr. p. 162; see Tr. pp. 161-62; Dist. Ex. 2 at p. 4).

(compare Dist. Ex. 2 at p. 3, with Dist. Ex. 7 at pp. 2-3).<sup>16</sup> The IEP reflected that the student's phonological skills were not commensurate with her age (Dist. Ex. 2 at p. 4). Also, according to the IEP, the student's speech intelligibility was "poor" due to overall facial musculature weakness, and she exhibited numerous phonological processes such as fronting, gliding, deaffrication, cluster reduction, frontal lisp, and vowel sound distortion (*id.*). The IEP also indicated that the student demonstrated poor breath support, a slow rate of speech and was often inaudible (*id.*).

The parents allege on appeal that the May 2011 IEP did not contain information regarding the student's academic present levels of functioning; however, a review of the hearing record supports a contrary conclusion. The IEP included results from the academic achievement assessments administered as part of the March 2011 psychoeducational evaluation indicating the student's strengths in letter and word as well as number skills, results which were commensurate with the JCSE special education teacher's progress report as well as the discussion during the May 2011 CSE meeting (Tr. p. 67; compare Dist. Ex. 2 at p. 3, with Dist. Exs. 4 at pp. 1-2; 7 at p. 4). The IEP provided the following K-SEALS subtest percentiles and corresponding "instructional levels:" letter and word skills (68th percentile; 6-2 instructional level), vocabulary (6th percentile; 4-0 instructional level), number skills (66th percentile; 6-4 instructional level) (Dist. Ex. 2 at p. 3). The IEP also provided K-SEALS subtest results of the student's expressive (16th percentile; 4-7 instructional level) and receptive (61st percentile; 6-1 instructional level) language assessments (*id.*; see Dist. Ex. 7 at p. 4).

Regarding the student's social/emotional skills and physical development, the hearing record shows that the information the May 2011 CSE reviewed was consistent with the description of the student included in the May 2011 IEP (compare Dist. Ex. 2 at pp. 4-5, with Dist. Exs. 4 at p. 1; 5 at p. 1; 7 at pp. 1, 5). Specifically, the IEP noted that while the student presented as a "well adjusted," and "pleasant" child who "interact[ed] well with peers and adults," she exhibited difficulty requesting assistance from peers and adults, identifying emotion words/facial expressions, and expressing her feelings (Dist. Exs. 2 at p. 4; 4 at p. 1; 5 at p. 1). As to the student's physical development, the May 2011 IEP indicated that the student became easily fatigued and exhibited low muscle tone and balance difficulties, information commensurate with the PT and OT reports the May 2011 CSE reviewed (compare Dist. Ex. 2 at pp. 4, 6, with Dist. Exs. 5 at p. 1; 6). The CSE determined that the student did not have mobility limitations nor did she require an accessible program (Dist. Ex. 2 at p. 6). The IEP also indicated that the student exhibited delays in fine motor, daily living, and visual perceptual skills (*id.*).

Based on the above, the hearing record shows that the May 2011 CSE incorporated the information before it regarding the student's cognitive, academic, speech-language, social/emotional, and motor skills into the May 2011 IEP, such that the resultant present levels of performance reflect the student's special education needs with sufficient accuracy to formulate a program designed to help the student progress (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

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<sup>16</sup> The district special education teacher, who participated in the May 2011 CSE meeting, stated that the school psychologist who conducted the March 2011 psychoeducational evaluation of the student prepared the cognitive and academic present levels of performance included in the May 2011 IEP (Tr. pp. 37-38, 43-44).

### 3. Annual Goals and Short-Term Objectives

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The May 2011 IEP included annual goals to meet the student's areas of need. Academic goals included goals designed to improve the student's ability to decode words and learn sight words, gain meaning from text using a variety of strategies, calculate addition and subtraction facts, and analyze and solve multi-step word problems (Dist. Ex. 2 at pp. 7, 14). Annual goals in the IEP to address the student's speech-language needs included using a "party blower" and chewing gum/candy to improve oral-motor skills, increasing the correct use of specific sounds to improve articulation skills, completing categorization tasks to improve vocabulary skills, and using two to three word sentences to describe objects and pictures (id. at pp. 11-13). The May 2011 IEP also provided an annual goal to improve the student's ability to use emotion words while playing a game (id. at p. 12). In the area of gross motor skills, the IEP provided annual goals and short-term objectives to improve the student's ability to safely negotiate the school environment, ascend and descend stairs, improve muscle strength, demonstrate age appropriate gross motor skills, improve motor planning, coordination, and dynamic balance skills, and participate in adapted physical education (id. at pp. 9-10, 15). To improve the student's fine motor and visual motor skills, the IEP provided annual goals and short-term objectives addressing the student's functional shoulder, arm and hand control via a variety of activities including using pop beads, scissors, and buttons; and tracing, copying and writing tasks (id. at p. 8).

To the extent the parents allege that the IEP contained "inappropriate" goals and lacked goals addressing the student's social/emotional needs, the hearing record does not support this contention.<sup>17</sup> Rather, a review of the evidence in the hearing record shows that the May 2011 CSE developed annual goals and corresponding short-term objectives in the student's areas of need as identified in the information reviewed and considered by the May 2011 CSE (compare Dist. Ex 2 at pp. 7-15, with Dist. Exs. 4-7). Further, the May 2011 IEP adequately described the student's social/emotional needs and specifically provided an annual goal designed to improve the student's use of emotion words while playing games (Dist. Ex. 2 at p. 12). The May 2011 IEP's annual goals and short-term objectives related to the student's gross motor, adapted physical education, and speech-language needs were designed to improve her gross motor and communication skills—and

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<sup>17</sup> The parents' due process complaint notice alleged that the May 2011 IEP academic, social/emotional, listening comprehension, and graphomotor goals were "insufficient, inappropriate, vague, and unmeasurable" (Parent Ex. A at p. 3); however, on appeal, the parents do not identify which goals they believe are "inappropriate." Also, the parents do not raise the measurability of the student's goals on appeal.

in turn, her social/emotional and peer interaction skills—and were appropriate to address the student's deficits in these areas (id. at pp. 9-13, 15, 18).

#### **4. 12:1+1 Special Class in a Community School**

The district asserts that the IHO erred in finding that a 12:1+1 special class was appropriate for the student. A review of the hearing record supports the district's position that it offered a placement reasonably calculated to provide educational benefit.

In arriving at its placement recommendation, the May 2011 CSE first considered placement in a general education classroom with integrated co-teaching (ICT) services because the student's academic skills were "not so far below" grade level, the ICT services would provide the student with an opportunity to learn at her own level, and she would be exposed to general education peer models (Tr. p. 42; see Dist. Ex. 2 at p. 17). According to the district special education teacher who participated in the May 2011 CSE, the parents and the student's JCSE special education teacher were "adamantly" opposed to this recommendation, contending that it would be "too large and too overwhelming" for the student (Tr. pp. 42, 82; Dist. Ex. 2 at p. 17). After considering this input, the May 2011 CSE ultimately recommended placement in a 12:1+1 special class in a community school for the 2011-12 school year (Dist. Ex. 2 at pp. 1, 16).

State Regulations provide that a 12:1+1 special class placement is appropriate for students "whose management needs interfere with the instructional process to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). In addition to related services, the May 2011 IEP identified supports to address the student's management needs, including repetition and rephrasing of information, positive reinforcement, support and reassurance, praise, and occasional redirection (id. at pp. 4-5). In addition, the student's present levels of performance, consistent with the evaluative material relied upon by the May 2011 CSE, reveal that the student exhibited significant delays in both receptive and expressive language skills, achieving a verbal ability score in the borderline range of functioning (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 7 at pp. 2-3). Further, according to the IEP, the student's speech intelligibility was "poor" as she exhibited a slow rate of speech and was often inaudible (Dist. Ex. 2 at p. 4). Additionally, the student possessed "low muscle tone" and became "easily tired" (id. at p. 6). These levels, as well as the extent that the student's management needs interfered with the instructional process indicate that it was appropriate for the CSE to recommend placement in a 12:1+1 special class.

In conjunction with the supports provided within a 12:1+1 special class, the May 2011 CSE recommended that the student receive three 30-minute sessions of individual OT per week, three 30-minute sessions of individual PT per week, two 30-minute sessions of individual speech-language therapy per week, and one 30-minute group (3:1) session of speech-language therapy per week (Dist. Ex. 2 at p. 18). Based on the foregoing evidence, the May 2011 CSE's recommendation of a 12:1+1 special class placement, together with the related services of speech-language therapy,

OT, and PT, was tailored to address the student's individual special education needs and thus reasonably calculated to enable her to receive educational benefits in the LRE.<sup>18, 19</sup>

### **E. Assigned Public School**

On appeal, the district contends that the parents' claims regarding the assigned public school site's inability to implement the May 2011 IEP, as well as its general unsuitability for the student were speculative under the facts of this case. The parents aver that the assigned public school would not have: appropriately grouped the student by functional level; provided sufficiently individualized instruction to meet the student's needs; and been able to satisfy the speech-language therapy services prescribed by the May 2011 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, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is

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<sup>18</sup> On appeal, the parents make much of the IHO's statement that a 12:1+1 placement represented the LRE for the student (see IHO Decision at p. 9). Upon review of the IHO's decision, it appears that the IHO's statement merely referenced the fact that the district's offered placement must, as required by the IDEA and State regulations, be in the 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]). Moreover, as the district contends, the parents allege that the district's placement was not the student's LRE in their due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]). Even assuming for purposes of argument that such a claim was properly presented on appeal, the May 2011 provided mainstreaming opportunities for the student, indicating that she would "participate in all school activities with adult supervision" such as lunch, assemblies, trips and other school activities (Dist. Ex. 2 at p. 18). These mainstreaming opportunities would have been markedly similar to the student's program at JCSE, which consisted of a special class within a general education school and provided opportunities to interact with nondisabled peers during lunch, recess, assemblies, and trips (Tr. pp. 132-34).

<sup>19</sup> To the extent that the parents claim the 12:1+1 special class placement lacked sufficient 1:1 instruction, a review of the information before the May 2011 CSE does not indicate that the student required 1:1 instruction in order to receive educational benefit (see generally Dist. Exs. 4-7).

into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>20</sup> When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the May 2011 IEP (see Parent Exs. F, G). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376,

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<sup>20</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y., 584 F.3d at 420; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]. Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the June 2013 IEP.<sup>21</sup>

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

## 1. Functional Grouping

With regard to the parents' claim related to grouping the student at the public school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii],

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<sup>21</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see E.E. v. New York City Dep't of Educ., 13-cv-06709 [S.D.N.Y. Aug. 21, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], *aff'd*, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], *adopted*, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at \*11).

200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned public school site was prepared to provide the student with suitable grouping for instructional purposes designed to meet her needs. A teacher from the assigned public school site testified that, for the 2011-12 school year, the student would have been placed in a first grade 12:1+1 special class composed of nine students, one special education teacher, and three paraprofessionals, two of whom were assigned to individual students (Tr. pp. 84, 87-88, 91). Most of the students in the proposed classroom were classified as students with speech or language impairments and received related services (Tr. pp. 91-92). According to the teacher, the students in the assigned classroom exhibited a variety of academic functioning levels, including some students who could read "very simple" books, and some students who could identify most letters and numbers (Tr. p. 92). Eight of the nine students in the assigned class communicated verbally, seven of the nine students did not use a behavior plan, and none of the students in the class exhibited mobility limitations (Tr. pp. 107-09, 115).<sup>22</sup> As previously stated, the hearing record shows that the student recognized the letter name and sound for the majority of letters, was learning to read CVC words, used verbal language to communicate, and did not exhibit behaviors that interfered with her learning or mobility limitations to the extent she required PT and adapted physical education services or supports beyond that provided for in the May 2011 IEP (see Dist. Exs. 2 at pp. 1, 5-6, 18; 4 at pp. 1-2; 7 at pp. 1-2). Accordingly, the evidence indicates that the assigned public school site had the capacity to implement the student's IEP with suitable grouping for instructional purposes in the 12:1+1 special class at the assigned district school.

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<sup>22</sup> Two students in the assigned class were provided with behavior plans related to communication and attention difficulties (Tr. p. 108).

## 2. Individualized Instruction

According to the special education teacher from the assigned public school site, at the beginning of each school year the special education teacher of the proposed classroom administered baseline assessments to develop instructional groups within the classroom (Tr. pp. 92-93). Throughout the school year, benchmark assessments were administered to assess student progress (Tr. p. 93). The assigned school offered a phonics program, two math programs, and two different reading programs depending on students' needs (Tr. p. 101). Specifically, one of the reading programs was designed for students with special needs or "at risk" students (Tr. p. 101). The teacher testified that all of the programs used had an intervention component to provide further support to students who were struggling (Tr. p. 101). Within the assigned classroom, during the special education teacher's "prep" time, and during the extended day program, students were provided with opportunities for individual and small group instruction, and the special education teacher testified how instruction was differentiated depending on students' needs (Tr. pp. 86-87, 104, 109-13). Although the assigned school utilized a "pacing calendar" to guide teachers about "what they should be teaching when," the special education teacher stated that students in the assigned classroom would not have been expected to keep up with the schedule set by the school (Tr. p. 113). She indicated that physical education, art, and computer teachers have access to students' IEPs, are aware of the students' limitations, and "plan[ne]d accordingly" (Tr. p. 105; see Tr. pp. 104-05). Therefore, the hearing record shows that the district would have provided sufficient individualization of instruction to meet the student's needs.

## 3. Related Services/Adapted Physical Education

The special education teacher from the assigned public school site testified that, during the 2011-12 school year, students received OT and PT services at the school (Tr. pp. 89-90). Although in September 2011 the assigned school did not have a speech-language therapist on site, parents were provided with RSAs and, eventually, the assigned school provided the services of an in-school speech-language therapist to "make-up" missed sessions (Tr. pp. 90-91).<sup>23</sup> The assigned school special education teacher stated that related service providers provided progress reports to parents according to the report card schedule, and that teachers met with related service providers at least once per week to discuss what the students were working on (Tr. pp. 96-97). She further testified that related service providers "push into" the lower grade classrooms so that their services were being used in "real [ ] time" in the classroom, and providers could see firsthand how to better provide services to the students (Tr. p. 97). The assigned school implemented a school-wide behavior policy described as "very similar" to positive behavior intervention, whereby students were taught acceptable behavior for different school environments, such as the classroom and "common areas," and when students exhibit appropriate behaviors, they were provided tokens to

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<sup>23</sup> Although not defined in the hearing record, RSA is a common acronym for "related service authorization," which "allows a family to secure an independent provider paid for by the [district]" and "is issued only when a contracted agency cannot provide the service" for the district (see F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 507 n.4 [S.D.N.Y. 2013] [citing a document published by the district]). The State Education Department has issued guidance indicating that it is permissible for districts to contract with private entities to provide related services to students with disabilities ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2, 2010], available at <http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>).

exchange for prizes each week (Tr. p. 98). Within the classroom, social skills instruction was built into the "group dynamic" during small group activities (Tr. p. 117).

During the 2011-12 school year none of the students attending the assigned school required adapted physical education; however, the assigned school special education teacher testified that, if a student required adapted physical education, the school would request that an adapted physical education instructor come to the school and provide this service (Tr. pp. 104-05). The parents testified that the student could navigate stairs and, further, that they did not request that the district provide a barrier-free school (Tr. pp. 256-58; see Dist. Ex. 2 at p. 6). Accordingly, the hearing record shows, contrary to the parents' assertion, that the district would have been able to meet the student's communication, social, and physical needs.

## **VII. Conclusion**

A review of the evidence in the hearing record supports the IHO's determination that the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits; therefore, it is not necessary to reach the issue of whether JCSE was appropriate for the student or whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; D.D-S., 2011 WL 3919040, at \*13).

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

**THE APPEAL IS DISMISSED.**

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

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**