



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 12-199**

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

### **Appearances:**

The Law Firm of Tamara Roff, PC, attorneys for petitioner, Tuneria R. Taylor, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Jewish Center for Special Education School (JCSE) for the 2011-12 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

During the 2010-11 school year, the student attended JCSE in an ungraded classroom and received counseling, speech-language therapy, and occupational therapy (OT) as related services (see Dist. Exs.5 at p. 1, 6 at p. 1, 7 at pp. 1-2).<sup>1</sup> The student also received the services of a full-time, 1:1 crisis paraprofessional from September 2010 through January 2011 (Dist. Ex. 4 at p. 2).

On March 28, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Dist. Exs. 1 at pp. 1-20; 12 at p. 2, 15 at p. 1).

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

Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the March 2011 CSE recommended a 12:1+1 special class placement in a community school (Dist. Ex. 1 at pp. 1, 17.).<sup>2</sup> The March 2011 CSE also recommended the following related services: one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a small group, one 30-minute session per week of individual speech-language therapy, two 30-minute session per week of speech-language therapy in a small group, and two 30-minute sessions per week of individual OT (*id.* at p. 19). The March 2011 CSE also recommended that the student's crisis paraprofessional be discontinued (*id.* at pp. 2, 19). The March 2011 IEP included annual goals and corresponding short-term objectives to address the student's needs and also included special education transportation (*id.* at pp. 8-11, 14-16).

By final notice of recommendation (FNR) dated August 4, 2011, the district summarized the special education and related services recommended in the March 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 3).

By a letter dated August 15, 2011, the parent informed the district that the assigned public school site was closed for the summer, and she would be unable to visit the school prior to September 6, 2011, but requested a class profile and program description (Parent Ex. B at p. 1). The parent also expressed her concerns regarding the March 2011 IEP as inappropriate and insufficient and that the recommended 12:1+1 special class staffing ratio was too large to provide sufficient support and individualized attention (*id.*). Also, the parent alleged that the March 2011 IEP goals were inadequate and the promotional criteria were inappropriate (*id.*).

By letter dated August 24, 2011, the parent notified the district that she had not received a response to her August 15, 2011 letter, restated her concerns and informed the district that she would be placing the student at JCSE for the 2011-12 school year (Parent Ex. C at p. 1). The parent also requested the district to provide bus transportation for the student (*id.*).

On August 31, 2011, the parent executed an enrollment contract and related services addendum with JCSE for the 2011-12 school year (Parent Exs. F at p. 2; G at p. 1).

By a letter to the district dated September 27, 2011, the parent, after visiting the proposed assigned public school, reported her concerns, which included: the student to staff ratio was insufficient and inappropriate to meet the student's needs; the assigned school would be unable to provide the student's related services; the assigned school would not provide an appropriate peer group; the proposed class would not meet the student's needs, academically, socially and behaviorally; and the school was too large and overwhelming causing the student, especially during transition time, to once again exhibit significant behaviors (Parent Ex. D at p. 1). Further, she reiterated her concerns regarding the March 2011 IEP and restated that the student would continue at JCSE for the 2011-12 school year (*id.* at p. 2).

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

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

By due process complaint notice dated February 28, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at pp. 1-3). More specifically, the parent asserted that the March 2011 CSE did not provide her with the opportunity to meaningfully participate in the decision-making process because she did not receive sufficient written notice of the March 2011 CSE meeting, she did not receive copies prior to the meeting of the documents reviewed by the March 2011 CSE, and the March 2011 CSE failed to discuss with her the documentation and reports used in its development of the March 2011 IEP (id. at p. 1). In addition, the parent asserted that the evaluative information relied upon was not sufficient to accurately assess the student's needs for purposes of developing the March 2011 IEP, and no new evaluations had since been conducted (id.).

Further, the parent alleged that the March 2011 IEP did not appropriately or sufficiently reflect the student's current performance levels as discussed at the March 2011 CSE meeting, and failed to adequately describe and address the student's strengths, weaknesses, preferences and needs (Parent Ex. A at p. 2). In addition, the recommended 12:1+1 special class placement did not address the student's need for individualized attention (id.). With regard to the annual goals, the parent alleged that the March 2011 IEP did not include a sufficient number of goals, and the annual goals were inadequate, inappropriate, vague, and failed to include measurable benchmarks (id.). The parent also asserted that the 12:1+1 special education placement recommended in the March 2011 IEP failed to provide an appropriate peer group for the student (id.). In addition, the parent alleged that the March 2011 IEP promotional criteria recommendations were inappropriate as they did not accurately reflect the student's current academic functioning (id.). The parent also asserted that the March 2011 IEP failed to include transition supports or goals necessary to prevent significant interfering behaviors, as the student transitions from a smaller, supportive environment to a larger "overwhelming" school setting (id. at p. 3).

Also, the parent asserted that the March 2011 IEP failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student, even though the annual goals in the March 2011 IEP refer to a behavior plan (Parent Ex. A at p. 2). The parent contends that this failure to conduct an FBA/BIP resulted in the March 2011 IEP recommended placement of a 12:1+1 special class in a community school which would not provide adequate individual support and attention for the student, especially given the March 2011 CSE's removal of the student's 1:1 paraprofessional (id. at p. 2- 3). In addition to asserting challenges to the assigned public school, as noted in her September 27, 2011 letter, the parent also asserted that the proposed public school would not be able to provide the student's related services (id. at p. 3). As relief, the parent requested prospective funding or reimbursement for the costs of the student's tuition at JCSE for the 2011-12 school year (id.).

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

On April 4, 2012, the IHO conducted a prehearing conference, and on May 22, 2012, the parties proceeded to an impartial hearing, which concluded on July 31, 2012, after four days of proceedings (see Tr. pp. 1-520). By decision dated September 7, 2012, the IHO concluded that the district offered the student a FAPE for the 2011-12 school year (see IHO Decision at p. 16).

Initially, the IHO found that, based upon the evidence in the hearing record, the parent received sufficient notice of the March 2011 CSE meeting, noting that the parent attended the March 2011 CSE meeting and did not ask to reschedule the meeting (id. at p. 11). Next, the IHO determined that district witnesses credibly testified to the documents reviewed at the March 2011 CSE meeting since the parent did not request any documents prior to, or during, the CSE meeting, object to the documents that were reviewed, or request additional evaluations, the parent's ability to participate in the March 2011 CSE was not significantly impeded (id.). Further, the IHO found the parent was provided with the opportunity to voice her opinions, ask for clarification and failed to express any concerns about the student's recommended placement at the March 2011 CSE meeting (id.). Also, the IHO found that the March 2011 CSE reviewed sufficient current reports regarding the student, including those from her current teachers and related services providers, and also received input from the parent during the meeting. (id.).

In addition, the IHO determined that the March 2011 IEP annual goals adequately addressed the student's needs; the March 2011 CSE used the student's JCSE teacher report to establish the student's grade and functional levels, and the student's present levels of educational performance adequately described the student's strengths and weaknesses (IHO Decision at pp. 13-14). Although the parent alleged certain goals were unattainable or inappropriate, the IHO found that some goals had already been achieved by the student and other goals would have been attainable in the program recommended by the March 2011 CSE (id. at p. 13). As to the district failing to use the mandated IEP form, the IHO determined that such a failure was *de minimis* as the March 2011 IEP provided the necessary information in all required areas (id. at p. 14).

With respect to the parent's claim that the March 2011 CSE failed to conduct an FBA and develop a BIP for the student, the IHO found that the CSE adequately addressed the student's behavioral needs with supports in the March 2011 IEP and an FBA/BIP was not necessary as, at the time of the March 2010 CSE meeting, the student was no longer exhibiting significant behaviors impeding her instruction or using the support of a crisis paraprofessional at JCSE (IHO Decision at pp. 11-13). Also, the student's mother and JCSE teacher agreed with the removal of the 1:1 crisis aide from the student's March 2011 IEP (id.). In addition, the IHO noted that the approach used in the student's current classroom behavioral plan, which was determined to be very effective, was consistent with goals in the March 2011 IEP, and the March 2011 CSE decision not to conduct an FBA/BIP must be considered in connection with the infrequency of interfering behaviors as known at the time of the March 2011 CSE meeting (id. at p.13).

Next, the IHO determined that the 12:1+1 special class placement was appropriate as the student would, with the supports offered in the March 2011 IEP, make meaningful gains (IHO Decision at p. 14). The IHO concluded that the student's JCSE classroom teacher and the parent both lacked knowledge of the 12:1+1 classroom and how the program functions, while the district witnesses, who the IHO found to be credible and familiar with the 12:1+1 program, concluded that the student could make meaningful gains with the supports provided in the March 2011 IEP (id.).

Finally, the IHO addressed the parent's challenge to the assigned public school site (see IHO Decision at pp. 14-15). The IHO concluded that the evidence in the hearing record, including the testimony of the teacher from the assigned public school, supported findings that the assigned public school site could implement the March 2011 IEP and that the student would be appropriately grouped with students of similar age, functioning level and academic and social/emotional needs

(*id.* at p. 14). The teacher of the assigned public school classroom that the student would have attended, testified that she used a classroom behavior plan, similar to one used at JCSE, but she would be able to develop an individual plan for a student if the classroom plan was ineffective in addressing the student's behaviors (*id.* at p. 15). In light of his findings, the IHO indicated that there was no need to consider the parties remaining claims concerning the parent's unilateral placement of the student at JCSE (*id.* at p. 16).

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

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Specifically, the parent asserts the IHO erred in finding the parent was provided with sufficient written notice of the March 2011 CSE meeting and was able to fully participate in the meeting. The parent also argues that the IHO erred in crediting the district's witnesses' testimony as a basis for determining that the parent was provided, before the March 2011 CSE, with adequate notice of the scheduled CSE meeting date. The parent asserts that these witnesses were only able to testify as to "general practices;" that documents used by the March 2011 CSE were insufficient; and that the March 2011 CSE failed to discuss with the parent which documents were used in developing the student's March 2011 IEP.

Further, the parent alleges that the CSE failed to conduct adequate and appropriate evaluations which resulted in the March 2011 IEP goals being insufficient to address the student's academic and social/emotional needs. In addition, the parent asserts that the March 2011 IEP contained inaccurate functioning levels and an inadequate description of the student's strengths, weaknesses, preferences and needs. Also, the March 2011 IEP failed to address the student's behaviors, by failing to conduct an FBA and develop a BIP for the student, resulting in insufficient information at the March 2011 CSE meeting to develop an appropriate placement for the student. The parent also asserted that the district failed to use the mandated IEP form required in the regulations.

In addition to challenges to the proposed assigned school previously raised, the parent also asserts the IHO erred as the class placement would not provide suitable grouping for the academic and social/emotional needs of the student; the behavioral strategies used in the assigned classroom were not appropriate for the student; and there was no evidence of adequate teaching credentials for the teachers providing science, gym and art to the student.

Also, the parent argues that JCSE was an appropriate placement as it offered a 7:1+1 classroom specifically designed to address the student's needs. Further, JCSE provided the student's related services, and addressed the behavioral needs of the student with both an individual and a classroom plan, allowing the student to make both academic and behavioral progress. In addition, the parent asserted that equitable considerations favor her request for funding or reimbursement of the student's tuition at JCSE, as the parent cooperated with the district and is unable to afford the cost of tuition and related services at JCSE.

In an answer, the district responds to the parent's allegations, and asserts that the IHO properly concluded that the district offered the student a FAPE for the 2011-12 school year. The district also asserts that while the parent's assigned school claims are speculative, the assigned public school site would have properly implemented the student's March 2011 IEP had the student

attended. In addition, the district argues that the parent did not sustain her burden to establish the appropriateness of the student's unilateral placement at JCSE, and equitable considerations precluded an award of tuition reimbursement.

## V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The

statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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



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

## **VI. Discussion**

### **A. CSE Process**

#### **1. Parental Participation**

The parent alleges that she did not receive written notice of the March 2011 CSE meeting and, therefore, was constrained to attend the meeting by phone (Tr. pp. 394-95). The parent asserts that her attendance by phone limited her ability to participate fully in the meeting (Parent Ex. A at p. 1).

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] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17-\*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

The district, in response to the parent's allegation, provides a copy of the meeting notice sent to the parent, dated February 18, 2011, outlining the time and place of the March 28, 2011 CSE meeting, a listing of those persons scheduled to attend and the rights of the parent to participate in this meeting (Dist. Ex. 12 at pp. 1-2).

While the parent testified that she did not receive written notice of the March 2011 CSE meeting, the district school psychologist and the district social worker both testified, based on their experience and as a "usual practice," that the CSE meeting notice is mailed to the parent and any

new evaluations are attached to it (see Tr. pp. 28-29, 33-35, 80-81, 113-14). Also, the contact sheet prepared by the district indicates that the meeting notice was mailed to the parent and the student's current school on February 18, 2011 (Dist. Ex. 15 at p. 1).

The district social worker testified that no one requested that the March 2011 CSE be rescheduled for any reason (Tr. p. 113). Further, even if the parent did not learn of the CSE meeting until two days before the actual meeting date, as discussed more fully below, the parent was able to, and did, attend the March 2011 CSE meeting and participate by telephone (see Tr. pp. 36, 82, 395). In addition, there is no indication in the hearing record that the parent objected to any CSE member's telephonic participation at the time of the CSE meeting. Also, the parent's own testimony acknowledges her involvement with the routine procedures of the CPSE and CSE, as the student has been provided with special education services since preschool (see Tr. pp. 390-93, 411, 415-16). Accordingly, given the parent's active participation in the telephone conference without requesting that the meeting be rescheduled or otherwise raising objections at the time with respect to the telephonic nature of her participation, or that of other CSE members, she has failed to demonstrate that she was denied full participation in the CSE meeting on this basis.

Next, the parent asserts that the documents reviewed by the March 2011 CSE, including the January 2011 classroom observation, were never provided, nor discussed with her, during the meeting, thus limiting her ability to participate in determining the student's IEP for the 2011-12 school year (Tr. p. 396).

The hearing record indicates that prior to the March 2011 CSE meeting, the district witnesses believed that the student's mother was provided with a copy of the January 2011 classroom observation report (Tr. pp. 28, 33-35, 80-81, 113-14). Also, the district social worker, who conducted the new classroom observation, testified that the March 2011 CSE considered and discussed this evaluation with the parent and the parent never asked to see the document, leading the district social worker to testify, "the mother did not indicate she did not receive the observation" (Tr. pp. 82, 114). Also, the district social worker testified that at the beginning of the March 2011 CSE meeting, the parent was informed that "if she had any questions, comments, to feel free to interrupt at any moment." (Tr. p. 103). Further, the district social worker testified that the parent did not express any concerns about the proposed placement and provided the March 2011 CSE with current medical information about the student as well as information regarding improvement in her behaviors (Tr. pp. 103-04). In addition, the January 2011 classroom observation was conducted in the student's then-current JCSE classroom and as such, the JCSE teacher, who participated in the March 2011 CSE by telephone, would have been familiar with what took place during the observation (Dist. Ex. 4 at pp. 1-2). According to the district social worker, the student's current JCSE teacher actively participated in the March 2011 CSE and was asked questions regarding the student's functioning, including academics and behaviors (see Tr. pp. 49-51). Further, the parent, when questioned by the IHO, acknowledged that she did not know why she did not ask for a copy of the observation as it was being discussed at the March 2011 CSE meeting (Tr. pp. 417-19).

The district school psychologist testified as to the evaluations and reports the March 2011 CSE considered. These included, a June 2010 social history update; a June 2010 psychological-educational report; a January 2011 classroom observation; a March 2011 counseling update; a February 2011 OT update; a February 2011 progress report from the student's current school and

the March 2011 speech progress report with accompanying goals (Tr. pp. 17-21, 328-29; Dist. Exs. 4 at pp. 1-2, 5 at p. 1, 6 at p. 1, 7 at pp. 1-2, 8 at pp. 1-3, 9 at pp. 1-3, 10 at pp. 1-2). Specifically, the district school psychologist testified that the parent provided information to the March 2011 CSE regarding the student's present health status and physical development, including the student's diagnosis of attention deficit hyperactivity disorder (ADHD), and the student's social/emotional needs (see Tr. pp. 56, 59). The district school psychologist also testified regarding her completion of a document labeled "contact sheet," which she prepared on the same day as the March 2011 CSE, and routinely completes for all CSE meetings in which she participates (Tr. pp. 30-31; Dist. Ex. 15 at p. 1). In this document, the district school psychologist notes that "academic levels of functioning and acad[emic] goals were reviewed with teacher and parent. OT, couns[eling], sp[eech] reports and goals were reviewed. Recommendation was reviewed. Parent and teacher agreed" (Dist. Ex. 15 at p. 1). The district social worker testified that she discussed and reviewed the evaluations and reports verbally at the March 2011 CSE meeting, and the parent and the student's current teacher participated by telephone (see Tr. pp. 82-84).

While the evidence supports the parent's claims that she did not have copies of every report and evaluation under consideration by the March 2011 CSE, the hearing record reflects that the parent was asked during the meeting if she had concerns regarding the CSE's recommendations and never indicated that she did not understand the student's needs as reflected in the various materials reviewed by the CSE and did not identify any additional information that the March 2011 CSE should have reviewed (see Tr. pp. 103-04, 344-45; Dist. Ex. 15 at p. 1). Furthermore, the parent did not request to reschedule the March 2011 CSE or ask the district, either prior to or during the meeting, to provide copies of the evaluative data to her, which the district's witness testified they would have done if requested (Tr. pp. 385-87, 395).

As a result of the foregoing, the hearing record demonstrates that the parent was not deprived of a full opportunity to participate in the 2011 March CSE meeting. She attended the meeting during which the student's needs and a recommended educational program and placement were evaluated and discussed and she actively participated in the discussion. Therefore, to the extent any minor procedural irregularities existed with respect to written notice to the parent of the March 2011 CSE meeting, or the provision of certain documents to her prior to the meeting, such irregularities did not rise to the level of a denial of FAPE (see e.g. R.E., 694 F.3d at 190).

## **2. Evaluative Information**

The parent alleged that the district lacked current evaluative data and that the 2010-11 evaluations utilized by the March 2011 CSE were insufficient to accurately assess and address the student's needs. A review of the hearing record demonstrates that the March 2011 CSE possessed substantial current evaluative information concerning the student's current skills and needs at the time of the meeting, and this evaluative information was reflected in the March 2011 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may

direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The hearing record demonstrates that the CSE team had access to and considered multiple evaluative data in its development of the March 2011 IEP, including a February 2011 teacher progress report, a February 2011 occupational therapy update, a March 2011 speech progress report with goals and a March 2011 counseling update, all provided by the JCSE (Tr. pp. 40, 82, 84, 119; Dist. Exs. 5 at p. 1, 6 at p. 1, 7 at pp. 1-2, 10 at pp. 1-2). In addition, the CSE had before it a January 2011 classroom observation, a June 2010 psychoeducational report, a June 2010 social history update and the then-current classroom teacher's verbal input (see Tr. pp. 40, 41, 49, 82, 84, 119; Dist. Exs. 4 at pp. 1-2, 8 at pp. 1-3, 9 at pp. 1-3).

The district school psychologist testified that the CSE had the student's school file before it at the March 2011 CSE meeting and it reviewed the aforesaid reports and social history during the meeting (Tr. pp. 41-42). According to the district school psychologist, the district completed the June 2010 psychoeducational evaluation less than a year prior to the meeting (Tr. p. 43). Furthermore, the district school psychologist testified that there was no request for updated evaluations by the related service providers, or any other requests for a reevaluation of the student (Tr. pp. 43-44).

On June 7, 2010, a district bilingual school psychologist (evaluating psychologist) conducted a psycho-educational evaluation of the student, which resulted in the June 2010 psycho-educational report. (Dist. Ex. 9 at pp. 1-3). The district conducted the June 2010 psychoeducational evaluation as part of a "triennial" re-evaluation of the student (Dist. Ex 9 at p. 1). The evaluating psychologist described the student as "tense" at the beginning of the testing procedure, but after five minutes, she became less tense, and was "able to focus" and "concentrate on the tasks" (Dist. Ex. 9 at pp. 1, 2). The student was "cooperative" and her eye contact was "appropriate" during the evaluation and she was "willing" to complete the testing and "follow directions" (*id.* at p. 2). The evaluating psychologist reported that the student was able to express herself in full phrases and "responded favorably to the praise and positive reinforcement" during the testing (*id.*). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full scale IQ of 86, a performance IQ of 84, and a verbal IQ of 92 (*id.*). Based on the results, the evaluating psychologist concluded that the student's cognitive abilities fell within the low average-to-average

range of functioning with higher developed skills in verbal areas (see Tr. p. 45; Dist. Ex. 9 at p. 2). The student achieved the following subtest standard scores: word reading, 77; reading comprehension, 71; numerical operations, 86; math reasoning, 81; and spelling, 73 (District Ex. 9 at p. 2). The evaluating psychologist reported that the student's performance on word reading, reading comprehension and spelling fell within the borderline range of functioning (id. at p. 3). She reported that the student's overall mathematics skills fell in the low average range of functioning (id.). In addition, the June 2010 psychoeducational report included results from the Conners Comprehensive Behavior Rating Scale (Conners 3rd Edition – Parent)(id.). The parent reported that the student presented with inattention, hyperactivity/impulsivity, aggressive behaviors, learning problems, and conduct problems (id.). In addition, projective drawings and a clinical interview revealed a verbal young girl, who may demonstrate "inaccessibility [and] emotional isolation of family members" (id.).

A review of the information from the parent provided in the June 2010 social history shows that the student's behavior is "compliant" at home and "does not reflect how she acts in school" and that she does "not need to be disciplined at home" (Dist. Ex. 8 at p. 2). In addition, the parent reported that the student was aware she had ADHD, and that she took medication for it (id.). Also, the parent reported that the student was behind academically, which may or may not be due to a learning disability or the student's emotional issues (id.).

In January 2011, the district social worker conducted a 40-minute classroom observation of the student in her special class at the JCSE (Dist. Ex. 4 at p. 1). During the observation, the student's then-current classroom teacher, the student and another student engaged in a spelling test and reading lesson (id.). The district social worker noted that during the spelling test, the student was "well-behaved" and "on task" and the then-current teacher described her performance as "typical" (id.). During the observation, the student spelled five out of nine words correctly, her handwriting was legible, but she failed to include a period at the end of her sentences even after three reminders to begin the sentence with a capital and end it with a period (id.). During the reading lesson, the classroom teacher described the student's performance as "not usual for her" as the student is "usually persistent during the completion of tasks and actively participates during discussions" and that her "behavior had improved since last year, when she would refuse to participate in class activities" and her "peer interactions [were] good" (Dist. Ex. 4 at pp. 1, 2). The student's current JCSE classroom teacher mentioned that during the previous reading lesson, the student's [text] reader changed which could be the cause of her difficulty reading aloud and not volunteering at the beginning of the lesson (id. at p. 1). Although the student did not volunteer to provide responses, after the teacher suggested a strategy to her, the student elaborated on her classmate's responses by providing additional details (id.). Furthermore, the district social worker noted that the student interacted appropriately with the other student throughout the activity such as sharing a textbook, taking and waiting for turns reading, following the words and sitting quietly as the other student read, and persistently attempting to sound out unknown words (id.). The district social worker observed that the student read slowly and had difficulty identifying many words (id.). At the time of the observation, according to the classroom teacher, the student was on a mid-first grade level for reading, but had good comprehension skills (id.). The district social worker's impartial hearing testimony is consistent with her January 2011 classroom observation report (compare Tr. pp. 72-80, 342-344, with Dist. Ex. 4 at pp. 1-2).

In February 2011, the student's JCSE classroom teacher completed the teacher progress report of the student (Dist. Ex. 10 at pp 1-3). The progress report described the student as a sweet child who was well-liked by her peers and who enjoyed social interactions, responded to and initiated peer interactions, and followed the rules of games (id. at p. 1). The teacher progress report indicated that the student made "significant progress" in her general behavior noting that at the beginning of the year, the student demonstrated defiant and aggressive behaviors, including ruining a classmate's work, coloring on the wall, and running out of the building (id.). The progress report indicated that the teacher implemented a systematic behavior system where the student would earn green pennies for good behavior and red pennies for inappropriate behaviors, and that each red penny received would require the student to return two green pennies (id.). The student collected the money she earned and bought a prize at the end of the week (id.). In addition, if the student completed her work, her name was entered in a raffle at the end of the day for a chance to win a privilege (id.). These two behavior plans had resulted in significant progress and "generally" the student followed classroom routine and performed the work required of her (id.). It was noted that "at times" when the student demonstrated defiant behaviors, she was provided with the choice of either doing her work or having her mother pick her up from the school; the student did not choose the latter option and "usually . . . reluctantly" completed her work (id.).

In the area of reading, the February 2011 teacher progress report indicated that the student had progressed in her reading abilities, though her skills were still delayed (Dist. Ex.10 at p. 1). The current JCSE classroom teacher noted that the student read at the beginning of second grade level and required systematic teaching, as well as repetition and review of phonic rules (id.). Further, the report noted that the student was not a fluent reader, but her ability to read faster had improved and identification of sight words was being addressed (id.). In addition, the progress report stated that the student's comprehension skills improved and she did well in a group (id.). Also, the student had difficulty reading a 3-4 sentence short paragraph independently, answering literal and inferential questions based on the paragraph, and often required reassurance and encouragement to perform the task (id.).

In the area of spelling, the February 2011 teacher progress report indicated the student stretched out words to encode and required assistance in remembering what letter-combinations make a given sound (Dist. Ex.10 at p. 2). The teacher progress report indicated that the student did not enjoy writing and her handwriting was often messy without proper alignment or punctuation (id.). The report further reflected that the student required help and reassurance when performing independent writing assignments, as she usually wrote just 1-3 sentences independently (id.). In the area of mathematics, the February 2011 teacher progress report stated that she had "progressed significantly," could add with regrouping and subtract with borrowing, and knew the proper operation to use to complete word problems (id.). In addition, the report reflected the student could tell time by the minute, count and add money, and read and write numbers through 1000 (id.). The progress report noted that in science, the student comprehended the lessons taught, and retained the knowledge (id.).

The February 2011 OT progress report described the student as pleasant and able to follow multi-step directions, but also often lethargic, easily tired, and demonstrated decreased motivation on tasks (Dist. Ex. 6 at p. 1). The OT progress report reflected that the student properly formed letters of the alphabet and demonstrated appropriate height of letters, but when she wrote spontaneously, the student's accuracy decreased related to the appropriate height of letters (id.). In

addition, the student's ability to appropriately space between words was inconsistent, and resulted in the student using her index finger to measure space between words, which impacted her writing speed (id.). In addition, the student exhibited upper body weakness (id.). The student's quality of writing was impacted by weakness of "intrinsic musculature of the hand" and the student had difficulty copying from the board, and often lost her place (id.). The report recommended continued individual OT services twice per week for 30-minute sessions (id.). The report indicated that the OT goals addressed by this related services provider included fine motor, graphomotor and visual skills (id.).

The March 2011 speech-language progress report indicated that the student presented with receptive and expressive language delays (Dist. Ex. 7 at p. 1). Expressively, the student demonstrated progress retelling a story with and without picture cues (id.). In addition, the student learned emotion words, figurative language, and demonstrated the ability to "figure out" vocabulary during reading comprehension tasks with prompting (id.). The speech-language progress report further indicated the student had learned "not to be" a passive learner and to ask questions when she did not understand (id.).<sup>3</sup>

The March 2011 counseling progress report described the student as a sweet girl, who socializes with peers and had made "significant progress throughout the school year" (Dist. Ex.5 at p. 1). The student received both individual and group counseling services at JCSE to address behavioral issues she exhibited in school (id.). The counseling progress report indicated that the student worked on identifying and exploring what triggered her moods, and learned how to express herself in a healthy manner instead of engaging in negative disruptive behavior (id.). The report further reflected that the student "at times" could become moody or disruptive in class, and the student exhibited behaviors such as not following directions or participating in classroom activities (id.). However, the report indicated that the student was able to leave the classroom and calm herself down in order to regain composure (id.). The report reflected that "recently" the student's teacher's reported that the student had been very disruptive "these last couple weeks in class" and had to leave the room daily to calm herself down, but "from the beginning of this school year until now" the student's behavioral episodes decreased "dramatically," occurring "only a few times in months" (id.). The counseling progress report reflected that the student worked "very nicely" in a group, got along with various types of girls, and had become more expressive with her friends, verbalizing how she felt instead of responding with negative behavior (id.). Included in the counseling progress report was the recommendation for continued mandated counseling services to understand what triggered the student's change of moods and caused a behavioral issue in the classroom (id.).

A review of the hearing record indicates that March 2011 IEP reflected—consistent with the evaluative information relied upon by the March 2011 CSE—the student's abilities and needs in the areas of cognition, academics (reading and mathematics), language skills, counseling, social/emotional functioning, and fine and gross motor skills (Dist. Exs.4 at pp. 1-2, 5 at p. 1, 6 at p. 1, 7 at pp. 1-2, 8 at pp. 1-3, 9 at pp. 1-3, 10 at pp.1-2). Therefore, based upon the foregoing—and consistent with the IHO's findings—the district had sufficient evaluative information relative

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<sup>3</sup> The hearing record exhibit "Speech Progress Report & Goals", includes counseling goals and short-term objectives identical to those found in the March 2011 IEP (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 1 at p. 10).

to the student's present levels of academic achievement and functional performance to develop an IEP that accurately reflected the student's educational needs for the 2011-12 school year.

## **B. March 2011 IEP**

### **1. Present Levels of Performance**

The parent appeals from the IHO's finding that the March 2011 IEP adequately described the student's strengths and weaknesses. A review of the March 2011 IEP, and, as discussed below, the hearing record demonstrates that the March 2011 CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs and that the description is commensurate with the previously discussed evaluative information that was available to the March 2011 CSE.

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]).

The hearing record reflects that the March 2011 CSE developed the present levels of performance and management needs from information provided by JCSE and the discussion among the participants during the March 2011 CSE meeting (see Tr. pp. 48-60). The district school psychologist testified that the present levels of performance were determined based on the student's functioning in school and the description of those skills was reflected in the March 2011 IEP (Tr. pp. 49-50). Consistent with the district school psychologist's testimony, a contact sheet produced on the same day as the March 2011 CSE meeting included her written summary of the events of the meeting and noted that academic levels of functioning were reviewed with the teacher and parent (Tr. p. 31; Dist. Ex. 15 at p. 1).

In addition, the March 2011 CSE relied on the February 2011 classroom teacher's progress report and her input at the March 2011 CSE meeting to determine the student's academic skill levels (Tr. pp. 51-53). The district psychologist testified that the February 2011 teacher's progress report was relied on instead of the June 2010 psychological report to determine the student's academic functioning levels as the February 2011 teacher's progress report was the "most recent for academic functioning [as] academic functioning is changing as opposed to cognitive functioning" (Tr. pp. 51-53; compare Dist. Ex. 9 at pp. 2-3, with Dist. Ex. 10 at pp. 1-2). In addition, the JCSE curriculum coordinator testified that she agreed with all of the levels reflected on the March 2011 IEP (Tr. pp. 504-5). Furthermore, the March 2011 IEP reflects that the March 2011 CSE anticipated that the student would begin third grade in the fall of 2011, as the student's current teacher indicated to the March 2011 CSE that the student was "presently attending a second grade class" (Dist. Ex. 1 at pp. 1, 18). The March 2011 IEP accurately reflects the discussion held at the CSE meeting (see Tr. pp. 39, 76-79, 92-94, 304-05, 333-34; Dist. Ex. 4 at p. 1).



Academically, the March 2011 IEP noted that "according to the information provided by the student's current JCSE teacher," the student demonstrated steady progress in her academic skills (Dist. Ex. 1 at p. 3). The March 2011 IEP reflected the teacher grade equivalent estimates recorded during the March 2010 meeting including decoding (2.5), reading comprehension (1.7), listening comprehension (1.7), writing (2.0), computation (3.3), and problem solving (2.3) (Tr. p. 54; Dist. Ex. 1 at p. 3). The March 2011 IEP reflected information from the teacher progress report that the student's reading comprehension had improved and noting writing as a "significant" difficulty (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 10 at p.1). The March 2011 CSE determined mathematics to be an academic strength for the student (see Tr. p. 53; compare Dist. Ex. 1 at p. 3, with Dist. Ex. 10. at p. 2).

With respect to social/emotional performance, the March 2011 IEP reflected information from the February 2011 classroom teacher progress report noting the student's significant progress in interfering behaviors in response to positive reinforcement (compare Dist. Ex. 1 at p. 5, with Dist. Ex. 10 at p. 1). In addition, the March 2011 IEP reflected the student's moodiness which resulted in her lack of participation in classroom activities, further noting that the teacher was "usually able to redirect her" (Dist. Ex. 1 at p. 5). The March 2011 IEP also noted that "the mother and teacher stated that they [did] not feel [the student] continue[d] to need a crisis paraprofessional" (id.).

Concerning the student's present health status and physical development, the March 2011 IEP reflected that there was no updated medical report provided at the conference, however, as previously discussed, the hearing record shows that the parent provided the March 2011 CSE with the student's diagnosis of ADHD, informing the CSE that the student took medication at home (Tr. pp.56, 59). The March 2011 IEP reflected information from the OT progress report, specifically noting the student's ability to follow multi-step directions, and decreased motivation to perform tasks when tired, as well as the student's difficulties with writing (compare Dist. Ex. 1 at p. 7, with Dist. Ex. 6 at p. 1). Accordingly, contrary to the parent's contentions, the hearing record demonstrates that the March 2011 IEP reflected the student's present academic and social/emotional functional levels and performance.

## **2. Annual Goals**

An independent review of the March 2011 IEP supports a finding that the annual goals and short term objectives were based on the evaluative information considered by the March 2011 CSE and are aligned with the student's present levels of performance. In addition, the annual goals and short-term objectives are consistent with the student's identified needs and contain sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2011 IEP included approximately 14 annual goals with corresponding short-term objectives to address the student's academic, social/emotional, behavioral, and physical development needs, and specifically targeted the following: reading, mathematics, writing, OT, receptive and expressive language, social/emotional skills, and communication skills (see Dist. Ex. 1 at pp. 8-16).. The district social worker testified that all of the goals were discussed at the meeting and that "different" members of the March 2011 CSE completed "different pages" of the IEP based on the information that was discussed at the meeting (see Tr. pp. 83-84, 133-34, 140; Dist. Ex. 1 at pp. 3-10). She further testified that the goals provided by JCSE were reviewed and discussed at the meeting and were used if determined appropriate (Tr. pp. 134-35). The contact sheet reflects that academic goals were reviewed at the meeting with the teacher and parent and that "OT, couns[eling], sp[eech]-[language]reports and goals were reviewed" (Tr. p. 31; Dist. Ex. 15 at p. 1).

The March 2011 IEP specified the student's aforementioned academic instructional levels in reading, writing, and mathematics and provided annual goals to address her needs in these areas (Dist. Ex. 1 at pp. 3, 11-16). The reading annual goals focused on the student's need to improve decoding text with learned sight words; to recognize letter/sound relationships to the third grade level; and improve comprehension skills by answering questions, recognizing cause and effect, and stating the main idea (id. at p. 16). The writing goals targeted the student's ability to demonstrate an understanding of grammatically correct simple sentences by writing ten of them containing appropriate grammar; improve her written expression skills by writing a paragraph with a conclusion, and edit her work with capitals and periods to the third, beginning of fourth grade level (id. at p. 11).

In addition, the mathematics goals focused on the student's ability to demonstrate multiplication of multi-digit numbers at third, beginning of fourth grade level; and the ability to divide double numbers, with regrouping as necessary, on a third, beginning of fourth grade level (id. at pp. 14-15). Although the parent testified that certain mathematics goals and the "ten sentence" writing goal were unattainable by the student, the district school psychologist testified that these goals would have been attainable in the recommended placement and further, the student's JCSE teacher for the 2011- 12 school year testified that the student had already mastered some of the mathematics goals that were included on the March 2011 IEP and the student was able to meet other mathematics goals from the March 2011 IEP by the end of the 2011-12 school year (Tr. pp. 265-66; Parent Ex. M at p. 4).

The March 2011 IEP also contained annual goals and short-term objectives that targeted the student's speech-language needs (Dist. Ex. 1 at p. 8). The student's receptive language needs were addressed by short-term objectives designed to improve the student's ability to answer questions related to a story's main idea and its details during a reading comprehension task, determine vocabulary from context, follow complex directives, and determine an idiom from a context clue (id.). To improve the student's expressive language needs, the March 2011 IEP provided short-term objectives directed at increasing the student's ability to explain a procedure using organization words, retell a story with picture clues using organization words, formulate a sentence with new vocabulary words, and give directives during a task (id.).

In the area of social/emotional functioning, the March 2011 IEP contained annual goals with corresponding short-term objectives that targeted the student's need to develop communication skills and learn alternative ways to manage her disruptive behavior (Dist. Ex. 1 at p. 10). These included identifying various triggers that make her unresponsive to behavior modification plans and redirection in class, communicating with her teachers verbally rather than disrupting the class by getting out of her seat or making noise at her desk, and learning how to sit in the classroom and not be disruptive even if she is not in a good mood (id.).

In the area of health/physical development, the March 2011 IEP contained annual goals with associated short-term objectives that targeted the student's OT-related needs (Dist. Ex. 1 at p. 9). The student's need to improve graphomotor skills were addressed by short-term objectives designed to improve the student's ability to demonstrate appropriate spacing between words, appropriate height of letters, and copying sentences accurately (id.). In addition, the March 2011 IEP focused on the student's ability to demonstrate improved visual perceptual and perceptual motor skills, with corresponding short-term objectives targeting the student's ability to place numbered cards in order, complete a puzzle independently, and identify hidden objects in pictures (id.).

Upon review, the annual goals in March 2011 IEP included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 1 at pp. 8-16). The annual goals and short-term objectives provide criteria for measurement to determine if a goal has been achieved (e.g., 70 percent accuracy, 80 percent accuracy), the method of how progress would be measured (e.g., teacher made materials, class activities, teacher/ provider observations), and a schedule of when progress would be measured (e.g., four times during the year) (id.). With respect to the counseling goals, although they lacked the criteria upon which to measure the student's progress, the goals and accompanying short term objectives were sufficient to address the student's social/emotional needs (id. at p. 10). The district social worker "believe[d]" the goals were provided by the counselor and the hearing record shows the counseling goals were read and discussed during the March 2011 CSE meeting (see Tr. pp. 107, 330). Testimony by the district social worker indicated that achievement of these goals would be measured under teacher/provider observation and teacher made materials and the strategies to measure the student would be left up to the counselor (Tr. pp. 110-11).

In reviewing and considering the goals contained in the March 2011 IEP and the services provided by the IEP as a whole, any alleged minor deficiencies or omissions in the goals do not rise to the level of a denial of a FAPE where, as here, the challenged IEP as a whole adequately addressed the student's needs as reflected in the evaluative information available to the CSE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]).

### **3. Consideration of Special Factors—Interfering Behaviors**

The parent asserts that the IHO erred in finding that the district's failure to conduct an FBA and develop a BIP did not constitute the denial of a FAPE. As set forth in greater detail below, the hearing record indicates that the student's behaviors did not seriously interfere with instruction and that the March 2011 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 2009 WL 3326627, at \*3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; F.L. v. New York City Dep't of Educ., 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>4</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and

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<sup>4</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

It is undisputed that the March 2011 CSE did not conduct an FBA or develop a BIP in this case. However, the evidence in the hearing record reflects that the March 2011 CSE discussed the significant improvements in the student's behavior and social skills (Tr. pp. 55, 84, 126; see Dist. Exs. 1 at pp. 5, 15). At the time of the March 2011 CSE, the district social worker testified that the student did not fit the profile of a student who required an FBA or a BIP (Tr. pp. 85, 141). Consistent with that testimony, the district school psychologist stated that the March 2011 CSE did not develop a BIP at the time of the meeting because the student did not present with significant and destructive behaviors, and she participated nicely in group activities (Tr. pp. 55-56; see Dist. Ex. 4 at pp. 1-2). She testified that, "[the student] was not disrupting other student's work" "she was not disruptive towards herself" and "she was not getting up" (Tr. p. 356). In addition, the district school psychologist reported that the student was helped by medication for attention deficit disorder (Tr. at p. 356; see Dist. Ex. 1 at p. 1). Moreover, the parent testified that this discussion, during the March 2011 CSE meeting, included the student's JCSE teacher, who discussed the improvement in the student's behavior, and recommended the removal of the 1:1 crisis paraprofessional (Tr. pp. 396-97).

With regard to the 1:1 crisis management paraprofessional, the district school psychologist testified "[the student's] paraprofessional was not actually working with [the student] because it was unnecessary" and that by mutual agreement of its members, the March 2011 CSE removed the assistance of the paraprofessional from the March 2011 IEP (see Tr. pp. 37-38, 331, 356-57; Dist. Ex. 1 at p. 2). Furthermore, the district social worker who conducted the classroom observation of the student testified that she did not observe any behavior that required any type of intervention or support (Tr. p. 90). The district social worker testified that at the time of the observation, she asked the student's JCSE teacher if the observed behavior was typical for the student, and she was told that it was typical as there had been significant improvement (Tr. pp. 73-74, 86; Dist. Ex. 4 at pp. 1-2). Consistent with the information reflected on the March 2011 IEP, the district social worker testified that according to the student's current JCSE classroom teacher "at times [the student] did need to be redirected and could be moody, but in general [the student] was following the classroom routine and participating in classroom activities" (Tr. p. 127 see Tr. p. 331; Dist. Ex. 1 at p. 5).

In addition to the supports reflected in the March 2011 IEP, and as discussed previously, the IEP includes goals and short-term objectives to improve the student's communication skills, to help the student identify triggers that make her upset, and learn alternative ways to manage her disruptive behavior, even when she was not in a good mood (Dist. Ex. 1 at pp. 5, 10). The district school psychologist testified that the student did not demonstrate significant disruptive behavior that would require an individual behavior BIP (Tr. pp. 346, 347). She testified that according to the student's teacher the behaviors were "very, very rare or almost not in existence" and that the student was "following class routine" (Tr. pp. 86, 127, 358, 359).

The hearing record shows that the JCSE had a behavioral plan that applied to all students involving a reward system for the whole class (see Tr. pp. 57, 88, 90, 111, 118, 471). The district social worker testified that JCSE did not indicate that they had in place, nor did they provide the March 2011 CSE with, a written BIP created specifically for the student (Tr. pp. 88-9). Instead,

the JCSE classroom teacher indicated to the district social worker that the school utilized strategies such as praise, encouragement, prizes, and pennies as "typical things that are used in class to encourage on task and appropriate behavior," and that the student was responsive to redirection from the teacher and positive reinforcement (Tr. pp. 88-89, 119, 120-21; see Dist. Ex. 10 at pp. 1-2).

In summary, a review of the hearing record reflects that, notwithstanding the lack of a formal FBA or BIP, the March 2011 IEP included sufficient information regarding the student's interfering behaviors and management needs and included strategies and goals in response to those needs. Moreover, sufficient evidence exists to support the CSE's determination that the student's prior disruptive behaviors had greatly improved and that no current interrupting behaviors warranted either an FBA or BIP. Accordingly, the IHO correctly found that the CSE's failure to conduct an FBA or create a BIP did not deprive the student of a FAPE.

#### **4. 12:1+1 Special Class Placement**

The parent argues that the IHO erred in determining that the 12:1+1 special class placement was appropriate. The parent asserts that the 12:1+1 special class placement was not appropriate because the student requires a smaller class and more individualized attention and support. The district argues that the 12:1+1 special class placement would provide the student with a small structured environment with related services of speech and language therapy, OT and counseling, and the positive reinforcement of appropriate behaviors that she requires. A review of the hearing record supports the IHO's finding that the 12:1+1 special class placement was appropriate, and therefore, the parent's arguments must be dismissed.

State regulations provide that a 12:1+1 special class placement is designed for those students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In reaching the decision to recommend a 12:1+1 special class placement, the March 2011 CSE considered the evaluative information available, which reflected the student's then-current functioning related to academic, behavior, health and physical development, social/emotional development, cognitive ability, language, and social history, and the types of supports currently in place for the student (see Tr. pp. 40-42, 44-49, 53, 55-56, 59-61, 82-84; Dist. Exs. 4 at pp. 1-2, 5 at p. 1, 6 at p.1, 7 at pp. 1-2, 8 at pp.1-3, 9 at pp. 1-3, 10 at pp. 1-2). In addition, the district school psychologist testified that the 12:1+1 special class placement in a community school was appropriate for the student for several reasons (Tr. p. 53). She indicated that the 12:1+1 special class placement met the student's needs for a smaller structured academic environment, including speech and language therapy, positive reinforcement of appropriate behavior, repetition and differentiating (id.). According to the testimony of the district school psychologist, the March 2011 CSE considered and rejected several other placement options, including general education, integrated co-teaching (ICT) services, and a special class placement in a specialized school (Tr. p. 332; Dist. Ex. 1 at pp. 17-18). Also, the district social worker testified that she agreed that the recommendation of a 12:1+1 special class placement for the student was appropriate "because it's a small supportive setting where [the student] would have the opportunity to receive more individualized attention, focusing, direction, [and] modified instruction, if necessary." (Tr. p. 104). Further she explained the March 2011 CSE described the 12:1+1 special class placement to the

parent during the meeting and the parent did not object or express any concern (see Tr. pp. 94, 103-04).

Contrary to the parent's argument, the hearing record does not contain evidence that the student required a student-to-teacher ratio smaller than the recommended 12:1+1 classroom placement due to her behavioral needs; indeed, the testimony adduced at trial with respect to the student's behavior uniformly demonstrates that her formerly disruptive behavior had reduced significantly, resulting in the removal of the student's 1:1 paraprofessional (Tr. pp. 37-38; compare Dist. Exs. 1 at pp.2, 5; 10 at p. 1, with Dist. Ex. 5 at p. 1). The district school psychologist and district social worker testified that based on the classroom observation, and discussions with the parent and student's JCSE classroom teacher, the student was not demonstrating significant disruptive behaviors impeding her academic performance at the time of the March 2011 CSE meeting and was no longer using a 1:1 paraprofessional at JCSE, resulting in the March 2011 CSE recommendation that the 1:1 crisis paraprofessional be removed from the IEP (see Tr. pp. 37-38, 55- 56, 84-86; Dist. Exs. 1 at pp.2, 5). The district social worker, who conducted the classroom observation of the student, testified that during her observation the student was very well behaved, worked on assigned tasks, shared appropriately with another student and was responsive to the teacher's assistance and support (Tr. p. 74; Dist. Ex. 4 at p. 1). Further, the district social worker stated that, at the time of the observation, she did not observe any inappropriate or disruptive behavior from the student, even though the student's 1:1 crisis paraprofessional was reported absent (Dist. Ex 4 at pp. 1-2). The student's current teacher at JCSE informed her that the student did not have a BIP but she was able to control any behaviors utilizing strategies in the classroom to encourage on task and appropriate behavior with positive reinforcement, including praise, encouragement and prizes (Tr. pp.74-75, 88-89).

The evidence in the hearing record amply supports the IHO's conclusion that the 12:1+1 special class placement in a community school provided adequate structure, support and individualized attention, particularly in conjunction with the annual goals and related services provided by the IEP, to meet the student's needs, including any behavioral needs, and was reasonably calculated to enable the student to receive educational benefits.

### **C. Challenges to the Assigned Public School**

The parent raises several challenges to the assigned public school site, including her concerns that the staffing ratio would not be properly maintained throughout the day, no specific classroom for the student was identified in the FNR, and that the student would be inappropriately functionally grouped and her related services would not be provided. In addition, the parent alleges that the assigned school is too large and overwhelming for the student and transitions within the building would cause her to regress in her behaviors.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8 2014]; see also K.L., 530 Fed. App'x



81, 87; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>5</sup> When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

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<sup>5</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the March 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the March 2011 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claims that the assigned public school site would not have properly implemented the March 2011 IEP.<sup>6</sup>

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that

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<sup>6</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at \*26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], *aff'd*, 556 Fed. App'x 1 [2d Cir. Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], *adopted*, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

## **VII. Conclusion**

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 22, 2014**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**