The University of the State of New York

The State Education Department
State Review Officer
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No. 12-062

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, Ilana A. Eck, Esq., of counsel

Kule-Korgood, Roff, and Associates, PLLC, attorneys for respondents, Tamara Roff, 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 a decision of an impartial hearing officer (IHO) which determined that its Committee on Special Education (CSE) did not recommend an appropriate educational program for respondents' (the parents') daughter for the 2011-12 school year. The parents cross-appeal from the IHO's decision to the extent that it denied certain of their challenges to the recommended program. The appeal must be sustained in part. 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 school 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

The student has received diagnoses of an auditory processing disorder and a disorder of written expression (Tr. p. 191; Dist. Ex. 4 at pp. 5, 7, 9-10). She has attended the Churchill School and Center (Churchill) since the 2008-09 school year (Tr. pp. 193-94; Parent Ex. B at pp. 1-2; see Tr. pp. 146-47, 242-43).[1] On May 31, 2011, the CSE convened to develop the student's IEP for

[1] Churchill is described in the hearing record as a K-12 school for students with learning disabilities that primarily serves students with language-based learning disabilities (Tr. p. 333). It has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (Tr. pp. 333-34; see 8 NYCRR 200.1[d], 200.7).

the 2011-12 school year (Dist. Ex. 2).[2] Materials considered by the CSE in developing the May 2011 IEP were a January 2010 private neuropsychological evaluation report, a February 2011 district psychological evaluation report, a December 2010 report of an observation of the student in her Churchill classroom, a January 2011 social history, and January 2011 reports from the student's Churchill speech-language pathologist, school psychologist, and classroom teacher (Tr. pp. 110-13; Dist. Exs. 4-10). The CSE recommended that the student attend a 12:1 special class in a community school with related services of speech-language therapy two times per week for 30 minutes in a group of six and counseling one time per week for 30 minutes in a group of six (Dist. Ex. 2 at pp. 1-2, 14).[3]

By final notice of recommendation (FNR) dated July 14, 2011, the district summarized the recommendations made by the May 2011 CSE and notified the parents of the particular public school site to which the student was assigned (Dist. Ex. 1). In a letter response dated July 27, 2011, the parents noted their inability to contact the assigned school, indicated that they were unwilling to place the student in a school they had not visited, noted that they would visit the assigned school when it reopened in September, and requested additional information about the assigned school, such as a classroom profile and a program description (Parent Ex. F). The parents also expressed a concern that the May 2011 IEP was not appropriate for the student, specifically stating their belief that the student required a smaller and more supportive classroom to address her educational and emotional needs (id.). In a subsequent letter, dated August 23, 2011, the parents noted that they had not received the information requested by the July 2011 letter (Dist. Ex. 11). The parents further indicated that the student would begin the 2011-12 school year at Churchill, pending their determination of whether the assigned school was an appropriate placement for the student, and stated their intention to request an impartial hearing to maintain the student's placement at Churchill (id.).

After visiting the assigned school, the parents sent the district a letter dated October 4, 2011, in which they indicated that they believed the assigned school was inappropriate for the student and that they had been informed there was not a seat available for the student (Dist. Ex. 14 at p. 1). In addition, the parents asserted that the classroom in public school site to which the student would have been assigned contained a group of students who functioned "on a lower level academically" than the student (id.). The parents also expressed concern that the student would have classes with regular education students, in contravention of the IEP and the student's need for small group, individualized instruction (id.). Furthermore, the parents asserted that a 12:1 classroom ratio was insufficiently supportive to enable the student to maintain focus and attention (id.). The parents also expressed concern that lunch and recess were held with multiple classes simultaneously, and that students were permitted to leave campus during lunch unsupervised (id. at pp. 1-2). For the foregoing reasons, the parents rejected the district's offer and stated that the

[2] The May 2011 IEP was set forth on a locally designed form; however, I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]; see "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Question 2, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm; "Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm).

[3] The student's classification as a student with a speech or language impairment is not in dispute in this appeal (Tr. p. 119; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

student would remain at Churchill for the 2011-12 school year and their intention to seek public funding for this placement (id. at p. 2).

A. Due Process Complaint Notice

By amended due process complaint notice dated October 12, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A).[4] The parents contended that the May 2011 IEP failed to reflect the results of the district's psychoeducational evaluation conducted prior to the CSE meeting and did not provide an accurate description of the student's needs (id. at p. 2). The parents also asserted procedural errors in the formation of the IEP, including that some members of the CSE were not present for the entirety of the May 2011 meeting and the CSE did not discuss goals for the IEP (id.). The parents asserted that a 12:1 ratio would not provide the student with sufficient support and attention to address her attention deficits, the IEP did not address the student's executive functioning or auditory processing delays, and the goals developed were insufficient to address all of the student's needs (id.).

With respect to the assigned school, the parents asserted that when they visited the school they were shown two potential classrooms, one of which contained the maximum number of students and the other of which contained only male students, precluding the student's placement in that classroom pursuant to school policy (Parent Ex. A at p. 2). Furthermore, the parents asserted that the students in the classroom containing only male students functioned on a lower academic level than the student (id.). The parents also contended that the student would have classes with regular education students, which was in violation of her IEP and inappropriate given the student's self-advocacy deficits (id.). In addition, the parents argued that it would be inappropriate for the student to leave school grounds unsupervised (id.). The parents sought "tuition and placement" for the student at Churchill for the 2011-12 school year as well as continued placement at Churchill as the student's pendency (stay-put) placement during the proceedings, and requested that the student's continued placement at Churchill be at district expense based on the district's failure to develop an appropriate IEP or recommend an appropriate placement for the student (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on January 10, 2012, and concluded on February 3, 2012 after two days of testimony (Tr. pp. 16, 187).[5] In a decision dated February 21, 2012, the IHO found that the district failed to offer the student an appropriate program by failing to ensure that the May 2011 IEP accurately reflected the student's cognitive functioning (IHO Decision at

[4] The parents initially requested an impartial hearing by due process complaint notice dated September 8, 2011; counsel for the parents asserted during the course of the impartial hearing that the district failed to convene a resolution meeting in response to the initial complaint (IHO Ex. IV at p. 1; see Dist. Ex. 12). I remind the district of its obligation to convene a resolution meeting within 15 days of receipt of a due process complaint notice, unless the parties jointly agree in writing to waive the resolution process or to use a mediation process instead (34 CFR 300.510; 8 NYCRR 200.5[j][2]; see 34 CFR 300.506; 8 NYCRR 200.5[h]).

[5] A hearing to determine the student's placement during the pendency of the impartial hearing was held on November 23, 2011 (Tr. pp. 1-15), resulting in an interim decision issued November 28, 2011, determining that the student's pendency placement was at Churchill and included related services (IHO Interim Decision).

pp. 23-25). Specifically, the IHO found that the CSE should have indicated why it chose to reflect on the IEP the results of cognitive testing conducted by the district, rather than those contained in the private neuropsychological evaluation, given the agreement by the members of the CSE that the prior results more accurately represented the student's cognitive abilities, and she further found that the failure to do so prevented the district from establishing that it had recommended an appropriate program for the student (id.). With regard to the parents' other challenges to the IEP, the IHO found that the goals contained in the IEP addressed the student's special education needs and were discussed at the CSE meeting and that a 12:1 classroom could have provided the student with meaningful educational benefits (id. at pp. 24-25).

Addressing the parents' challenges to the assigned school, the IHO found that the May 2011 IEP could not have been implemented at the assigned school because the IEP recommended that the student receive all instruction in a 12:1 special education class and the assigned school combined special education and regular education students for art classes in larger groups (IHO Decision at pp. 25-26). However, she rejected as speculative the parents' argument that the student would not have been appropriately functionally grouped in the assigned school, as the parents had rejected the recommended placement prior to the beginning of the school year (id. at p. 26).[6] The IHO also found credible the testimony of district witnesses that a seat was available for the student at the assigned school (id. at p. 26 n.13).

Turning to the relief requested by the parents, the IHO noted that the parents had no legal obligation to pay the student's Churchill tuition for the 2011-12 school year and that the parents had requested "continuation" of the student's placement at Churchill rather than tuition reimbursement (IHO Decision at pp. 20 n. 8, 26-27). Having found that the May 2011 IEP was not appropriate, the IHO found that the IEP was a "nullity" and she directed the CSE to reconvene to create a new IEP for the student which accurately described her intellectual functioning (id. at p. 27). The IHO further found that the district remained obligated to fund the student's placement at Churchill in the interim, as it had no basis to remove her from her placement there until it did so (id.).[7]

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the IEP was inappropriate because it inaccurately reflected her cognitive functioning. The district contends, among other things, that even it were required to accurately specify the student's cognitive functioning on the IEP, the student did not suffer harm as a result of this procedural violation of the IDEA, as the student's needs and cognitive levels would have been reassessed on her enrollment in a district school. The district also contends that because the IEP properly reported the student's present levels of academic achievement and functional performance, the discrepancy between the private

[6] The IHO denied the parents' request, made at the close of the first hearing date, to subpoena additional information regarding the functional levels of other students in the assigned school, finding that the parents had the opportunity to cross-examine the district's witnesses on this matter and that the request was overly burdensome when compared to the usefulness of the requested information (Tr. pp. 177-180; IHO Ex. IV).

[7] The IHO declined to address the parents' arguments regarding the CSE's failure to discuss Churchill as a possible placement for the student and the district's failure to provide them with prior written notice of the change in the recommended program and student's placement, finding that the parents had not raised these arguments in their due process complaint notice (id. at pp. 21-22).

and the district evaluations with regard to the student's cognitive functioning was immaterial, as the IEP sufficiently documented and addressed the student's needs. The district also argues that any concern that the improper reporting of the student's cognitive ability would negatively affect the student's instruction involves speculation regarding the student's functional grouping and should not have been considered by the IHO.

With regard to implementation of the IEP, the district asserts that the IHO erred in finding that the assigned school could not have implemented the IEP as written because the student would have received art class in a general education environment. The district asserts that the 12:1 special class placement on the IEP was intended only for academic instruction and did not apply to special classes such as art. In any event, the district contends that any deviation from the IEP would have been de minimis.

Next the district contends that the IHO erred in finding that the parents had not unilaterally placed the student at Churchill and in failing to analyze the appropriateness of Churchill and whether equitable considerations supported the parents' request for continued public funding of the student's placement there. The district contends that the parents' placement of the student at Churchill constituted a unilateral placement because of their rejection of the district's offered placement, invocation of the student's right to remain at Churchill during the pendency of the impartial hearing, and request for the student's continued placement at Churchill at district expense. The district asserts that upon proper analysis, the hearing record demonstrates that the parents did not meet their burden of demonstrating that Churchill was the least restrictive environment (LRE) for the student. The district further asserts that equitable considerations did not support the parents' request, as they had no financial obligation to pay the student's tuition for the 2011-12 school year and never intended to place the student in a district school. Finally, the district contends that the relief granted by the IHO improperly continues the student's stay put placement at Churchill beyond the pendency of the due process proceeding.

The parents answer, denying the district's contentions and asserting in a cross-appeal additional reasons for which the IHO should have found the district's recommended program was not appropriate for the student. Initially, the parents contend that the IHO erred in finding that because they had not raised the issue of prior written notice in their due process complaint notice, she was barred from considering it. The parents assert that because the district could have provided the information required to be contained in prior written notice in a response to the due process complaint notice, the claim was not ripe until after the district responded, and thus could not have been contained in the due process complaint notice.

Next, the parents assert that the IHO erred in finding that the student could have obtained educational benefits in a 12:1 special class, arguing that the student's language processing and attentional deficits required that she receive instruction in a group of no more than seven students. The parents also assert that the district did not include goals or services on the IEP to ensure the student's appropriate and successful integration into a general education environment. Furthermore, the parents contend that the IEP failed to reflect the student's social/emotional difficulties and recommended a reduction in counseling from what the student received at Churchill.

With regard to the assigned school, the parents assert that the IHO erred in finding that a seat would have been available at the assigned school and that their arguments with regard to

functional grouping were speculative. Specifically, the parents contend that their arguments regarding functional grouping in the 12:1 classroom at the assigned school were not speculative because the parents invoked the student's right to remain at Churchill before rejecting the recommended placement, rather than unilaterally placing the student there. The parents assert that because they did not unilaterally place the student at Churchill, the district had a continuing obligation to provide the student with a FAPE, such that the student could have attended the assigned school at any time if it was an appropriate placement. Accordingly, the parents contend that the district had a continuing obligation to ensure that the student would be functionally grouped appropriately. In any event, the parents assert that because the district's recommendation for the assigned school was based on an incorrect statement of the student's cognitive ability, the inappropriateness of the functional grouping is not speculative as the student's in the class within the assigned school to which the student would have been assigned were at a significantly lower cognitive level.

Finally, the parents contend that the IHO erred in denying their second and third subpoena requests seeking documentary evidence about the functional levels of the students in the classroom to which the student would have been assigned had she attended the assigned school. The parents argue that despite having the opportunity to cross-examine the district's witnesses, the requested documents were necessary to clarify the discrepancy between the district witnesses' testimony and the information they received when they visited the assigned school.

The district answers the cross-appeal, contending that the IHO's decision should be upheld to the extent appealed from by the parents.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21,

2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that 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 enabling 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 Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).[8]

VI. Discussion

A. Scope of Impartial Hearing and Review

Initially, I address the parents' arguments regarding the district's failure to provide them with prior written notice of the program it was recommending for the student for the 2011-12 school year. In this instance, I concur with the parents that the hearing record does not contain evidence showing that the district complied with the procedures requiring that prior written notice be given to the parents, which would have required the district to describe why it changed the student's services together with a description of each evaluation procedure, assessment, record, or report that was used as a basis for the proposed action (see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, this lack of evidence is not surprising since, as noted by the IHO, the issue was not properly before her because it was not raised in the parents' due process complaint notice (see IHO Decision at pp. 21-22; Parent Ex. A; see also 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]). I nonetheless remind the district that prior written notice should be sent to parents within a "reasonable time" (8 NYCRR 200.1[oo]) and, under the circumstances of this case, it would have been reasonable to provide it at some point before the date of initiation of the student's proposed IEP. Even if this matter had been properly raised before the IHO, it is unlikely in these circumstances to have altered the outcome of the case insofar as the parents do not allege that the student experienced a deprivation of educational benefits or that her right to a FAPE or their right to participate in the decision-making process was impeded as a result of the district's failure to provide them with prior written notice (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. Present Levels of Performance

Turning next to the parties' arguments regarding whether the student's needs were accurately reflected on the May 2011 IEP, among the necessary 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; and any special factors set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

[8] As discussed in more detail below, I find that the parents did not unilaterally place the student at Churchill and, therefore, the traditional Burlington/Carter tuition reimbursement analysis does not apply in this case (see Florence County Sch. Dist. Four v. Carter, 510 US 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]).

As further discussed below, I find that the May 2011 IEP as a whole did not accurately reflect the student's special education needs. The IEP indicated, without further description of her cognitive skills, that the student was "functioning at the borderline delayed range of intelligence," and that her full scale IQ was 78, her nonverbal IQ was 74, and her verbal IQ was 85 (Dist. Ex. 2 at p. 3). Although these scores were reported in the most recent psychological evaluation report conducted by the district (Dist. Ex. 5), other information considered by the CSE indicated that previous assessment of the student's cognitive skills revealed abilities in the average to high average range (Dist. Ex. 4 at pp. 1, 5; see Tr. pp. 110-12, 262).[9] At the impartial hearing, the district's school psychologist acknowledged the discrepancy between the reported cognitive scores and indicated that she considered the earlier cognitive testing to be a more accurate reflection of the student's cognitive functioning (Tr. pp. 162-63). Without additional information about the student's functional intellectual performance, the IEP did not adequately identify the student's skills and needs in this area.[10]

While the present levels of performance in the student's IEP indicated that the student was functioning at a fourth to fifth grade level in reading and a fourth grade level in math, the IEP did not identify the student's deficit areas or describe the skills that the student needed to develop (Dist. Ex. 2 at pp. 3-4). For example, with respect to writing, the IEP indicated that the student "did well" forming proper sentences using punctuation, verb tenses, and spelling (id. at p. 3). However, a review of the January 2011 Churchill teacher report, which the CSE used in developing the IEP, indicated that the student's written language needs included understanding the components of and developing complete sentences using capitalization and subject-verb agreement, and improving spelling skills (Dist. Ex. 10 at p. 2; see Tr. pp. 110, 113). In math, the IEP stated that the student did well with computation, including "fractions, etc." (Dist. Ex. 2 at p. 3). The IEP further indicated that in the area of reading the student did well with phonics and using prefixes and suffixes (id.). While this narrative provides information regarding the student's level of functioning and strengths, it fails to identify the individual needs of the student. In the example above, I note that the IEP did not reflect the student's need to improve reading fluency, monitor comprehension, and develop higher level reading comprehension skills, all of which were identified in the January 2011 Churchill teacher report (Dist. Ex. 10 at p. 1).

Furthermore, as noted above, the student is classified as a student with a speech or language impairment and this remains an area of need (Dist. Exs. 4 at pp. 6-7, 9-10; 8). Yet the May 2011 IEP included a single sentence regarding the student's speech-language functioning, indicating that the student's "impulsivity and language delays impact her ability to achieve expected academic levels using a general education curriculum" (Dist. Ex. 2 at p. 4). The IEP did not describe the student's language processing, word retrieval and expressive language needs as revealed in the most recent neuropsychological evaluation update report or speech-language mid-year report, nor did it reflect the severity of the student's language deficits (Dist. Exs. 4 at pp. 6-7, 9-10; 8).

[9] New cognitive testing was not conducted in conjunction with the January 2010 private neuropsychological evaluation report, but the report indicates that the June 2007 results continued to be an accurate reflection of the student's cognitive abilities (Dist. Ex. 4 at pp. 9-10).

[10] While the IHO relied primarily on the fact that the IEP failed to accurately state the student's cognitive functioning in finding that the district did not establish that it had offered the student an appropriate program, I need not address whether this deficit, standing alone, would suffice for such a finding, as I find that the IEP as a whole failed to reflect the student's needs.

For the foregoing reasons, I find that the IEP did not accurately reflect the student's needs.

2. 12:1 Special Class Placement

I next address the parents' assertion that the IHO erred in finding that the student could have received educational benefits from the recommended program of a 12:1 special class.

The district's school psychologist who participated in the CSE meeting testified that the CSE's primary concerns were the student's difficulties with math and her speech-language and attention deficits, which could be addressed by the provision of small group instruction in a 12:1 special class (Tr. pp. 121-22). The student's sixth grade English teacher at Churchill testified that while the student was distractible she could be easily redirected (Tr. pp. 290, 296). The student's teacher testified that she required a student-to-teacher ratio of no more than 7:1 because of her attention and language processing deficits (Tr. p. 299). However, she also testified that the student could make progress in a 12:1 classroom, but that she would not "make a year's progress in a year's time . . . the same progress that she would if she was in a smaller classroom" (Tr. p. 303). The May 2011 IEP included goals designed to address the student's executive functioning deficits such as her ability to follow multistep directions, respond to redirection, self-organize, and express herself using oral and written language (Dist. Ex. 2 at pp. 9-10, 12). While the IDEA requires the district to provide the student with an IEP that is "reasonably calculated to enable the child to receive educational benefits" (Rowley, 458 U.S. at 207), it does not require the district to "maximize the potential" of the student (id. at 199; see Walczak, 142 F.3d at 130). I find that the recommendation that the student attend a 12:1 special class placement, at the time the IEP was formulated in May 2011, was appropriate to meet her needs.[11]

C. Assigned School

With regard to the assigned school, the parents assert that there was no seat available for the student and that she would not have been appropriately grouped. In this case, analysis of the parents' claims with regard to the assigned school would require me to determine what might have happened had the district been required to implement the student's IEP. The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297,

[11] The parents' contentions regarding the district's failure to include goals to integrate the student into the assigned school and its recommendation that she receive less counseling than previously were not raised in the due process complaint notice and so are not properly before me (34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

at *2 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Additionally, the United States Department of Education (USDOE) has also clarified that 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 [August 14, 2006]).

The parents informed the district in August 2011 that the parents had concerns about the May 2011 IEP and had not been able to visit the assigned school yet, therefore, the student would begin the 2011-12 school year at Churchill and that they would be requesting an impartial hearing to invoke her entitlement to continued placement there pursuant to pendency (Dist. Ex. 11). I find that this constitutes a rejection of the May 2011 IEP prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that a seat was available or the student would have been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, there is no evidence in the hearing record to support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 821-22; see A. L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. 2011]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

Under these factual circumstances, the district did not have the obligation to present evidence that it would have appropriately grouped the student, and the parents' concerns regarding what might have happened had the student attended the public school are not a basis for concluding that the district failed to offer the student a FAPE by failing to implement the student's IEP in a material or substantial way. For these reasons, I find the parents' assertions to be without merit.[12]

D. Relief—Nonpublic School Placement

As a final matter, it is necessary to briefly address the appropriate analysis to apply to the parents' request for continued placement at Churchill. The IHO found, and the parents urge, that the tuition reimbursement analysis applicable to unilateral placements—under which the parents would bear the burden of proof with regard to Churchill's appropriateness for the student—does not apply. Under the circumstances of this case, I agree. A student is considered to have been unilaterally placed when his or her parents change the student's placement "during the pendency

[12] As I agree with the IHO that the parents' arguments regarding the student's functional grouping at the assigned school are speculative, I need not address at length their arguments regarding the IHO's refusal to issue subpoenas for documentation regarding other students in the assigned classroom. Briefly, however, I agree with the IHO that the requested information was duplicative of information already contained in the hearing record from the testimony of the district's witnesses and thus not necessary for her decision. I note in particular that the requested information related to students other than the student at issue in this proceeding, and find that the IHO properly exercised her discretion in declining to issue the requested subpoenas, that she had an adequate evidentiary basis upon which to render a decision, and that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 34 CFR 300.514[b][2][ii]; see also Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Handicapping Condition, Appeal No. 92-20; Letter to Stadler, 24 IDELR 973 [OSEP 1996]). Accordingly, I decline to disturb the IHO's decision on the basis of her ruling sustaining the district's objections to the subpoenas.

of review proceedings, without the consent of state or local school officials" (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74 [1985]; see 34 CFR 300.148[c]).

The hearing record indicates that the student was initially placed at Churchill in 2008 as a publicly funded placement pursuant to a "Nickerson letter" and that the district subsequently convened a CSE meeting to memorialize her placement there in an IEP dated November 26, 2008 (Tr. p. 194; Parent Ex. B at pp. 1-2).[13] As this public placement remained the student's last agreed-upon placement at the time of the IHO's pendency decision (see IHO Interim Decision at pp. 2-3) and the student was initially placed in the approved nonpublic school setting by the district, I find that the parents' continuation of the student's placement at Churchill did not constitute a unilateral placement. Rather, Churchill was the student's mutually agreed upon placement at the time this proceeding was commenced (see Application of a Child with a Disability, Appeal No. 96-48). Accordingly, as the district failed to develop an appropriate IEP and the placement of the student at Churchill was not a unilateral one on the part of the parents, the district must reconvene the CSE to develop an IEP in conformity with the IDEA that meets the student's needs prior to modifying the student's educational placement. Although the district now argues that Churchill is no longer the student's LRE, there is no evidence contained in the hearing record showing how the CSE considered the matter at the time of the May 2011 CSE meeting and I find that the district has not established that Churchill was otherwise inappropriate to address the student's needs.

VII. Conclusion

The district failed to comply with the IDEA in developing the May 2011 IEP and the hearing record provides no reason to reverse the IHO's determination to remand the matter to the CSE for development of an IEP in accordance with relevant statutory and regulatory requirements. I have considered the parties' remaining contentions and find them to be without merit.[14]

IT IS ORDERED that, unless the parties otherwise agree, the CSE shall reconvene to develop an IEP for the student in accordance with this decision and the IDEA.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 18, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] A Nickerson letter 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]; Application of the Dep't of Educ., Appeal No. 12-021).

[14] I recognize that this decision, coming more than one year after the challenged IEP was developed, may have no practical effects on the student's education. By now the district has likely already called upon the parties to convene to develop an IEP for the student for the 2012-13 school year, and has already been required to fund the student's placement at Churchill for most of the 2011-12 school year. Accordingly, the parties may agree to forgo reconvening the CSE to redevelop the IEP for the student for the 2011-12 school year, provided they agree that it would be in the student's educational interests.