The University of the State of New York

The State Education Department
State Review Officer
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No. 12-058

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Samantha Bernstein, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Churchill School (Churchill) for the 2011-12 school year. The parents cross-appeal from some of the determinations of the IHO. The appeal must be sustained. The cross-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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

In October 2009, the Committee on Preschool Special Education (CPSE) evaluated the student and found him eligible for special education itinerant services (SEIT) services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 5 at p. 2). The student attended a general education preschool program while receiving the special education services (Tr. pp. 444-45).

For the 2010-11 school year, the student attended Churchill (Tr. pp. 345, 421; see Dist. Exs. 5 at p. 2; 6; 7; 8; 9; 10).[1] On March 8, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 1). The CSE found the student eligible for special education programs and related services as a student with a speech or language impairment and recommended a 12:1 special class in a community school (id. at p. 1).[2] The CSE also recommended related services of two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute session of individual counseling per week, one 30-minute session of counseling per week in a group of six, three 30-minute sessions of OT per week in a group of six, one 30-minute session of individual PT per week, and one 30-minute session of PT per week in a group of two (id. at pp. 1, 20).

In a final notice of recommendation (FNR) dated July 11, 2011, the district summarized the recommendations made by the March 2011 CSE and identified the particular school to which the district assigned the student for the 2011-12 school year (Dist. Ex. 3). The FNR listed an address for the assigned school, as well as the name, address, and telephone number of an individual to contact from the CSE for information (id.). The student continued to attend Churchill for the 2011-12 school year (Tr. p. 358; see Parent Exs. A; C; E).

A. Due Process Complaint Notice

In a due process complaint notice dated September 28, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds for the 2011-12 school year (Dist. Ex. 12 at p. 1). Pertaining to the March 8, 2011 CSE meeting, the parents asserted improper CSE composition; specifically, that there was not a qualified regular education teacher present at the meeting (id. at p. 4). In addition, the parents asserted that they were denied meaningful participation in the March 2011 CSE meeting due to the CSE's refusal to listen to the student's parents and teacher, failure to allow the student's teacher to fully answer questions, and failure to include the parents in the creation of the annual goals on the student's IEP (id. at pp. 2, 5-6). The parents also asserted that a 12:1 special class in a community school was insufficient to meet the student's needs (id. at p. 4). The parents asserted that the student required a small structured and supportive setting with individualized attention to achieve educational benefits (id.). The parents further asserted that the program was not reasonably calculated to confer educational benefits, as the CSE disregarded the recommendation of the parents and teacher, who were the only people at the CSE meeting with substantial knowledge of the student (id.). Regarding the assigned class, the parents asserted that it could not provide the student with a suitable and functional peer group for academic or social/emotional purposes and that there were only five students enrolled in September 2011, and that such was too restrictive (id. at pp. 3-4). In addition, the parents asserted that the district failed to provide

[1] Churchill is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Tr. p. 339).

[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 in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

mandated transportation services to Churchill for the student (id. at p. 3).[3] The parents further asserted that the student's placement at Churchill was appropriate and that equitable considerations weighed in their favor (id. at p. 6). As relief, the parents sought a Nickerson letter[4] to fund the student's placement for the 2011-12 school year, or alternatively that the CSE reconvene and make an appropriate recommendation by deferring the student's case to the central based support team (CBST), or alternatively tuition reimbursement (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 13, 2011 and concluded on January 5, 2012, after two days of proceedings (Tr. pp. 1-474). In a decision dated February 16, 2012, the IHO found that the district did not offer the student a FAPE because the CSE was not properly constituted (IHO Decision at pp. 31-34). The IHO based this finding on a determination that a regular education teacher meeting statutory and regulatory requirements was not present at the March 2011 CSE meeting to consider the student's transition from a 12:1+1class at a nonpublic school to a 12:1 special class in a community school with participation in the general education setting for specials, lunch and recess, without the support of a special education teacher (id.). The IHO further found that the failure to have a regular education teacher at the CSE meeting deprived the student of meaningful educational benefits (id. at pp. 33-34).

As to the parents' meaningful participation claim, the IHO found that the March 2011 CSE had not predetermined its recommendation for the student or denied the parent meaningful participation (IHO Decision at p. 34). Although the IHO noted "rude and unprofessional" behavior at the March 2011 CSE meeting by one of the CSE participants, the IHO found that the hearing record supported a finding that the parents and teacher had the opportunity to state their positions, as reflected by testimony and CSE meeting minutes (id.).

The IHO also found that the record supported a finding that the IEP accurately reflected the student's functioning levels, which were taken from the student's standardized test scores reflected on the psychological evaluation (IHO Decision at p. 35). The IHO found that with the

[3] The parents also reserved the right "to raise any other procedural or substantive issues that may come to their attention during the pendency of the litigation" (Dist. Ex. 12 at p. 6). One U.S. district court in New York has recognized, however, that to allow the parents to raise additional issues without the district's agreement pursuant to a reservation of rights clause would render the IDEA's statutory and regulatory provisions meaningless (see B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 5 [E.D.N.Y. Jan. 6, 2012]; 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; Application of the Dep't of Educ., Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).

[4] A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

exception of the writing score, the student's reported levels between standardized scores and teacher estimates were substantially similar, and that while the better practice would be to include both standardized scores and teacher estimates, the "[de minimis] discrepancies" and "inflated" writing score were not sufficient to provide a basis to annul the IEP (id. at pp. 35-36).

Regarding the 12:1 special class in a community school with related services recommended by the March 2011 CSE, the IHO found that it was an appropriate recommendation (IHO Decision at p. 36). The IHO explained that "[a] small class with one specialized teacher, no more than 11 other students and limited exposure to a general education environment where he would have supports as well as peer models was an appropriate recommendation" (id.). As to the student's access to some mainstreaming in nonacademic areas, the IHO found that the testimony, classroom observations, and psychological evaluation supported a finding that it was appropriate (id. at p. 36). The IHO added that the CSE's determination as to a program that would provide the student with educational benefits and meaningful progress was reasonable (id. at pp. 36-37).

Regarding the assigned class, the IHO found that the district failed to prove that it was appropriate to meet the student's needs (IHO Decision at p. 37). The IHO found that the students in the class would have been an inappropriate functional group for instructional purposes and for social emotional purposes (id. at pp. 37-39). The IHO noted that the teacher of the assigned class did not explain "what structures" existed for the students during the time when the teacher gave extra help to students who need such help and also indicated that the student would have difficulty learning in such a "distracting environment" and that the one teacher in the described class would not leave time for enough adult support for the student in his areas of need (id. at pp. 37, 39).

In addition, the IHO found that Churchill was an appropriate placement for the student for the 2011-12 school year and that equitable considerations supported an award of tuition in favor of the parents (IHO Decision at pp. 39-42). As relief the IHO ordered the district to reimburse the parents for the student's tuition costs at Churchill for the 2011-12 school year upon presentment of proof of payment and that the district provide transportation for the student (id. at p. 44).[5]

IV. Appeal for State-Level Review

The district appeals the IHO's decision that the district failed to offer the student a FAPE for the 2011-12 school year and the award of tuition reimbursement. Regarding CSE composition, the district asserts that the CSE did not need to include a regular education teacher because the CSE was not considering a general education environment in academics for the student; and that although the CSE considered an integrated co-teaching (ICT) class, regular education teacher input was not required because such classes were co-taught by a special education teacher. In addition, the district asserts that although not identified in the IEP, a named participant certified as a regular education teacher filled the role of regular education teacher; alternatively, the district asserts that the parents failed to show that the lack of a regular education teacher at the March 2011 CSE

[5] Regarding the parents' assertion that the district failed to provide mandated transportation services to Churchill for the student, the IHO found that the district did not meet its burden to prove that the student was not entitled to transportation (IHO Decision at pp. 43-44).

meeting impeded the student's right to a FAPE, deprived the parents of meaningful participation, or caused deprivation of educational benefits.

As to the assigned school, the district asserts that it does not have a duty to establish functional grouping since the parents did not accept the district placement and did not enroll the student. Alternatively, the district asserts that the student would have been suitably grouped in the class. In addition, the district asserts that the IHO's conclusion that the student would have difficulty learning in such a distracting environment was speculative.

The district further asserts that Churchill was not appropriate for the student because it was not the least restrictive environment and that equitable considerations do not favor the parents because they did not intend to place the student in a public school.

As relief, the district requests that the IHO decision dated February 16, 2012 be vacated.

In an answer, the parents initially assert that the district failed to appeal from that part of the IHO's decision finding that the assigned class was inappropriate due to lack of structure and support by the teacher in classroom, that such a finding is final and binding, and that it provides a sufficient basis to affirm the IHO's decision. The parents admit and deny allegations, asserting that the district failed to offer the student a FAPE; that Churchill was an appropriate placement for the student; and that equitable considerations favored the parents.

In a cross-appeal, the parents assert that the IHO erred in finding that the parents meaningfully participated in the March 2011 CSE meeting, and further erred in finding that the CSE's failure to draft an IEP that adequately reflected the student's functional levels was a de minimis error. In addition, the parents assert that the parents' and teacher's inability to participate at the CSE meeting directly contributed to the "unsound" IEP and that inclusion of an inflated writing score resulted in an IEP that was not reflective of the student's needs and abilities. In addition, the parents assert that the IHO erred in finding a 12:1 special class appropriate; that there was no evidence that the student was capable of functioning in a classroom with a single teacher; and that the student required individual instruction and support throughout the day. As relief, the parents request that the petition be dismissed; that the IHO's decision be upheld to the extent that it awarded relief to the parents; and that the SRO overturn the portions of the IHO's decision which found that the parents had an opportunity to meaningfully participate in the March 2011 CSE meeting; that the IEP discrepancies were de minimis errors; and that the 12:1 special class recommendation was appropriate for the student.

In an answer to the cross-appeal, the district asserts that the parents had an opportunity to meaningfully participate in the development of the March 2011 IEP; that the IEP, as a whole, constituted an accurate indication of the student's functional levels; and that the IHO correctly found that a 12:1 special class was appropriate for the student for the 2011-12 school year.

In a reply, regarding the parents' assertion that the petition does not include an appeal from that part of the IHO's decision finding the assigned school insufficient based upon the structure and support that the student would have received if he had attended the assigned class, the district asserts that the IHO's description of the teacher's classroom does not constitute findings and

conclusions, but rather part of the basis of the reasoning and that the district has appealed from the finding/conclusion that the assigned school was inappropriate.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 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, 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, 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. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

As discussed above, the parents assert that the district failed to appeal from that part of the IHO's decision finding that the assigned class was inappropriate due to lack of structure and support by the teacher in the classroom, and the parents argue that such a finding is final and binding, and provides a sufficient basis to affirm the IHO's decision (see IHO Decision at pp. 37-38). An IHO's decision is final and binding unless timely appealed to a SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Upon review of the pleadings, I agree with the district that the IHO's discussion of the assigned classroom, referencing the lack of support and structure, can best be identified as part of the reasoning in support of the IHO's finding that the district failed to prove that the assigned class was appropriate to meet the student's needs (see IHO Decision at pp. 37-39). I note that the IHO's discussion of the lack of structure and support in the assigned class is also contained within the IHO's discussion of functional grouping and before his conclusion that the assigned school was not appropriate to meet the student's needs (id.). Upon review of the pleadings, I find that the district has appealed from the IHO's finding that the assigned school was not appropriate to meet the student's needs (see IHO Decision at pp. 37-39; Petition ¶¶ 6, 7, 35, 51-60). In addition, I note that the district indicated its position regarding the assigned class and presented facts in support of its position from the hearing record when it referenced the structure and support provided by the assigned teacher in the assigned class (see Petition ¶ 21). Accordingly, I find that the district's appeal includes the issue regarding the appropriateness of the assigned class due to lack of structure and support by the teacher in the classroom.

B. CSE Composition

I will now address the district's assertion that the IHO erred in finding a denial of a FAPE based upon a determination that the March 2011 CSE was inappropriately constituted because it did not include a regular education teacher to consider the student's transition from a nonpublic school to a 12:1 special class in a community school and the student's participation in the general education settings of music, art, physical education, and recess (see IHO Decision at pp. 32-33). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, a review of the March 8, 2011 IEP reflects that attendees at the March 8, 2011 CSE review included the district representative, who also acted as the special education teacher, a school psychologist, the parent, the parent's attorney, an additional parent member, and participants by telephone included the administrative director of the student's nonpublic school, the student's special education teacher, and the student's speech-language therapist (Dist. Ex. 1 at

p. 2). The hearing record further reflects that the attendance record of the March 2011 CSE meeting does not include a signature in the space provided for the regular education teacher (id.). In addition, the hearing record reflects that the school psychologist testified that the district representative, who also acted as the special education teacher at the March 2011 CSE meeting, was a licensed regular education teacher (see Tr. pp. 71, 129). However, the hearing record is inconclusive as to whether or not the district representative also acted as the regular education teacher at the meeting (see Tr. pp. 71, 129, 159-60, 312). Moreover, the hearing record reflects that the district did not establish that the regular education teacher was a teacher "of the student" and I am not persuaded by the evidence that the attendance of the district representative, who was also a certified regular education teacher, in this circumstance, comported with the requirements of federal and State regulations (see Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). Thus, the hearing record does not establish that the district's regular education teacher at the March 2011 CSE meeting was teaching at the time of the March 2011 CSE meeting; nor does the hearing record show that it was reasonably anticipated at the time of the CSE meeting that she might implement the student's IEP for the 2011-12 school year (see Tr. p. 129).

However, I find that the hearing record does not provide a basis upon which to conclude that this procedural inadequacy 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, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]). The parents assert that the presence of an appropriate district regular education teacher was required at the March 2011 CSE meeting because the district considered a regular education program for the student and recommended a placement that included integration with the general education population. However, as discussed below, upon my independent review, I find that the recommended placement was appropriate and that the March 2011 IEP provided the student with appropriate supports in the recommended setting. Accordingly, I find that the IHO erred in finding a denial of a FAPE based upon a determination that the March 2011 CSE was inappropriately constituted because it did not include a regular education teacher (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012] [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]; see also S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

C. Parental Participation

The parents assert that the IHO improperly found that the parents meaningfully participated at the March 2011 CSE meeting. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Upon review of the hearing record, I find that the IHO's finding that the parents and teacher had an "opportunity to voice their concerns" and that the district did not deny the parents meaningful participation at the March 2011 CSE meeting is supported by the hearing record (see IHO Decision at p. 34; Tr. pp. 84-85, 90-91, 98-100, 102, 114-15, 158; Dist. Ex. 2 at pp. 4-5, 8). The hearing record reflects that the student's mother participated in the development of the IEP, including providing the CSE with her concerns regarding the student's abilities and placement and that both the parent and the student's then-current Churchill teacher provided information regarding the student's academic skills and social/emotional functioning to the March 2011 CSE which was incorporated into the student's IEP (Tr. pp. 84-85, 90-91, 98-100, 102, 114; Dist. Exs. 1; 2 at pp. 4-5, 8). I note that the minutes of the March 2011 CSE meeting also indicate that the parent and the student's Churchill teacher participated in the CSE process including sharing their perspectives on the student's abilities and concerns regarding the student's placement (Dist. Ex. 2 at pp. 1-6). Additionally, I note that the hearing record reflects that the student's Churchill teacher provided the annual goals for the March 2011 (Tr. pp. 114-15).

Regarding the parents' assertion that the March 2011 CSE did not consider the recommendations made by the parent and the student's Churchill teacher, the hearing record reflects that the CSE began the meeting by asking the parent for her concerns and further discussed the parent's preferred placement option of Churchill during the meeting (Tr. pp. 90, 158). The hearing record reflects that the student demonstrated skills close to grade level and therefore the CSE considered an integrated co-teaching (ICT) class for the student; however, based on information and concerns provided by the parent and teacher that the student required a small class, the CSE recommended a 12:1 special class (Tr. pp. 81-82, 84-85).

A review of the hearing record reflects that CSE considered the parent's perspective regarding development of the student's March 2011 IEP and in accordance with the evaluative data, as discussed below, recommended an appropriate program for the student based on his needs. Upon my review of the hearing record, I concur with the IHO that the parents were afforded an opportunity to participate in the IEP development process. Although the parents disagree with the CSE's decision, the hearing record shows that the CSE responded to their concerns and I

specifically note that the CSE considered an integrated co-teaching (ICT) class for the student, but that based on the parent's and teacher's concerns that the student required a small class, the CSE recommended a 12:1 special class (see Tr. pp. 81-82, 84-85). Accordingly, based upon my review of the hearing record, I find that the parents were afforded an opportunity to meaningfully participate in the development of the student's IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

D. March 2011 IEP

1. Evaluative Information and Present Levels of Performance

The parents assert that the IHO erred in finding that the March 2011 IEP accurately reflected the student's functioning levels. The parents base their assertion on the claim that the district's January 2011 psychological assessment of the student was not representative of the student's abilities within the classroom. Further, with respect to the district's 2011 psychological evaluation, the parents assert that the student's standard score in the area of writing was inflated, resulting in an IEP that was not reflective of the student's abilities and needs.

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 E.A.M, 2012 WL 4571794, at *9-*10; S.F., 2011 WL 5419847, at *10; 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).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general 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]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

The hearing record indicates that the March 2011 CSE reviewed a November 2010 Churchill teacher report, December 2010 and January 2011 classroom observations, a January 2011 psychological evaluation, a January 2011 counseling update, a January 2011 speech and language report, a January 2011 social history, a January 2011 OT report, and a November 2011 physical examination report, as well as a draft IEP (Tr. pp. 64, 68-69; see Dist. Exs. 4-11). While the parents allege that the evaluative information included in the March 2011 IEP was inadequate because the March 2011 CSE derived functional levels for academics based on the 2011 psychological evaluation and not the student's teacher, State regulations require that an IEP report the student's present levels of academic achievement and functional performance; State regulations do not mandate precisely where that information must come from (see Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 10-099). Moreover, in determining the student's functional levels, a review of the hearing record reflects that the March 2011 CSE relied not only on the 2011 psychological evaluation, but also on input from the student's Churchill teacher (Tr. pp. 82, 100; Dist. Ex. 1 at pp. 3-5; Parent Ex. 4). Although the teacher at Churchill disagreed with the psychological evaluation results, the school psychologist testified that the results of the psychological evaluation and the academic functioning levels reported by the teacher were highly correlated (Tr. pp. 100, 132, 173-74). The school psychologist further testified that any discrepancies between the evaluative results and teacher's report reflected the student's progress over time (Tr. p. 100). While the school psychologist testified that the student's standard score in the area of writing was "probably inflated," the student's goals related to writing clearly delineated the student's deficits in that area (Tr. p. 163; Dist. Ex. 1 at p. 7). With respect to the student's score in the area of writing, the school psychologist testified that based on the discussion at the CSE meeting with the student's Churchill teacher that the student exhibited difficulties with writing, the CSE developed an annual goal for the student to address his needs in this area (Tr. pp. 97, 162; Dist. Ex. 3 at pp. 3, 7).

Accordingly, a review of the information considered by the March 2011 CSE, as detailed above, reflects: that the March 2011 CSE had before them adequate and appropriate current evaluative information with respect to the student, which the CSE utilized in the development of the student's March 2011 IEP; that despite any discrepancy in the student's writing score, the annual goal addressed the student's needs in the area of writing; and that, as viewed as a whole, the student's functional abilities were accurately documented throughout the IEP, which resulted in an IEP that reflected the student's special education needs with sufficient accuracy and a program designed to help the student progress (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see E.A.M., 2012 WL 4571794, at *9-*10; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see also Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ.,

Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

2. 12:1 Special Class Placement

The parents assert that the IHO erred in finding that a 12:1 special class was appropriate for the student. A review of the documents considered by the March 2011 CSE supports the conclusion that the CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs and that a 12:1 special class was appropriate for the student (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]).

In November 2010, the student's Churchill teacher completed a teacher report of the student (Dist. Ex. 7). The student's independent math skills fell at the "Pre-K.5" level and his instructional math level fell at the kindergarten level (id. at p. 1). The report indicated that the student counted from 0 to 20 and was developing a sense of one-to-one correspondence when working with sets of objects under 12 (id.). The report noted that the student's slow processing speed and difficulties with receptive language and memory negatively affected his performance in math class (id.). The report indicated that the student better participated in math class when instructed with visuals and manipulatives, as well as frequent review and repetition of concepts (id.).

The 2010 teacher report from Churchill also indicated that the student's independent reading skills fell at the "Pre-K" level and his instructional reading level fell at the kindergarten level (Dist. Ex. 7 at p. 1). The student identified many upper and lower case letters and decoded several short CVC words (id.). The report indicated that to address the student's needs related to language processing, the student needed a small class setting, frequent and slower review of instructional materials, and multisensory instruction (id.). The student exhibited difficulties with processing oral language due to his deficits in the areas of receptive vocabulary, attention, and processing (id. at p. 2). The report also indicated that the student responded well to teacher prompts and cues during large group activities (id.). The student's ability to communicate was compromised by his difficulties with organization, slow processing speed, and limited pragmatic language (id.). He sometimes struggled to initiate and maintain conversations with peers due to his difficulties with language (id.). With respect to written expression, the student wrote simple stories when provided with a teacher model (id.). In the areas of fine and gross motor skills, the student exhibited skills below his same age peers (id.). The student demonstrated difficulties with balance, motor planning, eye-hand coordination, and cutting skills (id. at p. 3). With respect to social skills, the student exhibited difficulties initiating and maintaining conversations with peers (id.).

In a November 2010 physical examination report, the student's physician recommended that the student receive PT, OT, and speech-language therapy to address his developmental delays (Dist. Ex. 11 at pp. 1-2).

In December 2010 and January 2011, the district conducted classroom observations of the student at Churchill, both of which provided consistent information regarding the student (Dist. Ex. 6). The student was described as easily engaged and cooperative with average attention (id. at pp. 1, 3). He exhibited a positive response to teacher direction and reinforcement (id.). The

student worked independently on a writing and drawing activity and followed classroom rules and procedures (id. at p. 2). According to the observation report, the student required the level of 1:1 assistance that a student would receive in a special class (id.). The student exhibited age appropriate self-advocacy skills, social skills, and motor skills (id. at pp. 2, 4).

The January 2011 psychological evaluation of the student reflected that, during the assessment, the student completed tasks at an average pace with adequate fine motor manipulation (Dist. Ex. 4 at p. 1). Results from the psychological evaluation indicated that the student demonstrated overall average cognitive abilities, average reading and math skills, and high average writing skills (id. at pp. 2-3). The student accurately decoded and identified words (id. at p. 3). According to the report, the student exhibited difficulty with tasks related to oral comprehension (id. at pp. 3-4). The student demonstrated social skills indicating that he could effectively interact with peers (id. at p. 5).

In January 2011, the Churchill social worker completed a counseling update of the student (Dist. Ex. 10). With respect to the student's group counseling session, the report indicated that the student was a "very eager member of the group" and participated in all group discussions and activities (id.). The report indicated that the student would benefit from social skills activities that focused on collaborative and imaginary play as well as conversational skills (id.).

The student's Churchill speech-language pathologist provided a September 2010-January 2011 progress report of the student (Dist. Ex. 9). The report indicated that the student exhibited improvement in the area of auditory comprehension, including responding to concrete wh-questions with minimal support, as well as answering more complicated questions with scaffolding support (id.). The student followed simple commands, but exhibited greater difficulty following multi-step directions (id.). The report noted that the student exhibited progress in the area of expressive language (id.). In the area of pragmatic language, the student required adult support to maintain a conversational topic and limit irrelevant comments (id.).

The January 2011 social history described the parents' concerns regarding the student, including the student's difficulties with articulation, word retrieval, auditory processing, and fine and gross motor skills (Dist. Ex. 5 at pp. 1, 3).

In January 2011, the student's occupational therapists at Churchill provided a progress report of the student (Dist. Ex. 8). The student worked on improving his grasp, including working on letter formation for which he required moderate verbal cues (id.). According to the report, the student demonstrated an increase in upper extremity strength/shoulder stability and eye-hand coordination (id.). The student exhibited mild to moderate difficulties with motor planning, postural control, crossing midline, and bilateral coordination (id.).

The March 2011 CSE developed an IEP for the student based on his needs, as indicated in the evaluative reports and input from the team members (Tr. pp. 84-85, 90-91, 98-100, 102, 114; Dist. Ex. 2 at pp. 1-8). The IEP reflected that the student demonstrated overall average cognitive skills and average academic skills with a strength in written expression (Dist. Ex. 1 at p. 3). The IEP also reflected the student's difficulties with oral comprehension, attention, pragmatic language, and self-confidence (id. at pp. 3-4). The IEP indicated that the student was capable of interacting with peers, but exhibited difficulty maintaining conversations and playing with peers (id. at p. 4).

The IEP also indicated that the student exhibited difficulties with fine and gross motor skills (id. at p. 6).

The March 2011 IEP contained specific recommendations regarding accommodations and strategies for the student based on his needs, including the following: (1) a class with a small teacher to student ratio; (2) a highly structured class with clear expectations; (3) use of visual supports and chunking of information; (4) behavior management techniques to be used consistently, including a positive reward system; (5) teacher modeling, praise, and 1:1 support; (6) counseling to address social/emotional functioning; and (7) OT and PT to address fine and gross motor delays (Dist. Ex. 1 at pp. 3-6).

Based on the information before it, the March 2011 CSE recommended a 12:1 special class in a community school (Dist. Ex. 1 at p. 1). The CSE also recommended related services of two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute session of individual counseling per week, one 30-minute session of counseling per week in a group of six, three 30-minute sessions of OT per week in a group of six, one 30-miunute session of individual PT per week, and one 30-minute session of PT per week in a group of two (id. at pp. 1, 20).

While the parents assert that the student would not receive the individualized attention he required within a 12:1 special class, I note that the student's Churchill teacher testified that the student engaged in independent work with check-ins from the teacher (Tr. pp. 382, 405). The student's Churchill teacher also testified that the student functioned within a group of 12 students with reminders to maintain his attention (Tr. p. 386). The Churchill teacher stated that the student socialized with other students and responded to redirection (Tr. pp. 397-98). Within a 12:1+1 class at Churchill, the student was able to participate in the curriculum with supports such as monitoring, chunking of information, and scaffolding (Tr. p. 392). In addition, testimony of the school psychologist supports the recommendation of a 12:1 special class in a community school (Tr. pp. 76-77, 79, 81-82, 84-85, 93-94, 123-24). According to the school psychologist, within a special class, the special education teacher supports the students by providing modified and differentiated instruction based on the student's individual needs (Tr. p. 77). The school psychologist testified that based on the student's needs in areas of language and memory, the teacher within a 12:1 special class setting could provide visual cues, scaffolding, multisensory instruction, and chunking of information (Tr. p. 79). The school psychologist testified that a 12:1 special class was appropriate for the student based on his needs, as indicated in the evaluative reports and the input from the student's Churchill teacher at the CSE meeting (Tr. p. 81).

According to the March 2011 IEP, the CSE recommended that the student attend general education classes with nondisabled peers in the areas of music, art, physical education, and recess (Tr. pp. 76, 124; Dist. Ex. 1 at p. 20). The school psychologist testified that, based on the student's strengths, the CSE recommended he participate in general education classes with nondisabled peers to develop age appropriate skills (Tr. pp. 123-24). The CSE noted on the IEP that the student exhibited difficulties with anxiety and would benefit from a small class size (Dist. Ex. 1 at p. 18). The CSE recommended counseling to address the student's social/emotional needs and speech-language therapy to address his language processing needs (Tr. pp. 93-94). To address the student's fine motor needs, the CSE recommended OT (Tr. p. 93). The CSE also recommended

PT based on the recommendation of the student's physician regarding gross motor skills (Tr. p. 93; Dist. Ex. 11).

Based on the foregoing, I find that the March 2011 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting and developed an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045). As discussed above, the evidence in the hearing record also supports the conclusion that the student would have been provided adequate support within a 12:1 special class to address his special education needs. Accordingly, I find that the CSE's recommendation of a 12:1 special class, in conjunction with the recommended related services and the program accommodations and strategies described above, was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

E. Assigned School

While the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6), the parents in this case assert that the student was denied a FAPE because the student would not have been grouped with students having similar functional ability in the assigned class at the public school site. Here, a meaningful analysis of the parents' claim with regard to the student's particular public school assignment would require me to speculate to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 557 U.S. at 246), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11).

In R.E., the Second Circuit also 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" (694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *15-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; c.f. E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). Thus, in a case such as this one when it became clear that the student was not going to be educated under the proposed IEP, there can be no denial of a FAPE due to the speculation that there would be a failure to implement the IEP (see R.E., 694 F.3d at 195; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at Churchill prior to the time that the district became obligated to implement the student's IEP (see Dist. Ex. 12 at p. 1; Parent Ex. C). Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 822; 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. Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D.Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. Functional Grouping

I will now consider the IHO's finding that the student was denied a FAPE based upon the determination that the student would not have been grouped with students having similar functional ability at the public school site (IHO Decision at pp. 37-39). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of

different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to the following: the levels of academic or educational achievement and learning characteristics; the levels of social development; the 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).

The hearing record reflects that the student would have presented in a similar manner with respect to both academic and social/emotional functioning compared to the students in the assigned class (Tr. pp. 183, 193-96, 208-10, 221, 252, 266, 277-78; Parent Ex. G). In November 2011, the assigned class consisted of seven first grade students who were classified with a speech or language impairment or a learning disability (see Tr. pp. 183, 193-94, 276, 285).[6] The class profile for the assigned class as well as the testimony of the teacher at the assigned school indicated that the reading, math, and writing levels of the students within the assigned class ranged from prekindergarten to low first grade level in all areas (Tr. pp. 195-96; Parent Ex. G). The student's March 2011 IEP indicated that the student was performing at a prekindergarten to first grade level in the areas of reading, math, and writing (Dist. Ex. 1 at p. 3). With respect to social/emotional functioning, the special education teacher at the assigned school testified that the student was similar to the students in the assigned class (Tr. pp. 208-10). In view of the foregoing, I find that the hearing record shows that the assigned school was capable of suitably grouping the student for instructional purposes in compliance with State regulations and that had the parents elected to place the student in the assigned 12:1 special class, the student would have been appropriately grouped with students exhibiting similar needs and abilities.

Regarding the assertion by the parents that the assigned class was inappropriate for the student due to lack of structure and support provided by the teacher, I find that this contention is

[6] During the 2011-12 school year the number of students within the assigned class varied from five to seven students and at one time also included a kindergarten age student (Tr. pp. 183, 247-48, 276, 285).

the type of speculative claim that is not an appropriate basis for unilateral placement under the IDEA (see R.E., 694 F.3d at 195).[7]

In view of the foregoing, the hearing record shows that the assigned public school site had a seat available in a 12:1 special class with students who exhibited similar academic, behavioral and communication needs as the student, and it further suggests that the assigned school was capable of suitably grouping the student for instructional purposes in compliance with State regulations.

VII. Conclusion

Based on the hearing record evidence, I find that the recommended 12:1 special class in a community school with related services was reasonably calculated to provide the student with educational benefits and, therefore, offered him a FAPE during the 2011-12 school year. Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Churchill or whether the equities support the parents' claim for the tuition costs at public expense (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated February 16, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and ordered reimbursement for the cost of Churchill for the 2011-12 school year.

Dated: **Albany, New York**
January 02, 2013

STEPHANIE DEYOE
STATE REVIEW OFFICER

[7] In any event, a review of the hearing record reflects that the structure and support provided by the assigned teacher did not render the assigned class inappropriate (see Tr. pp. 185-87, 188-90, 193, 195, 198, 200-05, 266-73).