



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-191

Application of a STUDENT WITH A DISABILITY, by her parent, 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:

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition 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

During the 2010-11 school year, the student attended a nonpublic, integrated co-teaching (ICT) preschool program and received special education and related services as a preschool student with a disability pursuant to an IEP developed by the Committee on Preschool Special Education (CPSE) (see Dist. Exs. 6 at p. 1; 7 at p. 2; 8; see also Tr. pp. 40-41, 57-59). The student's preschool program consisted of a total of 20 regular education and special education students, 2 teachers, and 2 paraprofessionals; in addition, the student received the services of a health paraprofessional, as well as occupational therapy (OT) and speech-language therapy (see Tr. pp. 57-59, 65-68, 238-39; Dist. Exs. 6 at p. 1; 7 at p. 2; 8).

On May 31, 2011, the CSE convened to conduct the student's "turning five" conference and to develop an IEP for the 2011-12 school year with a projected implementation date beginning September 2011 (see Dist. Ex. 10 at pp. 1, 9).¹ Finding the student eligible for special education and related services as a student with a speech or language impairment, the May 2011 CSE recommended a 12:1+1 special class placement in a community school with related services consisting of two 30-minute sessions per week of speech-language therapy in a small group and three 30-minute sessions per week of individual OT (id. at pp. 1, 7, 9-10).² In addition, the May 2011 CSE created annual goals to address the student's needs, and recommended strategies to address the student's management needs (id. at pp. 3-7).

By final notice of recommendation (FNR) dated June 13, 2011 the district summarized the special education and related services recommended in the May 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 11).

On June 27, 2011, the parent visited the assigned public school site, and she described the visit in an undated letter sent to the district via facsimile on June 29, 2011 (see Parent Ex. D at pp. 1-2). The parent noted that school was not in session during his visit, so he could not "see the students or meet any teachers" (id. at p. 1). The parent further noted that during the visit the parent coordinator explained that the assigned public school site only had "one special education class" and the students in that class had "varied behavior issues" (id.). The parent expressed concern about the functional grouping of the students and the "physical size" of the building (id.). The parent requested a class profile "detailing the functional levels of the other students in the class," along with "any other information concerning the program" and the assigned public school site (id.). At that time, the parent informed the district that he could not make a decision regarding the appropriateness of the assigned public school site, and he would visit the assigned public school site during the first week of school in September (id.).

By a letter dated August 17, 2011, the parent repeated the information provided in his previous letter regarding the assigned public school site (compare Parent Ex. E at p. 1, with Parent Ex. D at p. 1). The parent also informed the district that he had not received a class profile or "relevant information about the program" as requested in the letter (id.). Although he intended to visit the assigned public school site when it opened in September to determine whether it was appropriate for the student, the parent notified the district of his intention to place the student at JCSE (id.). If, upon visiting the assigned public school site he found it was not appropriate, the parent would continue the student's placement at JCSE and seek tuition reimbursement (id.).

On September 1, 2011 the parent executed an enrollment contract with JCSE for the student's attendance during the 2011-12 school year (see Parent Ex. B at pp. 1-3).

¹ When a student in the district transitioned from receiving special education programs and related services through the CPSE to receiving special education programs and related services through the CSE as a school age student, the district referred to the initial CSE meeting as a "turning five" conference (see Tr. pp. 29-31, 59).

² The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

On September 22, 2011, the parent visited the assigned public school site, and in a letter dated September 27, 2011, notified the district that the "class" was not appropriate to meet the student's needs (Dist. Ex. 12). In addition, the parent informed the district that he had not received a class profile or "other relevant information" about the program as previously requested (id.). During the visit, the parent observed a science class comprised of "three classes" that included "[four] kindergarten students" and what appeared to be "older" students (id.). In addition, the parent expressed concern about the functional levels of the other students in the class, as well as their behavior (id.). Consequently, the parent notified the district of his intention to continue the student's placement at JCSE and to seek tuition reimbursement (id.).

A. Due Process Complaint Notice

By a due process complaint notice dated February 24, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Answer Ex. 1 at p. 1).³ Initially, the parent alleged that the May 2011 CSE was not properly composed because the CSE failed to include the attendance of individuals who either would implement the May 2011 IEP or had knowledge about the "appropriateness of the recommended program" (id.). Next, the parent alleged that the May 2011 CSE failed to follow the "proper procedures in convening the meeting," and the May 2011 CSE did not review the "appropriate documentation" before making its recommendation (id.). The parent also asserted that the May 2011 IEP failed to "fully or accurately describe" the student's needs (id.). With regard to the annual goals, the parent asserted that the annual goals and short-term objectives did not "appropriately" address the student's special education needs because they were vague and did not address the "complexity" of the student's special education needs (id.). Finally, the parent alleged that the recommended 12:1+1 special class placement was "substantively inappropriate" for the student; the student required "much more 1:1 support than [was] offered in a class this large;" and without "direct support and instruction," the student could not learn (id.).

Turning to the assigned public school site, the parent repeated the concerns expressed in previous letters sent to the district, and alleged that the district's failure to respond to the parent's concerns "inhibited parental participation" (compare Answer Ex. 1 at pp. 1-2, with Parent Ex. D at pp. 1-2, and Parent Ex. E, and Dist. Ex. 12). Next, the parent alleged that JCSE appropriately addressed the student's special education needs (see Answer Ex. 1 at p. 2). As relief, the parent

³ Neither party entered the due process complaint notice into evidence at the impartial hearing (see Tr. pp. 1-319; Dist. Exs. 1-12; Parent Exs. A-J). The district attached the due process complaint notice to its answer as additional documentary evidence for consideration on appeal, and the parent did not raise any objections to its consideration (see Answer Ex. 1 at pp. 1-2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). Initially, as a reminder to both parties, amendments to State regulations effective February 2014 require the submission of the due process complaint notice as part of the hearing record (see 8 NYCRR 200.5[j][5][vi][a]). In light of the new regulatory requirement and the absence of any objections by the parents, the due process complaint notice will be considered on appeal and made part of the hearing record in this matter.

requested reimbursement for the costs of the student's tuition and related services at JCSE for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

On April 3, 2012, the IHO conducted a prehearing conference, and on May 9, 2012, the parties proceeded to an impartial hearing, which concluded on June 20, 2012 after four days of proceedings (see Tr. pp. 1-319). By decision dated August 23, 2012, the IHO concluded that the district offered the student a FAPE for the 2011-12 school year, and thus, denied the parent's request for relief (see IHO Decision at pp. 11-16). Initially, the IHO found no procedural errors in the development of the May 2011 IEP (id. at p. 12). Next, the IHO found that the May 2011 CSE considered the "relevant data" concerning the student's academic and social/emotional abilities in the development of the May 2011 IEP (id.). In addition, the IHO noted that the May 2011 CSE considered and discussed reports created by the student's teacher and related services' providers, the student's April 2011 psychoeducational evaluation report, a classroom observation, and the parent's concerns, and incorporated the information into the May 2011 IEP (id.).

Based upon the student's "cognitive, academic, and speech-language needs," the IHO found that the May 2011 CSE's recommendation of a 12:1+1 special class placement was appropriate to meet the student's needs (IHO Decision at p. 12). In addition, the IHO noted that the May 2011 IEP contained appropriate "academic and social/emotional management tools," related services, and annual goals (id. at pp. 12-14). With respect to the parent's argument that the district failed to conduct a speech-language evaluation as recommended in the April 2011 psychoeducational evaluation report, the IHO determined that the speech-language progress report and the April 2011 psychoeducational evaluation report considered by the May 2011 CSE included sufficient information about the student's speech-language needs such that an additional evaluation would not result in a failure to offer the student a FAPE (id. at p. 13). The IHO further noted that the May 2011 CSE recommended speech-language therapy in the May 2011 IEP (id.).

Having determined that the district offered the student a FAPE for the 2011-12 school year, the IHO nonetheless addressed the appropriateness of the parent's unilateral placement of the student at JCSE and equitable considerations (see IHO Decision at pp. 14-15). Generally, the IHO found that JCSE was "'specifically designed to meet the unique needs' of the student" and the evidence in the hearing record would not preclude an award of tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Specifically, the parent asserts that the district failed to establish the "procedural adequacy" of the May 2011 CSE meeting. Next, the parent alleges that the May 2011 CSE failed to obtain a social history and failed to conduct a speech-language evaluation. The parent contends that the May 2011 IEP failed to include sufficient and accurate information based upon the information considered. Next, the parent asserts that the May 2011

IEP failed to include a behavior intervention plan (BIP).⁴ The parent alleges that the May 2011 CSE was not properly composed due to the absence of a special education teacher responsible for implementing the student's IEP, and as a result, no one at the CSE meeting could explain how the recommended program would "appropriately meet [the student's] needs." The parent also asserts that the annual goals were not appropriate, the 12:1+1 special class placement was not appropriate, and the district failed to demonstrate that the student would be functionally and appropriately grouped at the assigned public school site. As relief, the parent seeks to overturn the IHO's finding that the district offered the student a FAPE for the 2011-12 school year and payment of the costs of the student's tuition at JCSE. In addition, the parent seeks to uphold the IHO's findings with respect to the student's unilateral placement at JCSE and equitable considerations.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's finding that the district offered the student a FAPE for the 2011-12 school year. The district also asserts that the parent cannot prevail on any arguments raised regarding the assigned public school site. In addition, the district asserts that if the parent is entitled to prospective funding, any award must be reduced by any amounts already paid by the parent, the costs of the religious studies, and the costs of counseling services.⁵

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school

⁴ Here, since the parent asserts for the first time on appeal that the May 2011 IEP failed to offer the student a FAPE because the May 2011 CSE failed to develop a BIP, this allegation was raised for the first time on appeal and, therefore, this allegation will not be considered (N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).[13-140]

⁵ To the extent that the parent's reply exceeds the permissible scope, it will not be considered (see 8 NYCRR 279.6 [limiting a reply to any "procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"]).

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. CSE Process

1. May 2011 CSE Composition

Turning to the parent's arguments regarding the composition of the May 2011 CSE, a review of the evidence in the hearing record supports a finding that the May 2011 CSE was properly composed.

At the time of the May 2011 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the

person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).⁶ However, as noted above, 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]).

In this case, the parent asserts that the district special education teacher could not be responsible for implementing the student's IEP because the evidence in the hearing record did not establish that she had any experience teaching a 12:1+1 special class placement, and at the time of the May 2011 CSE meeting, she provided SETSS. As a result of the improper composition of the May 2011 CSE, the parent asserts that no one could explain how the "recommended program" met the student's needs. The hearing record indicates that the following individuals attended the May 2011 CSE meeting: a district school psychologist, a district special education teacher (who also served as the district representative), a district regular education teacher, and the parent (see Dist. Exs. 4 at p. 1; 10 at pp. 10-11; see also Tr. pp. 33-34).⁷ The district school psychologist testified that the district special education teacher who attended the May 2011 CSE meeting was a certified special education teacher (see Tr. pp. 29-30, 33-34, 94). He further testified that while the district special education teacher currently provided special education teacher support services (SETSS), she "would be the one to implement the IEP if [the student] attended [their] school" (Tr. p. 51). The district school psychologist also testified that as the district representative, the district special education teacher was "knowledgeable about all the services" offered through the district (id.).⁸ Although he could not recall the district special education teacher's specific input at the May 2011 CSE meeting, the district school psychologist testified that generally the district special education teacher reviewed the special education programs; the "different setting[s];" and explained the differences between a "12:1 class and a 12:1+1 class," as well as SETSS (Tr. pp. 53-54). The district school psychologist further testified that the May 2011 CSE reviewed the student's IEP, and explained the "recommendations, the related services" and the annual goals to the parent (see Tr. pp. 39-40).

At the impartial hearing, the parent testified that the May 2011 CSE discussed that the student needed a "different school environment" because she could not "function" in her then-current setting with 20 students, and the May 2011 CSE recommended a 12:1+1 special class placement (see Tr. pp. 238-42). The parent admitted that the May 2011 CSE discussed the

⁶ The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

⁷ The district school psychologist testified that the parent waived the attendance of the additional parent member (see Tr. pp. 34, 56-57).

⁸ State regulation requires the attendance of a district representative at a CSE meeting who is "qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]). A special education teacher may dually serve as both the district representative and the special education teacher on a CSE (id.).

student's IEP, the recommended program of a "small class," and the annual goals (see Tr. pp. 252-53). The parent explained that the "basic idea" was that the student "just needed a small class, personal attention, [and] need[ed] to concentrate on her speech and thought process" (Tr. p. 253). He further testified that he had the opportunity to voice any concerns he had at the May 2011 CSE meeting (see Tr. pp. 253-54).

Based upon the foregoing, the evidence in the hearing record does not support the parent's assertions. First, neither State regulations nor the analysis of comments interpreting federal regulations cited above require that the special education teacher member of a CSE have experience teaching in a specific placement on the continuum.⁹ Second, the evidence in the hearing record indicates that the district special education teacher who attended the May 2011 CSE meeting was certified, and would be the teacher responsible for implementing the student's IEP. Finally, the evidence in the hearing record indicates that as the district representative, the district special education teacher was knowledgeable about the district's resources, including 12:1+1 special class placements and, accordingly, was also capable of explaining all district special education services and potential placements on the continuum to the CSE and the parent (Tr. pp. 51, 54). Consequently, the evidence in the hearing record supports a finding that the May 2011 CSE was properly composed, and the parent's assertions must be dismissed.

2. Evaluative Information and Present Levels of Performance

As noted above, the parent argues that the May 2011 CSE's failure to obtain a social history and a speech-language evaluation of the student—and its corresponding failure to sufficiently and accurately rely upon the evaluative information considered at the May 2011 CSE meeting—resulted in a failure to offer the student a FAPE for the 2011-12 school year. In opposition, the district argues that the parent did not allege in the due process complaint notice that the May 2011 CSE failed to obtain a social history report or a speech-language evaluation, and therefore, the IHO properly declined to address these issues. Alternatively, the district asserts that the May 2011 CSE considered and relied upon sufficient evaluative information to develop the May 2011 IEP, which sufficiently and accurately described the student's needs. A review of the evidence in the hearing record does not support the parent's arguments.

⁹ Moreover, a State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 2011 WL 4479033, at *4 n.3 [S.D.Cal. Sept. 26, 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]).

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]). However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 578-82 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

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][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the hearing record indicates that the May 2011 CSE had the following evaluative information available to develop the May 2011 IEP: a December 2010 integrated student progress report (December 2010 progress report), which included an undated speech-language progress report; an undated related service progress report (OT); an April 2011 psychoeducational evaluation report; and an April 2011 classroom observation report (see Tr. pp.

30-32, 34, 83-85, 99; Dist. Exs. 5-8).¹⁰ The district school psychologist testified that the May 2011 CSE relied upon the aforementioned evaluative information—as well as input from "former teachers" obtained during the classroom observation of the student—to develop the student's IEP (Tr. pp. 34-35). In addition, as noted more fully below, the evidence in the hearing record shows that the present levels of performance and individual needs section of the May 2011 IEP reflected, in most instances, a nearly verbatim duplication of the evaluative information available to the May 2011 CSE (compare Dist. Ex. 10 at pp. 1-3, with Dist. Ex. 5 at pp. 1-2, and Dist. Ex. 6 at pp. 1-3, and Dist. Ex. 7 at pp. 1-2, and Dist. Ex. 8).

According to the December 2010 progress report, the student exhibited "delays" in cognitive skills, social skills, and language skills (see Dist. Ex. 7 at p. 1). In addition, the student demonstrated difficulty with receptive and expressive language skills, and she could not "stay on one topic for more than a few seconds" (id.). The student also had difficulty "following classroom rules and routines," especially during "circle time and large group activities;" in addition, she was "easily distracted" and would "misbehave or get irritable after a short period of time" (id.). As a result, the student's paraprofessional would remove her from the classroom (id.). According to the December 2010 progress report, the student required "much prompting" to complete activities in small groups and to follow classroom routines (id.). In the report, the teacher noted that the student did not appear to understand "what [was] going on around her" and demonstrated little, if any, "reasoning skills" (id.). The teacher also reported the student demonstrated difficulty interacting appropriately with her peers and relating to her surroundings, and exhibited a "lot of difficulty in large group settings" (id.). The teacher noted that the student showed "almost no improvement since the start of the school year" (id.). The teacher further noted that, recently, the student acted out more and had become "more behavioral" (id.). To address these concerns, the teacher included annual goals in the December 2010 progress report to address the student's attention and focusing skills, as well as her social skills, and suggested the student required a "more specialized center based program in order to help her learn to function at an age appropriate age" (id.).¹¹

In the undated speech-language progress report—and as reflected in the May 2011 IEP—the student's provider noted that the student "lack[ed] abstract reasoning skills," she exhibited "difficulty processing information," and she could not "comprehend stories and understand spatial[,] quantitative and descriptive concepts" (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 10 at p. 1). In addition, the provider indicated the student exhibited difficulty "expressing herself, retelling events and answering questions" (id.). The provider included annual goals and short-term objectives in the speech-language report to address the student's receptive and expressive language skills, as well as her processing skills, and noted generally that she had "observed a percentage increase from baseline performance" with regard to the student's progress (see Dist. Ex. 7 at p. 2).

¹⁰ Although undated, it appears that the student's respective providers created both the speech-language and OT progress reports in or around December 2010 or January 2011 given a comparison of the student's birthdate and age noted in both reports (see Dist. Ex. 7 at p. 2; 8).

¹¹ The district school psychologist testified that although the student's teacher "mentioned that [the student's] behavior[s] at times were inappropriate," during his classroom observation of the student—as detailed more fully below—he observed the student to "maintain her composure" and "not overreact" when such occasions presented themselves with peers and further, that the student appeared able to "manage" the situations appropriately (Tr. pp. 102-03).

In the undated OT progress report—and as reflected in the May 2011 IEP—the student demonstrated delays in fine motor and graphomotor skills, as well as in sensory processing skills, which affected the "quality" of the student's "performance of necessary skills" and "limit[ed] [her] skill acquisition" in both the education and home environments (compare Dist. Ex. 8, with Dist. Ex. 10 at p. 2). The OT provider included annual goals and short-term objectives in the progress report and noted that the student's progress was assessed through "[c]linical observation as well as parent/teacher interview" (Dist. Ex. 8).

In the April 2011 classroom observation report, the district school psychologist described the student as "very loving, spontaneous, agile and energetic" (Dist. Ex. 5 at p. 1). He observed the student interacting "naturally and freely with her peers" (id.). During story time, the student selected a book and sat by herself to read (id.). When questioned about a story the student recently heard, the district school psychologist noted described her responses as "tangentially related to the story" and he noted that she "missed the pertinent points of the story" (id.). Based upon an interview, the classroom teacher indicated that the student exhibited difficulty with "understanding certain concepts" and tended to provide "unconventional answers instead of expected ones" (id.). However, the teacher also noted that the student was "very artistic, able to draw, and love[d] to dance" (id.). In addition, the student did not write her name and could not "differentiate a triangle among three circles"—but she could correctly identify a triangle, a circle, and a square (id.).

In summary, the district school psychologist noted in the classroom observation report that the student continued to "lag cognitively and academically behind her peers," she exhibited below age-appropriate expressive language skills, and she continued to need sensory stimulation—such as "hugging, holding, and physical contact"—to soothe her (Dist. Ex. 5 at p. 1). In addition, the district school psychologist noted that the student demonstrated "inconsistent" social judgment, indicating further that the student could "overreact" when provoked (id.). However, during the classroom observation, the district school psychologist observed the student demonstrate self-control and maintain her composure during a more challenging peer interaction (id.). In addition, the district school psychologist reported that the student demonstrated age-appropriate gross motor skills, and appeared "comfortable playing alone" or periodically interacting with peers or staff (id. at pp. 1-2). A review of the May 2011 IEP reveals that the May 2011 CSE incorporated some of the district school psychologist's observations of the student, noting her agility, flexibility, graciousness, and adequate upper body strength (see Dist. Ex. 10 at p. 2).¹²

Next, a review of the evidence in the hearing record reveals that compared to the December 2010 progress report and the two related services' progress reports, the May 2011 CSE relied heavily upon information in the April 2011 psychoeducational evaluation report to develop the student's May 2011 IEP, and in particular, the present levels of performance and individual needs section of the IEP. In April 2011, a school psychologist administered the following assessments to the student due to the parent's concerns about her academic delays and speech-language development: the Wechsler Preschool and Primary Scale of Intelligence—Third Edition (WPPSI-III), the Kaufman Survey of Early Academic and Language Skills (K-SEALS), selected subtests of the Kaufman Test of Educational Achievement—Second Edition (K-TEA-II), a modified

¹² The district school psychologist testified that he observed the student for a total of over 60 minutes in both the classroom setting and at recess (see Tr. pp. 50-51, 108).

version of the Bender Visual-Motor Gestalt Test (Bender-Gestalt), and a clinical interview (see Dist. Ex. 6 at pp. 1-3). Overall, the student's cognitive skills fell within the low average range, and her academic skills fell below the "kindergarten level" (id. at p. 3). The student demonstrated "[d]elayed" perceptual motor skills and "significant speech/language-language processing delays" (id.). According to a notation in the April 2011 psychoeducational evaluation report, a "[p]rogram recommendation w[ould] be made at the Educational Planning Conference after the speech evaluation [was] completed" (id.).¹³

Initially, a review of the present levels of performance and individual needs section of the May 2011 IEP reflects information obtained during the April 2011 psychoeducational evaluation report (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at pp. 1-2). For example, as noted in the April 2011 psychoeducational evaluation report—and as repeated in the IEP—the student demonstrated difficulty engaging in the "give and take" of conversation, her responses at times during the evaluation were "off target," she appeared to "focus inwardly but she was easily refocused," and she benefitted from "repetition of directions and questions" (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at p. 1). In addition, the May 2011 IEP noted that the student's "expressive language appear[ed] limited," her pencil grasp was "awkward," she did not "write her name," and she printed "random strings of numbers and letters" (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at pp. 1-2). As noted in the April 2011 psychoeducational evaluation report, the May 2011 IEP indicated that the student's "human figure drawings" focused on the "head" and "differentiated between males and females," she demonstrated a "below age expectation" in perceptual motor integration skills, she also demonstrated "mastery of horizontal orientation, produced an angular three sided figure, and demonstrated control of circular and curved figures" (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at p. 2). Finally, the May 2011 IEP noted that the student could not "integrate parts into wholes" (id.).

Next, the May 2011 IEP reported the student's overall level of cognitive functioning as measured by the WPPSI-III, which yielded a full-scale IQ of 82 (low average range) (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at p. 2). The May 2011 IEP also reported the student's scaled index scores and subtest scores obtained through the administration of the WPPSI-II: verbal scale IQ, 81 (low average range); and performance scale IQ, 86 (low average range) (id.). As noted in the April 2011 psychoeducational evaluation report, the May 2011 IEP noted that the student's ability to "define commonly used words" and "solve simple word riddles" fell within the low average range (id.). Similarly, the May 2011 IEP indicated that while the student attempted to "answer each question," her answers were "often tangentially related to the questions or just missed the point" of the question (id.). At that time, the student's "fund of general information" fell within the borderline range (id.).

With respect to the student's performance IQ, the May 2011 IEP indicated that the student's ability to "classify and categorize illustrations of objects" appeared to fall within the average range (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 6 at p. 2). In addition, the May 2011 IEP indicated that the student's ability to "analyze and reproduce block structures from models and her ability to perceive relationships among symbols on a measure of visual information processing" fell within

¹³ The district school psychologist testified that he did not know whether a speech-language evaluation was completed (see Tr. pp. 69-70).

the low average range (*id.*). Next, the May 2011 IEP noted that the student performed in the average range on tasks that required her to "quickly process simple or routine visual information without making errors" (*id.*).

With regard to the administration of the K-SEALS to the student, the May 2011 IEP reflected the student's early academic and language skills composite score of 78 (below average range) (*compare* Dist. Ex. 10 at p. 1, *with* Dist. Ex. 6 at p. 2). In addition, the May 2011 IEP reported the following scores obtained through the administration of the K-SEALS: vocabulary skills, 7th percentile (age equivalent, 3.6 years); expressive language skills, 7th percentile (age equivalent, 3.6 years); receptive language skills (age equivalent, 3.0); and numbers, letters, and words, 14th percentile (age equivalent, 4.1 years) (*compare* Dist. Ex. 10 at pp. 1-2, *with* Dist. Ex. 6 at p. 2). Next—as reflected in the April 2011 psychoeducational evaluation report—the May 2011 IEP reported that the student "identified pictures of common objects" and "labeled pictures of common objects and concrete activities" (*compare* Dist. Ex. 10 at p. 2, *with* Dist. Ex. 6 at p. 3). Similarly, the May 2011 IEP reflected that the student could "solve some simple word riddles with visual cues," and she understood the concepts of "biggest and smallest" and "one to one correspondence of numbers one to five" (*id.*). However, at that time, the student could not "identify [the] letters of the alphabet or single digit numbers" (*id.*).

Next, the May 2011 IEP reported the student's performance on selected subtests of the K-TEA-II (*compare* Dist. Ex. 10 at p. 2, *with* Dist. Ex. 6 at p. 3). With respect to mathematics concepts and applications, the student performed in the "borderline, pre[-]kindergarten level" (*id.*). As noted in the April 2011 psychoeducational evaluation report, the May 2011 IEP indicated that the student could "count," and could identify "basic geometric shapes," as well as "tallest" (*id.*). In relation to the listening comprehension, the May 2011 IEP noted that the student performed in the "borderline, pre[-]kindergarten level" (*id.*). The May 2011 IEP also indicated that the student demonstrated age-appropriate adaptive living skills and self-help skills (*id.*).

In describing the student's expected rate of progress in acquiring skills and information within the May 2011 IEP, the May 2011 CSE indicated that the student required supplemental support and related services to acquire the necessary skills to be successful (*see* Dist. Ex. 10 at p. 2). The May 2011 CSE also described the student's learning style, noting that a "multimodal approach w[ould] best serve [the student's] academic development," and recommended the use of "oral, graphic, and pictorial" methods to present information, as well as using simple, verbal instructions and visual supports (*id.*). The May 2011 CSE noted the student's preference for independent work and her strengths and interests in "creative arts" (*id.*). In describing the student's academic, developmental and functional needs—and in consideration of the parent's concerns—the May 2011 CSE indicated that the student benefitted from "academic support" and speech-language therapy; classroom adaptations, including facing the student when speaking, verbal cues to alert the student when she will be called on, establishing eye contact with the student prior to giving instructions or presenting new material, and introducing new concepts using a variety of methods (*id.* at p. 2).

With regard to the student's social development, the May 2011 IEP—as reflected in the April 2011 psychoeducational evaluation report—described the student as a "sweet, shy child," with "significant" speech-language processing delays and a "limited ability to understand spoken language," which could be affecting the student's development of social skills, as well as her ability

to acquire grade-level academic skills (compare Dist. Ex. 10 at p. 2, with Dist. Ex. 6 at p. 3). Consistent with the April 2011 psychoeducational evaluation report, the May 2011 IEP noted that the student needed "consistent redirection," and she frequently appeared "to be in her own world" (id.). The May 2011 IEP also consistently reported that the student "appropriately" interacted with the evaluator (id.). In the area of social development, the May 2011 IEP described the student's strength as "developing good interpersonal skills" and further noted the student's "age appropriate" behaviors (id.). Finally, the May 2011 IEP noted the parent's concern that the student performed "below standards in some areas" when compared to her peers (Dist. Ex. 10 at p. 2). In addition, the May 2011 IEP indicated that a "smaller setting with additional academic support" would assist in maintaining the "gains" the student already made, and that "[m]odeling of desired behavior and group behavior" would help the student to learn those behaviors (id.).

Based upon the foregoing, the evidence in the hearing record indicates that in developing the student's May 2011 IEP, the May 2011 CSE considered and relied upon the results of the student's most recent evaluation (April 2011 psychoeducational evaluation report), the student's progress reports, and a classroom observation report; the student's strengths; the parent's concerns; and the academic, developmental and functional needs of the student—as described in the evaluative information available to the May 2011 CSE—consistent with regulations. In addition, the evidence in the hearing record demonstrates that the May 2011 CSE accurately and sufficiently described the student's needs consistent with the evaluative information available to the CSE. Consequently, the evidence in the hearing record does not support the parent's allegations that the district's failure to obtain a social history or a speech-language evaluation of the student—even if such failures constituted a procedural violation—would result in a finding that such procedural inadequacies impeded the student's right to a FAPE, (b) significantly impeded the parent's 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]).

B. May 2011 IEP

1. Annual Goals

The parent asserts that the IHO erred in finding that the annual goals in the May 2011 IEP were appropriate. The parent argues that the annual goals were "vague," the annual goals did not address the student's vocabulary skills or social skills, and the annual goals were "unrealistic." The district rejects the parent's contentions. A review of the evidence in the hearing record supports the IHO's conclusion, and therefore, the parent's contentions must be dismissed.¹⁴

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

¹⁴ Although the IHO found that the absence of short-term objectives in the May 2011 IEP did not result in a failure to offer the student a FAPE, the IHO impermissibly relied upon retrospective testimony by the principal of the assigned public school to support this finding (see IHO Decision at p. 13). In this instance, the May 2011 CSE was not required to include short-term objectives in the May 2011 IEP because the student was not recommended for alternate assessment (see (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

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]).

In this case, a review of the May 2011 IEP reveals that the May 2011 CSE created approximately 11 annual goals to address the student's identified needs in the following areas: expressive language skills to improve her ability to express wants and retell events, receptive language skills to improve her attention and following simple directions, fine motor skills, sensory processing skills to effectively interact with people and objects, graphomotor skills to improve her letter formation and spacing, mathematics skills to solve problems and identify numbers, phonemic awareness and letter/sound identification skills, auditory processing skills to improve her ability to follow commands, focus and attention skills, and reading comprehension skills (see Dist. Ex. 10 at pp. 4-7). At the impartial hearing, the district school psychologist testified that the May 2011 CSE generated the annual goals in the May 2011 IEP based upon the annual goals in the December 2010 progress report, as well as the annual goals in the undated speech-language and OT progress reports; however, the May 2011 CSE "amended" the annual goals in the progress reports to remove the short-term objectives (see Tr. pp. 38-39, 41-43, 73-76, 91-93, 99-102; compare Dist. Ex. 10 at pp. 4-7, with Dist. Ex. 7 at pp. 1-2, and Dist. Ex. 8). Furthermore, the district school psychologist testified that the May 2011 CSE reviewed the annual goals at the meeting (see Tr. p. 40). At the impartial hearing, the parent confirmed that the May 2011 CSE reviewed the annual goals and that he "definitely" had the opportunity to voice any concerns (see Tr. pp. 252-54).

Contrary to the parent's assertion, a review of the annual goals targeting the student's expressive and receptive language needs reveals that they are not vague, and moreover, address the student's vocabulary needs. Here, the annual goals target the student's needs to express her wants, retell events, attend to task, follow directions, understand a story, answer questions, and understand spatial concepts—all of which supported the student's need to increase her vocabulary and were different defined and measurable tasks (see Dist. Ex. 10 at pp. 4, 6).

Next, although the May 2011 CSE derived one OT annual goal for coloring a simple design within half inch of the boundary, developing a static tripod grasp during writing tasks, and developing cutting skills from three short-term objectives in the undated OT progress report, the hearing record does not contain any evidence to suggest that the annual goal was not appropriate or failed to adequately address the student's identified needs (compare Dist. Ex. 10 at p. 4, with Dist. Ex. 8). Generally, as written, the OT annual goals in the May 2011 IEP address fine motor control for different tasks, including maintaining boundaries, age-appropriate grasp for writing, cutting, forming letters, and maintaining spacing—all of which were different defined and measurable tasks; as such, the evidence in the hearing record does not support the parent's assertion that the writing goals were vague or duplicative (see Dist. Ex. 10 at pp. 4-5).

Contrary to the parent's assertion, the evidence in the hearing record establishes that the May 2011 IEP also included annual goals to support the student's social skills (see Dist. Ex. 10 at pp. 5-6). More specifically, the annual goals in the May 2011 IEP targeted the student's social

skill needs through the development of the student's ability to attend and ability to manage competing auditory stimulation in order for her to relate and interact effectively with people and objects in the environment (*id.*). In addition, the annual goals addressing the student's attention and managing auditory stimulation included skills to increase attending time increments, her ability to maintain attention to table top activities, her ability to increase attending to teacher directed tasks with minimal facilitation, and her ability to discriminate between relevant and irrelevant auditory stimulation (*id.* at pp. 4-6).

Based upon the foregoing, a review of the evidence in the hearing record demonstrates that the annual goals included in the May 2011 IEP were sufficiently linked to the student's needs as identified in the present levels of performance and individual needs section of the May 2011 IEP (compare Dist. Ex. 10 at pp. 4-6, with Dist. Ex. 10 at pp. 1-3). Thus, overall, the evidence in the hearing record supports a finding that the annual goals in the May 2011 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

2. 12:1+1 Special Class Placement

The parent asserts that the 12:1+1 special class placement was not appropriate because the student would not receive the "intensive individualized support" she required in order to make "appropriate progress." The district rejects the parent's contentions and argues that the 12:1+1 special class placement was appropriate. A review of the evidence in the hearing record supports a finding that the 12:1+1 special class placement was appropriate, and therefore, the parent's arguments must be dismissed.¹⁵

State regulations provide that a 12:1+1 special class placement is designed 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]). In reaching the decision to recommend a 12:1+1 special class placement, the May 2011 CSE considered the student's then-current functioning related to behavior, social/emotional development, motor skills, cognitive skills, and language needs as reflected in the evaluative information available—in addition to input from the student's teachers obtained during the classroom observation of the student regarding the "best setting" for the student (see Tr. pp. 34-

¹⁵ Although the IHO found that the behavior management plan at the assigned public school appropriately addressed the student's "misbehaviors," and did not result in a failure to offer the student a FAPE, the IHO impermissibly relied upon retrospective testimony by the principal of the assigned public school to support this finding (see IHO Decision at p. 13).

35, 93-94; Dist. Exs. 5-8). The district school psychologist testified that the student's teachers recommended a "smaller setting with a classroom para[professional], along with the related services she was getting at that time" (Tr. pp. 34-36). The district school psychologist also testified that although the May 2011 CSE considered a 12:1 special class placement, the CSE ultimately opted for a 12:1+1 special class placement to provide the student with the "supplemental support, academic support" she required (Tr. pp. 40-41). He further testified that the classroom paraprofessional in a 12:1+1 special class could "interact and implement some of the strategies" in the May 2011 IEP (*id.*). The district school psychologist also testified that the 12:1+1 special class placement was appropriate for the student because it would provide her with the "proper support and strategy and intervention from both the teacher and the classroom para[professional]"—and he had "no doubt" that the student would succeed academically in this setting (*id.*; *see* Tr. pp. 82, 99).

Generally, the district school psychologist testified that a 12:1+1 special class placement served students with "severe academic deficits" and provided those students with the opportunity to "make academic gains" due to the student-to-teacher ratio and the classroom paraprofessional, who would "serve as a supportive role academically" to the students (Tr. pp. 104-05). In addition, 12:1+1 special class placements also existed to support students with "behavior issues" (*id.*). However, the district school psychologist testified that the May 2011 CSE intended the student to be placed in a 12:1+1 special class with "mostly academic issues" and not behavior issues (*id.*; *see* Tr. pp. 108-09).

In addition, the May 2011 CSE considered but rejected a general education setting because the student's "current academic deficits" could not be remediated in "such a large setting" (Dist. Ex. 10 at p. 10). Similarly, the May 2011 CSE considered but rejected a special class in a specialized school because it would be "too restrictive" for the student (*id.*). The May 2011 CSE also recommended speech-language therapy and OT services to further address the student's needs, as well as the following strategies to address the student's management needs: continued related services to assist the student's sensory and language development, preferential seating, facing the student when speaking to her, notifying the student prior to calling on her, establishing eye contact with the student before giving instruction or introducing new material, introducing new concepts through a variety of methods, and using simple, verbal instructions and visuals (*id.* at pp. 3, 7).

In this case, given that the student functioned academically and cognitively in the low average range, and exhibited difficulty in processing information; comprehending stories, as well as spatial, quantitative, and descriptive concepts; difficulty expressing herself; and need for repetition and redirection, the evidence in the hearing record establishes that the 12:1+1 special class placement—together with the annual goals, related services, and management needs in the May 2011 IEP—was reasonably calculated to enable the student to receive educational benefits. Contrary to the parent's allegations, the evidence in the hearing record does not demonstrate that the student required "intensive individualized attention" to make progress, or that the supports or interventions required by her needs could not otherwise be delivered by either the classroom teacher or the paraprofessional in the 12:1+1 special class placement recommended in the May 2011 IEP. As such, the parent's arguments must be dismissed.

C. Challenges to the Assigned Public School Site

Finally, the parent asserts that the district failed to demonstrate that the student would have been functionally grouped at the assigned public school site. The district argues that it had no legal obligation to establish that the assigned public school site could implement the May 2011 IEP, and alternatively, the evidence in the hearing record demonstrates that the student would have been appropriately grouped at the assigned public school site. As explained more fully below, the parent's assertions must be dismissed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [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 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, 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, 2013]). 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]).¹⁶ When the Second

¹⁶ 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; 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

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 parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of his choosing prior to the time the district became obligated to implement the May 2011 IEP (see Parent Exs. B; D-E). Therefore, the district is correct that the issues raised and the arguments asserted by the parent 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 the 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, 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 parent's 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 May 2011 IEP.¹⁷

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.

¹⁷ 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 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., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record 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. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at JCSE was an appropriate placement or whether equitable considerations supported the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 14, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER

[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. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).