The University of the State of New York

The State Education Department
State Review Officer
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No. 13-004

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

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Jewish Center for Special Education (JCSE) for the 2011-12 school year. The appeal must be sustained.

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

The hearing record reveals that at the age of five months, the student received special education and related services through the Early Intervention Program (EIP) in the form of speech-language therapy, occupational therapy (OT), and physical therapy (PT) to address the student's history of global developmental delays and low muscle tone (Dist. Ex. 11 at p. 2). With regard to the student's educational history, she attended an integrated prekindergarten class and for kindergarten and first grade attended a nonpublic general education school (Tr. pp. 208-09; Dist.

Ex. 11 at pp 2-3). In September 2009 (second grade), the parents enrolled the student at JCSE, where she continued to attend through the 2011-12 school year (Tr. pp. 208-09).[1]

On March 10, 2011 a CSE convened to conduct the student's annual review and to develop the student's IEP for the 2011-2012 school year (Dist. Ex. 4). Finding the student eligible for special education and related services as a student with a learning disability, the March 2011 CSE recommended a 10-month program in a 12:1+1 special class in a community school with the following related services: two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (3:1) (id. at pp. 1, 19).[2] The March 2011 CSE also recommended accommodations related to the student's participation in State and local assessments and participation in adapted physical education (id.). By final notice of recommendation dated August 9, 2011, the district summarized the special education 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 (Dist. Ex. 3).

In a letter to the district dated August 18, 2011, the parent expressed her concern with respect to the district's recommendation of a 12:1+1 special class in a community school noting her belief that a "class this large would [not] give [the student] the amount of individualized support that she requires" (Dist. Ex. 12).[3] In addition, the parent notified the district that, as it was summer and the assigned public school site was closed, she would visit the school in September to determine if it was appropriate for the student; however, she requested "any information on the placement, such as a class profile" (id.). In the meantime, the parent indicated her intent to maintain the student's enrollment at JCSE and seek reimbursement for the costs of the student's tuition "if the IEP and program continue[d] to remain inappropriate" (id.). On September 1, 2011, the parent executed an enrollment contract for the student's attendance at JCSE for the 10-month 2011-12 school year (Parent Ex. D).

In a letter dated September 21, 2011, the parent notified the district that she spoke with the special education coordinator from the assigned public school site and was informed that the two available 12:1+1 special classes were full and "it would be a waste of time" for the parents to visit the school (Dist. Ex. 13).[4] The parent also reiterated her concerns from her August 2011 letter

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[1] The Commissioner of Education has not approved JCSE as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[2] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] The hearing record reflects that both parents were named as parties to this proceeding, however, only the student's mother attended the March 2011 CSE meeting and testified during the impartial hearing (Dist. Ex. 4 at p. 2). Unless otherwise noted, the term "parent" refers to the student's mother in this decision.

[4] Although the parent refers to the classes at the assigned school as "12:1" classes in the due process complaint and in her letter to the district, the parent makes several references to a 12:1+1 special class in the assigned school being offered to the student (Dist. Exs. 1; 12; 13). Moreover, the IEP teacher testified that the classrooms were "12:1+1" special classes (Tr. pg. 14). To remain consistent with the hearing record and in order to avoid confusion, we shall refer to the parents' references to the "12:1" classrooms as "12:1+1" classrooms.

regarding the district's recommendation of a 12:1+1 special class placement (Dist. Exs. 12; 13). Based on the foregoing, the parents notified the district that the student would remain at JCSE and they would seek reimbursement for the costs of the student's tuition (Dist. Ex. 13).

A. Due Process Complaint Notice

In a due process complaint notice dated May 7, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1). More specifically, the parents contended that the March 2011 CSE was improperly composed, failed to follow proper procedures in convening the March 2011 CSE meeting, and did not review appropriate documentation prior to making its recommendation (id. at p. 1).[5] Next, the parents alleged that the March 2011 IEP failed to accurately describe the student's needs (id.). The parents further alleged that the annual goals and objectives failed to address the student's needs (id.). Relative to the 12:1+1 special class placement, the parents contended that a class size of 12 students was "too large" for the student and inappropriate because the student required "more 1:1 [support] and individualized instruction to address her learning needs and distractibility" (id.). Additionally, the parents contended that after speaking with the special education coordinator from the assigned public school site, they were advised that there were no available spots for the student at the school (id. at p. 2). Based on this information, the parents argued that they wrote to the CSE regarding the assigned school being full but received no response (id.). The parents alleged that the district's failure to respond to the parents' concerns inhibited their parental participation (id.). Next, the parents argued that the student's unilateral placement at JCSE was appropriate for the student because it provided her with "small group support and individualized attention" (id.). As relief, the parents requested prospective funding or reimbursement for the costs of the student's tuition at JCSE for the 2011-12 school year (id.). The parents also requested the costs of the student's tuition pursuant to pendency to the extent applicable (id.).

B. Impartial Hearing Officer Decision

On August 1, 2012, an impartial hearing convened in this matter and concluded on September 19, 2012, after three days of proceedings (Tr. pp. 1-237). In a decision dated December 5, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, that JCSE was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 10-18). Initially, the IHO found that the March 2011 CSE did not include a special education teacher who could implement the student's IEP or explain how a 12:1+1 special class placement would be appropriate, and that these failures impacted the parents opportunity to participate in the March 2011 CSE meeting resulting in a denial of a FAPE (id. at pp. 14-15). Next, the IHO found that the March 2011 CSE failed to "consider sufficient documentation or consider the documentation" in front of the CSE (id. at p. 15). With respect to the March 2011 IEP, the IHO found that it did not appropriately meet the student's needs (id.). The IHO found that the annual goals were insufficient

[5] The parents' allegation that the March 2011 CSE "did not follow the proper procedure in convening the [CSE] meeting" was neither addressed by the IHO nor advanced on appeal by the parents. Under the circumstances of this case, the parents have effectively abandoned this claim by failing to identify it in any fashion or make any legal or factual argument as to how it would rise to the level of a denial of a FAPE. Therefore, this claim will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

and inappropriate (id.). Specifically, the IHO found that there were no writing goals and that the district failed to establish that the goals were appropriate given the student's functional levels (id.). Additionally, the IHO found that the 12:1+1 special class placement was not appropriate for the student because it was "too large" and even with 1:1 support in the classroom, the student would have a "difficult time" (id.). The IHO also found that the district "failed to consider a more restrictive setting" and "predetermine[d] the recommendation" (id.).[6] Next, the IHO found that the CSE failed to provide the student with transition services to support the student's transition into a larger school environment (id. at pp. 15-16).[7] With respect to the assigned public school site, the IHO found that the district failed to establish that the assigned school could meet the student's needs because the district failed to offer testimony regarding the assigned classroom or how it would be appropriate for the student (id. at p. 16). The IHO also found the district's assertion that it had an available spot for the student at the assigned public school site to be "disingenuous" (id.). Next, the IHO found that the unilateral placement of the student at JCSE was appropriate because the student progressed both academically and socially (id. at pp. 16-17). Lastly, the IHO found that equitable considerations supported the parents' request for relief and ordered the district to pay the costs of the student's tuition at JCSE for the 2011-12 school year reduced by fifteen percent, the portion of the school year attributable to "religious instruction" (id. at pp. 17-18).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision that it failed to offer the student a FAPE for the 2011-12 school year, that the parents' unilateral placement at JSCE was appropriate, and that equitable considerations favored the parents.

First, the district asserts that the IHO erred in finding that the March 2011 CSE was improperly composed. The district further argues that that the IHO erred in finding that the March 2011 CSE failed to consider the documentation before it and further argues that the CSE considered sufficient evaluative information. The district argues that the IHO erred in finding that

[6] The IHO exceeded his jurisdiction by making a sua sponte determination that the CSE predetermined the 12:1+1 special class placement recommendation because the parents did not raise this issue in their due process complaint notice (compare IHO Decision at p. 15, with Dist. Ex. 1 at pp. 1-2). Accordingly, this finding must be reversed.

[7] The IHO exceeded his jurisdiction by making a sua sponte finding that the CSE failed to provide support to transition the student into a "larger environment" because the parents did not raise this issue in their due process complaint notice (compare IHO Decision at pp. 15-16, with Dist. Ex. 1 at pp. 1-2). Accordingly, this finding must be reversed. However, even assuming the parents raised the issue of "transitional support services" in the due process complaint notice, their argument is without merit, as such services are not provided to the student; but rather, are provided on a temporary basis to teachers "to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]; see 8 NYCRR 200.6[c]; 200.13[a][6]). In this case, the CSE recommended that the student attend a special class in a community school, with no indication in the hearing record that she would have any more interaction with nondisabled students in the district public school than the student received at JCSE (see Tr. pp. 42-42, 157-58). Furthermore, "there is no requirement in the IDEA for a 'transition plan' when a student moves from one school to another" (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013], citing E.Z.-L v. New York City Dep't of Educ., 763 F.Supp. 2d 584, 598 [S.D.N.Y., 2011], aff'd sub nom., R.E., 694 F.3d 167; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; ,; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 195 [2d Cir. 2012]).

the annual goals were inappropriate and insufficient. Additionally the district argues that the CSE's recommendation of a 12:1+1 special class was not predetermined, but rather, a result of meaningful and active participation from the parents and JCS staff. The district further contends that the IHO erred in finding that lack of transition support services in the March 2011 IEP resulted in a denial of a FAPE. In addition, the district argues that the IHO erred in finding that the district failed to establish that the assigned public school site would have been able to meet the student's needs. The district also contends that the IHO erred in finding that JCSE was appropriate and in finding that equitable considerations weighed in favor of granting the parents' requested relief. Lastly, the district argues that the parents are not entitled to direct payment because they did not establish that they were unable to front the costs of the student's tuition.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's conclusions that the district failed to offer the student a FAPE for the 2011-12 school year, that JCSE was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief.

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]).

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. CSE Composition

In the instant case, the parents assert that the March 2011 CSE was improperly composed due to the absence of a special education teacher who would have been responsible for implementing the March 2011 IEP and someone who could have discussed the appropriateness of the 12:1+1 special class placement. The parents also assert that this impeded their ability to participate in the development of the March 2011 IEP.

The presence of a "special education teacher" or "special education provider" of the student is required by the IDEA (20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The Official Analysis of Comments to the federal regulations states that the special education teacher member of the CSE "should be the person who is, or will be, responsible for implementing the IEP" (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The hearing record indicates that the following individuals attended the March 2011 CSE meeting: a district school psychologist (who also served as the district representative), a district general education teacher, a district social worker, a parent member, the student's special education teacher at JCSE (via telephone) and the parent (via telephone) (Dist. Ex. 4 at p. 2). Additionally, a district special education teacher attended the CSE meeting; however, the district school psychologist did not recognize the signature on the CSE attendance sheet and did not recall which of two special education teachers with whom she "usually" worked attended the March 2011 CSE meeting (Tr. pp. 122-23). Thus, the hearing record is unclear as to whether the district special education teacher who attended the CSE meeting met the regulatory criteria. Assuming for the purposes of this decision that the district special education teacher who took part in the March 2011 CSE would not have been responsible for implementing the March 2011 IEP, to the extent that this constituted a procedural violation, the hearing record does not provide any basis under these circumstances upon which to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 14-15 [2d Cir. 2011]; R.B. v. New York City Dep't of Educ., 15 F.Supp.3d 421, 430, *5-*6 [S.D.N.Y. Mar. 26, 2014]

[finding that the CSE's reliance, in part, upon progress reports created by the student's teacher "significantly mitigated" the absence of a special education teacher at the CSE meeting who was not the student's "own special education teacher"]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011]).

This is particularly so given that during the March 2011 CSE meeting, the student's teacher at JCSE provided the CSE with information regarding the student's progress, academic weaknesses and strengths, annual goals, and social emotional development (Tr. pp. 60, 63, 67; 109; Dist. Exs. 4 at pp. 3, 5; 5; 10). Furthermore, the hearing record reflects that the CSE considered a February 2011 JCSE progress report, prepared by the student's JCSE teacher (Tr. p. 60; Dist. Ex. 10). Additionally, the March 2011 CSE minutes indicate that the JCSE teacher provided information to the CSE regarding the student's instructional levels (Dist. Ex. 5). Moreover, the district school psychologist testified that it was reasonable for the CSE to rely on the teacher's estimates in terms of the student's instructional levels because "the teacher is the person who works with the student directly . . . and can provide the most recent information . . . this is what the [the CSE] really need[s]" (Tr. pp. 64-65). As the student's JCSE teacher—who was directly acquainted with this student's particular needs—was able to fully participate in the March 2011 CSE meeting, and because I find the CSE had adequate evaluative information to recommend an appropriate program for the reasons stated below, the participation of a district special education teacher who would not have been able to implement the IEP did not rise to the level of a denial of a FAPE (A.H., 394 Fed. App'x at 720-21; see R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *6 [S.D.N.Y. Mar. 26, 2014]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011]).

Contrary to the parent's argument that the absence of a district special education teacher resulted in the absence of a CSE member who could discuss the appropriateness of the 12:1+1 special class placement recommendation, a special education teacher is not the CSE member who is required to have overall knowledge of the district's special education programs and resources; rather, that role lies with the district representative (see 8 NYCRR 200.3[a][1][v]). In this case, the district representative who attended the CSE meeting testified that her role as a district representative was to "explain[] the program recommendation, what kind of program is recommended, a related service recommendation, how the student's needs are going to be addressed within the school system and answer the parents' questions about [the] recommendation in [the] public school system in general" (Tr. p. 59). The district representative further testified that she was "qualified" to answer any of the parents' questions and that every other CSE team member had extensive knowledge about the public school system and program recommendation as well (id.). Additionally, the district representative testified that the CSE considered other placement options for the student and explained why the CSE rejected those options (Tr. pp. 83-84). Therefore, the evidence in the hearing record indicates that the district representative was knowledgeable about the district's resources, including 12:1+1 special class placements and, accordingly, was also capable of explaining the special education services and potential placements on the continuum available in the district to the CSE members, including the parent. Consequently, the evidence in the hearing record supports a finding that the parents' assertions regarding the composition of the March 2011 CSE must be dismissed.

2. Consideration of Evaluative Information and Present Levels of Performance

I turn next to the parents' assertion that the March 2011 CSE failed to consider sufficient evaluative information and that the March 2011 IEP failed to describe the student's needs and did not accurately reflect information provided by JCSE.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the hearing record indicates that the March 2011 CSE had the following evaluative information available to develop the March 2011 IEP: an April 26, 2010 psychoeducational evaluation report, a January 20, 2011 classroom observation conducted by the district social worker who attended the March 2011 CSE meeting, a February 28, 2011 progress report prepared by the student's teacher at JCSE, a February 2011 JCSE OT update, a March 2011 JCSE speech-language progress report, and a PT update (Tr. pp. 56-57; Dist. Exs. 6-11). The district representative testified that the March 2011 CSE relied upon the aforementioned evaluative information—as well as the student's previous IEP, verbal input from the student's teacher and parent, and information in the student's file—to develop the student's IEP (Tr. 58).

As described in detail below, the information found in the evaluative material that the CSE had before it is appropriately reflected in the Mach 2011 IEP. The March 2011 IEP included grade equivalents based on teacher estimates for the student's instructional levels and identified the student's decoding at a 1.2 instructional level, reading comprehension at a 1.2 instructional level, listening comprehension at a 1.2 instructional level, writing at a K.8 instructional level, math computation at a 3.1 instructional level, and math problem solving at a 2 instructional level (Dist. Ex. 4 at p. 3). Consistent with the February 2011 progress report prepared by the student's JCSE teacher, the IEP indicated that the student made significant progress in her reading (compare Dist. Ex. 4 at p. 3; with Dist. Ex. 10 at p. 1). As reported in the JCSE progress report—and as reflected in the March 2011 IEP—the student read consonant-vowel-consonant words with all short vowels and words with initial and final consonant blends and digraphs (id.). Consistent with the JCSE progress report, the March 2011 IEP reflected that the student could answer comprehension questions after reading short passages with 80% accuracy (id.). In addition, as indicated in the JCSE progress report and IEP, the student could perform three digit addition and subtraction with regrouping, solve one step problems with money, and identify time on an analog clock to the nearest five minutes (id.).

According to the March 2011 speech-language progress report prepared by the student's speech-language therapist at JCSE and as reflected in the March 2011 IEP, the student presented with pragmatic, receptive, and expressive language delays (compare Dist. Ex. 4 at p. 4; with Dist. Ex. 8 at p. 1). The district school psychologist testified that the JCSE speech-language therapist wrote the speech-language portion of the student's present levels of performance (Tr. p. 62; Dist. Ex. 4 at p. 4). As indicated on the March 2011 IEP, the student's pragmatic deficits were characterized by poor eye contact, poor focus and attending, and poor eating skills that impacted the student socially (Dist. Ex. 4 at p. 4). Also, according to the April 2010 psychological report and the March 2011 IEP, the student presented with an open mouth posture and drooling caused by her oral motor weakness (compare Dist. Exs. 4 at p. 4, with 11 at p. 4). Receptively, the student had difficulty answering "wh" questions during reading comprehension skills (Dist. Ex. 4 at p. 4). Expressively, the student had a limited vocabulary and difficulty organizing her thoughts to retell a simple narrative (id.).

Consistent with the February 2011 JCSE progress report, the March 2011 IEP described the student as being usually well behaved and interacting with others (compare Dist. Ex. 4 at p. 5; with Dist. Ex. 10 at p. 1). According to the January 2011 classroom observation, the February 2011 JCSE OT update, the February 2011 JCSE progress report, an undated PT update, and as indicated in the social/emotional performance section of the March 2011 IEP, the student was easily distracted and had difficulty sustaining attention (Dist. Exs. 4 at p. 5; 6 at p. 1; 7; 9; 10 at p.1).

Additionally, as reported in the February 2011 JCSE progress report and in the social/emotional performance section of the March 2011 IEP, the student required constant redirection, to which she was responsive, along with positive reinforcement and verbal praise (Dist. Exs. 4 at p. 5; 10 at p. 1). As indicated in the JCSE progress report and recorded on the March 2011 IEP, at times the student could be immature, crying easily , or could become overly excited regarding routine events (Dist. Exs. 4 at p. 5; 10 at p. 1). The March 2011 IEP also indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and the student's therapist (Dist. Ex. 4 at p. 5). As reported on the IEP and gathered from teacher reports, teacher verbal input, parent verbal input, a classroom observation, and overall discussion during the March 2011 CSE meeting, the student's social/emotional needs included refocusing, repetition, redirection, modeling of appropriate behavior, positive reinforcement, and praise (Tr. pp. 67-68; Dist. Ex. 4 at p. 5).

Portions of the health and physical development section of the March 2011 IEP were completed by the student's JCSE physical therapist and occupational therapist prior to the CSE meeting (Tr. pp. 69-71; Dist. Ex. 4 at pp. 6, 8). The district social worker also completed a part of the health and physical development section using information provided by the parent during the March 2011 CSE meeting (Tr. pp. 69-70; Dist. Ex. 4 at p. 7). According to the health and physical development section of the March 2011 IEP, the student was in good health (Dist. Ex. 4 at pp. 6-7). As indicated on the March 2011 IEP, the parent reported that the student's doctor had recommended that the student avoid milk due to frequent episodes with a runny nose (Dist. Ex. 4 at pp. 1, 7). As reported in the JCSE OT update, the March IEP also indicated that the student was cooperative during therapy but demonstrated difficulty maintaining eye contact and was easily distracted by both auditory and visual stimuli (Dist. Exs. 4 at pp. 6, 8; 7). Also as reported in the February 2011 JCSE OT update and the March 2011 IEP, the student had decreased strength and endurance which impacted her fine motor and graphomotor skills (Dist. Exs. 4 at p. 8; 7). At the time of the OT update, the student formed several lowercase letters of the alphabet incorrectly and had not yet mastered the appropriate height of letters or spacing between letters and words (Dist. Exs. 4 at p. 8; 7). According to the PT update and as recorded in the health and physical development section of the March 2011 IEP, the student presented with multiple motor deficits and with decreased muscle strength, especially in the upper extremities and trunk (Dist. Exs. 4 at p. 6; 9). As described in the health and physical development section of the March 2011 IEP and consistent with the PT update, the student presented with spatial awareness and sensory integration issues which impacted "her ability to ascend and descend stairs as well as negotiate obstacles safely" (id.). The student chronically demonstrated poor body and safety awareness in the school environment, especially in crowed areas (id.). As reported in the PT update and in the health and physical development section of the March 2011 IEP, the student required frequent verbal prompts to maintain an upright sitting posture in class, demonstrated difficulty in gross motor skills such as jumping, hopping, throwing and ball playing skills, and had decreased static and dynamic balance skills as well as decreased coordination (id.).

With respect to the student's related services, the health and physical development needs section of the March 2011 IEP indicated that the student should continue with OT and PT services, consistent with the February 2011 JCSE OT update and the undated PT update (Dist. Exs. 4 at pp. 6, 7, 8, 17, 19; 7; 9).

Based on the foregoing, the hearing record reflects that in developing the student's March 2011 IEP, the March 2011 CSE considered and relied upon the student's psychoeducational evaluation, classroom observation, and PT update, along with several reports provided by JCSE staff (Dist. Exs. 6-11). Furthermore, the March 2011 IEP reflected the aforementioned evaluative information and incorporated additional information from the student's IEP from the preceding school year, information from the student's file, as well as input from the student's JCSE teacher and the parent (Tr. 58). In addition, the hearing record reflects that the March 2011 CSE accurately and sufficiently described the student's needs consistent with the evaluative information available to the CSE. Consequently, the evidence contradicts the parent's allegations that the March 2011 CSE failed to consider sufficient evaluative information and that the March 2011 IEP failed to describe the student's needs and accurately reflect the information provided by JSCE.

B. March 2011 IEP

1. Annual Goals and Short-Term Objectives

Turning to the dispute regarding the annual goals and short-term objectives, the parents assert that the annual goals and short-term objectives did not address the student's needs. The parents further assert that the IHO correctly found that the annual goals and short-term objectives were inappropriate and insufficient, particularly because there were no writing goals and the district failed to establish that the goals addressed the student's needs given the student's functional levels.

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]).

In this case, a review of the hearing record reflects that the March 2011 CSE developed approximately 14 annual goals and 27 corresponding short-term objectives to address the student's individual needs as reflected in the present levels of performance (Dist. Ex. 4 at pp. 9-16). According to testimony by the district school psychologist, the contents of the annual goals and short-term objectives were discussed by the entire CSE team and no objections were made during the March 2011 CSE meeting (Tr. pp. 72-82). Additionally, the parent testified that the March 2011 CSE discussed the student's strengths and weaknesses and what the student's goals and objectives would be to meet them(Tr. p. 217). The parent further testified that all the student's providers gave their opinion as to what was necessary to help the student meet her goals (id.). Furthermore, the March 2011 CSE meeting minutes indicate that the student's goals were discussed and that the parent and JCSE teacher were in agreement with the goals (Dist. Ex. 5).

Contrary to the parents' assertions, a review of the annual goals and short-term objectives contained in the March 2011 IEP reveals that they addressed the student's needs (Dist. Ex. 4 at pp. 9-16). To address the student's academic needs, the March 2011 IEP included an annual goal

designed to improve the student's math skills as demonstrated by her ability to measure objects, read a thermometer, perform operations with fractions, and multiply and divide single digit numbers (id. at p. 14). The IEP also included reading goals that targeted the student's ability to increase her sight word vocabulary; improve her reading comprehension skills as demonstrated by her ability to read and retell short stories in sequence; and improve her reading decoding skills as demonstrated by her ability to decode words containing long vowel sounds (id. at pp. 14-15). The district school psychologist testified that the March 2011 CSE created the student's academic goals at the meeting in consultation with the student's then-current special education teacher (Tr. p. 79; Dist. Ex. 4 at pp. 14-15).

To address the student's identified social and communication needs, the March 2011 IEP included annual goals and short-term objectives targeting the student's ability to improve her pragmatic skills by maintaining eye contact for five minutes and ignoring distractions and her receptive language skills by answering "wh" questions during a reading comprehension task, by brainstorming a topic and giving three examples, and by giving the opposite of a presented word (Dist. Ex. 4 at p. 11). The March 2011 IEP also included an annual goal to improve the student's expressive language skills and short-term objectives that targeted the student's ability to retell a story in sequence with the help of an introductory sentence or word cues and to "use one-two new vocabulary words when retelling her story" (id. p. 12). To further improve and support the student's speech-language needs, the IEP included a goal for the student to increase her oral motor and feeding skills, including tongue retraction and use of a rotary chew (id.).

To address the student's gross motor skills, the March 2011 IEP included three annual goals and nine short-term objectives (Dist. Ex. 4 at pp. 9-10). The goals and objectives targeted the student's ability to negotiate her school environment safely while transitioning with her class in hallways and stairways; to exhibit improved trunk control in order to improve her sitting posture and thereby her participation in school activities; and to demonstrate improved motor planning and coordination skills, as well as improved dynamic balance, for safer negotiation throughout the school environment (id.). To address the student's fine motor skills the March 2011 IEP included two goals and eight short-term objectives (id. at p. 13). The goals and objectives targeted the student's ability to demonstrate improved graphomotor skills for writing tasks and improved functional shoulder, arm, and hand control for greater success with fine motor tasks (id.). In addition, the March 2011 IEP included an annual goal that indicated the student would "participate in an adapt[ed] physical education program designed to promote overall physical fitness, as demonstrated by her ability to engage in activities chosen by the teacher, to demonstrate turn taking skills and adherence to the rules of games being played" (id. at p. 16).[8]

The parents also assert that the annual goals and short-term objectives contained in the March 2011 IEP, specifically the academic goals, did not appropriately address the student's special needs, given her level of performance. Of the approximately fourteen annual goals included in the March 2011 IEP, four were academic (Dist. Ex. 4 at p. 14). Of the four academic goals, three identified a target grade level at which the student was to perform the stated skill (id.). With respect to reading, the March 2011 IEP indicated that based on teacher estimate the student's

[8] The hearing record reflects that the adapted physical education goal was based on student's needs discussed in the PT and OT report, as well as teacher and parent input and written by the CSE team, as testified by the school psychologist (Tr. p. 81).

instructional level for decoding and reading comprehension was at the 1.2 grade level (id. at p. 3). The IEP goals called for the student to increase her sight word vocabulary to a third grade level and her reading comprehension skills to an upper second to beginning third grade level (id. at pp. 3, 14). In math, the March 2011 IEP indicated that the student's instructional level for problem solving was at the 2.1 grade level while her instructional level for computation was at the 3.1 grade level (id. at p. 3). The math IEP goal called for the student to improve her skills to the upper third to beginning fourth grade level (id. at p. 14). Thus, in order to achieve the academic goals as stated in the March 2011 IEP the student would be required to demonstrate, in some instances, almost two years of progress in one year's time. To the extent that these three goals were not as well-tailored as could be desired, they were sufficiently aligned with the student's needs to guide a teacher in providing the student with instruction (see D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 360-61 [S.D.N.Y. 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]). Thus, overall, the record supports a conclusion that the CSE adequately addressed the student's needs as reflected in the evaluative data available to the CSE with goals that were reasonably calculated to produce educational progress (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

The parents further contend that although writing was the student's area of greatest academic deficit, the March 2011 CSE failed to develop a goal for the student in this area. By teacher estimate, at the time of the March 2011 CSE meeting the student was functioning at a K.8 instructional level for writing (Dist. Ex. 4 at p. 3). Consistent with the parent's assertion, this was the lowest instructional level reported on the student's IEP (see id.). While the March 2011 IEP does include a goal that targets improving the student's graphomotor skills necessary for writing, it does not include a goal related to composing sentences or paragraphs. Thus, the March 2011 CSE should have developed a writing goal for the student in the area of composing sentences or paragraphs; however, in reviewing and considering the goals contained in the IEP and the services provided by the IEP as a whole, in this instance I decline to find that the lack of a goal directed at composing sentences and paragraphs rose to the level of a denial of a FAPE. Overall, the IEP adequately addressed the student's needs as reflected in the evaluative information available to the CSE (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]; see also Bell v. Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008]).

2. 12:1+1 Special Class Placement

The parents assert on appeal that the district's recommendation of a 12:1+1 special class was not appropriate because it was "too large" for the student and the student required "much more 1:1" support and individualized instruction to address the student's learning needs and

distractibility. For the reasons that follow, the hearing record supports a finding that a 12:1+1 special class placement would have met the student's needs.

State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]).

At the time of the impartial hearing, the student was attending JCSE, where she was enrolled in a class of six students (Tr. p. 142). A review of the student's progress reports and related services updates completed by JCSE staff indicates that in this setting, the student had difficulty attending and required prompting and redirection (Dist. Exs. 7; 8; 10 at p. 1). More specifically, the student's teacher at JCSE reported that the student was easily distracted and had difficulty sustaining attention to assigned tasks (Dist. Ex. 10 at p. 1). The student's JCSE teacher further reported that the student required constant redirection to enable her to remain focused and complete assignments (id.). Similarly, the student's occupational therapist reported that during therapy, the student was easily distracted by both auditory and visual stimuli and often required redirection to presented tasks (Dist. Ex. 7). Finally, the student's physical therapist noted that the student had difficulty maintaining eye contact and was easily distracted (Dist. Ex. 9). Similarly, a review of district-generated documents considered by the March 2011 CSE reflects the student's attending difficulties (Dist. Exs. 6 at p. 1; 11 at p. 4). In the April 2010 psychoeducational evaluation, the district school psychologist observed that the student's eye contact was at times inconsistent and that the student showed some distractibility and required some refocusing and redirection (Dist. Ex. 11 at p. 4). The district social worker, who observed the student in a dance activity with a teacher and one other student, reported that the student inconsistently followed directions and on a few occasions the teacher needed to refocus the student because she was looking out the window or around the room (Dist. Ex. 6 at p. 1).

Although the student had difficulty focusing and attending, the hearing record shows that the student had other attributes that positively impacted her ability to learn. In the February 2011 JCSE progress report, the student's special education teacher indicated that the student was generally well behaved and that when she was given responsibility for her own learning she performed "more adequately" (Dist. Ex. 10 at p. 1). The special education teacher also noted that the student responded well to positive reinforcement and verbal praise (id.). In addition, the special education teacher indicated that during reading activities the student was able to work independently for "roughly 20 minutes" (id.). The occupational therapist described the student as cooperative during therapy (Dist. Ex. 7). Likewise, in a January 2011 classroom observation, the district social worker reported that the student waited patiently with the assistant teacher and followed all directives while transitioning from dance to math (Dist. Ex. 6 at p. 1). Additionally, the district psychologist who evaluated the student in April 2010 reported that the student was well-behaved and cooperative (Dist. Ex. 11 at p. 5).

At the time of the March 2011 CSE meeting, information considered by the CSE showed that the student's overall cognitive abilities were at the "borderline level" and the student's academic skills ranged from a late kindergarten to early third grade level (Tr. pp. 63-65; Dist. Exs.

4 at p. 3; 11 at pp. 6-7).[9] The district school psychologist, who served as the district representative during the March 2011 CSE meeting, testified that based on her familiarity with JCSE, the environment in the auditorium, where some of the student's instruction took place, was hectic and noisy and was not good for a student with focusing difficulties (Tr. pp. 93-95; see Tr. p. 97). The district school psychologist further testified that the CSE believed that a 12:1+1 special class was the appropriate ratio for the student (Tr. p. 97). She further described a 12:1+1 special class environment as quiet and structured with minimal distractions(id.). According to the school psychologist, a "typical class profile" for a 12:1+1 class was discussed at the CSE meeting; specifically that the program was for students with learning difficulties and should contain no more than 12 students with a certified special education teacher and a teacher assistant (Tr. pp. 119-120). The CSE did not consider a "more restrictive" placement for the student than the 12:1+1 special class in a community school (Tr. pp. 83-84). Also, based on testimony from the school psychologist, and as indicated in the March 2011 CSE minutes, all areas of the student's functioning were discussed during the CSE meeting and the parent and teacher were in agreement with the goals, the mandates, and the recommendation (Tr. pp. 59, 89; Dist. Ex. 5 at p. 1). The parent also testified that the March 2011 IEP reflected the student developmentally and her deficits (Tr. pp. 232-33). In addition to recommending the student for a special class, the CSE recommended that she be provided with various environmental modifications and human and material resources to address her academic and social/emotional management needs, including refocusing, repetition, redirection, modeling of appropriate behavior, positive reinforcement, and praise (Dist. Ex. 4 at pp. 3, 5).

Accordingly, the evidence in the hearing record supports the conclusion that the student would have received adequate support within a 12:1+1 special class to address her needs. Further, the March 2011 CSE's recommendation of a 12:1+1 special class in conjunction with the recommended related services, annual goals, various environmental modifications, and human and material resources was designed to provide the student with sufficient individualized support such that her IEP was reasonably calculated to enable her to receive educational benefits.

C. Assigned Public School Site

Finally, the parents assert that the assigned public school site was not appropriate for the student because the student would not have been functionally grouped and there was no spot available for the student in the assigned classroom. The district contends that the parents' arguments are speculative. For the reasons explained more fully below, the IHO's decision on this point must be overturned.

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

[9] Based on her review of previous standardized testing conducted in 2007, the school psychologist noted an overall decline in the student's cognitive abilities from average to the borderline level (Dist. Ex. 11 at pp. 7-8). However, the school psychologist noted that the earlier full scale IQ score was a "[p]artial [p]rorated score" that did not include processing speed subtests (id. at p. 8). The psychologist noted that the student's processing skills were "extremely weak" and had a negative impact on her overall functioning (id.). She opined that "some greater cognitive potential [wa]s possible than revealed by present testing" (id.).

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. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013[holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; 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]).[10] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their 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 student did not attend the district's assigned public school site. Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87). 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

[10] 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. 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.

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 parents cannot prevail on their claims that the assigned public school site would not have properly implemented the March 2011 IEP.

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

1. Functional Grouping

With regard to the parents' argument that the student would not have been appropriately grouped with the other students at the assigned school site, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]). Upon review of the hearing record, assuming that the student had attended the assigned public school site, the evidence indicates that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 12:1+1 special class at the assigned school for the 2011-12 school year.

As mentioned above, the student's overall cognitive abilities were at the "borderline level" and the student's academic skills ranged from a late kindergarten to early third grade level (Tr. pp. 63-65; Dist. Exs. 4 at p. 3; 11 at pp. 6-7). The special education coordinator at the assigned public school site testified that the student could have been appropriately grouped at the assigned public school site (Tr. p. 17).[11] The special education coordinator testified that on the first day of school, there were six students in the four-five bridge class consisting of fourth and fifth grade students who were functioning along the same level (Tr. pp. 15-16). The special education coordinator further testified that the student would have been placed in the four-five bridge class because the student's functioning levels were similar to those students (Tr. p. 17). Additionally, the special education coordinator testified that the student's academic performance, learning characteristics, social/emotional performance, and health and physical development were similar to the students in the class (Tr. pp. 18-19). The special education coordinator also noted that the student "would have fit right in" (Tr. p. 19). The special education coordinator testified that there were two or three students in the classroom that also had difficulty with refocusing and redirection (id.). Moreover, the special education coordinator testified that based on the annual goals described in the student's March 2011 IEP, the student's goals were similar to the other students in the classroom (id.). Accordingly, the hearing record does not support a conclusion that the student was denied a FAPE based on the grouping of the student at the assigned school site by functional level.[12]

2. Availability of a Classroom Seat at the Assigned Public School Site

Finally, with respect to the parties' contentions regarding the availability of a seat for the student at the assigned public school site at the beginning of the 2011-12 school year, I note that to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).

In the instant case, the hearing record reflects that the district developed an IEP for the student prior to the beginning of the school year as required by State and federal regulations (Dist. Ex. 4; see 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194). Prior to the beginning of the school year, the district also notified the parent of the district's recommendation of a 12:1+1 special class and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 3). The parent testified that she called the assigned school in August but the school was closed so she notified the district by letter that she would wait until September to visit the school (Tr. pg. 211; Dist. Ex. 12). On September 1, 2011, the parent executed an enrollment contract for the student's attendance at JCSE

[11] The special education coordinator at the assigned public school site described her job title as "IEP teacher"; however, while she testified that she obtained a masters degree in special education she also testified that her only certifications were in general education and administration (Tr. pp. 9-11). Additionally, in describing her role at the assigned public school site, most of her duties involved administration rather than teaching (see Tr. pp. 11-12). Accordingly, for the purpose of having consistent references, she is referred to herein as the special education coordinator.

[12] As further evidence of the speculative nature of claims regarding functional grouping for an unimplemented IEP, the special education coordinator testified that the assigned classroom became full when the in February or March of 2012, and that six students were present on the first day of school (Tr. pp. 15-16; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]).

for the 2011-12 school year (Parent Ex. D). The parent testified that she contacted the assigned public school around the first week of September and the special education cordinator advised her that there were two 12:1+1 classrooms, one being a one-two bridge class and the other being a four-five bridge class, but they were both "closed" and there was no reason to visit the school (Tr. pp. 212, 228-29; Dist. Ex. 13). On September 21, 2011, the parent sent a letter to the district notifying the district that she spoke with the special education coordinator from the assigned public school site and was informed that the two 12:1+1 classrooms were full (Dist. Ex. 13). The special education coordinator testified that she did not recall the phone call with the parent, but that as of September 21, 2011, the four-five bridge class was not full (Tr. pp. 23-24, 29). While I find no reason to disbelieve that the parent may have spoken to the special education coordinator, under the circumstances presented, a telephone conversation is insufficient to find that the district would have failed to offer the student any educational services at all, especially considering that there is nothing in the hearing record to rebut the special education coordinator's testimony that there was space available. These issues are of little moment in any event as the parent enrolled the student at JCSE well before speaking with the special education coordinator and contacted the assigned public school site regarding availability for the student after the school year began (compare Dist. Ex. 13; with Parent Ex. D). Therefore, even if implementation of the March 2011 IEP were a permissible consideration, the evidence supports the conclusion that a seat was available for the student in the assigned public school site on the first day of school.

In view of the foregoing, the hearing record shows that the assigned public school site had a seat available in a 12:1+1 special class with students who exhibited similar academic, behavioral and communication needs as the student, and it further suggests that the assigned school was capable of suitably grouping the student for instructional purposes in compliance with State regulations. Thus, the IHO erred in finding that the district failed to offer the student a FAPE and therefore that determination must be reversed.

VII. Conclusion

Having determined that the IHO erred in finding that the district did not offer the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether JCSE was an appropriate placement for the student or whether equitable considerations support the parents' requested relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *14 [S.D.N.Y. Feb. 20, 2013]). In light of my determinations herein, I need not address the parties' remaining arguments.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 7, 2012 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to fund the cost of the student's tuition at JCSE for the 2011-12 school year.

Dated: **Albany, New York**
December 12, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER