



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-141

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**

Kule-Korgood, Roff & Associates, PLLC, attorneys for petitioners, Andrea M. Santoro, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Jewish Center for Special Education (JCSE) for the 2012-13 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that equitable considerations weighed in favor of the parents' request for relief. The appeal must be dismissed. The cross-appeal must be dismissed.

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

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 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]).

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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on April 26, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (see generally Dist. Ex. 2 at pp. 1-11). The parents disagreed with the recommendations in the April 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year, and as a result, in a letter dated August 22, 2013, notified the district of their intent to unilaterally place the student at JCSE (see Dist. Ex. 8; Parent Ex. L). In a due process complaint notice, dated November 21, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at pp. 1-3).

On December 17, 2012, the parties proceeded to an impartial hearing, which concluded on April 12, 2013, after five days of proceedings (Tr. pp. 1-456).<sup>1</sup> In a decision dated June 25, 2013, the IHO determined that the district offered the student FAPE for the 2012-13 school year, that JCSE was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (see IHO Decision at pp. 9-14).

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

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining that the evaluative information considered and relied upon by the January 2010 CSE was sufficient to develop an appropriate IEP;
2. Whether the IHO erred in determining that the present levels of performance in the April 2012 IEP were sufficient;
3. Whether the IHO erred in determining that the annual goals in the April 2012 IEP were appropriate and specifically addressed the student's needs;
4. Whether the IHO erred in determining that the 12:1+1 special class at a community school was appropriate to address the student's needs; and,

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<sup>1</sup> On January 3, 2013, the IHO issued an interim order on pendency, which found that JCSE—and related services of speech-language therapy, OT, and counseling—constituted the student's pendency (stay-put) placement and directed the district to continue to fund such pendency placement (see Interim IHO Decision at p. 2; Tr. pp. 1-9). On January 4, 2013, the IHO conducted a prehearing conference; although the district did not attend, the IHO proceeded with the prehearing conference and scheduled dates for the impartial hearing (see Tr. pp. 10-19).

5. Whether the IHO erred in determining that the assigned public school site was appropriate for the student.

The parents additionally argue the merits of certain issues that the IHO did not address, including the parents' claim relating to prior written notice, the appropriateness of the promotion criteria, and the appropriateness of the student participating in State and district wide assessments.

## 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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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**

Upon careful review, the evidence in the hearing record reflects that the IHO correctly reached the conclusion that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 9-14). The IHO accurately recounted the facts of the case, addressed the core issues that were identified in the parents' due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 3-14). The decision shows that the IHO considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

In particular, the evidence in the hearing record supports the IHO's determination that the procedural and substantive defects asserted by the parents were either without merit or did not rise to the level of a denial of FAPE. Similarly, a review of the evidence in the hearing record shows that those claims the IHO did not reach would not result in a different outcome in this instance.

Turning first to the issue of whether the evaluative information was appropriate, the evidence in the hearing record shows that the evaluative information available to and considered by the April 2012 CSE included information about the student's academic, communication, language, and attentional needs provided by progress reports, the parents, the student's then-current teacher, and the program director of JCSE (see Tr. pp. 56, 62, 72, 333; Dist. Exs. 2 at p. 11; 3-6; 9). Further review of the evidence in the hearing record shows that the evaluative information available to and considered by the April 2012 CSE was sufficient to develop an appropriate IEP for the 2012-13 school year (see Tr. pp. 56, 62, 72, 333; Dist. Ex. 2 at p. 11; 3-6; 9). Regulations require that 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 S.F. v New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; 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).

With regard to the issue of whether the April 2012 present levels of performance were sufficient to develop an appropriate IEP, a comparison of the evaluative information with the April 2012 IEP shows that the present levels of performance directly and accurately reflected the information available to and considered by the April 2012 CSE (compare Dist. Exs. 3-6, and Dist. Ex. 9, and Parent Ex. C at pp. 2-3, with Dist. Ex. 2 at pp. 1-2). 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]). A review of the evidence in the hearing record shows that the April 2012 CSE utilized input from the parents and JCSE staff, progress reports, as

well as a March 2011 psychoeducational report and a March 2012 classroom observation, to develop the present levels of performance in the April 2012 IEP (Tr. pp. 56, 62, 72; Dist. Exs. 3-6; 9; Parent Ex. C). With regard to the parents' assertion that the student had management needs that were not appropriately included in the April 2012 IEP, the present levels of performance identified a variety of management needs that would appropriately address the student's academic, communication, language, and attentional needs (see Dist. Ex. 2 at pp. 1-2).<sup>2</sup>

Turning next to the parents' claim that the IHO erred in determining that the annual goals were appropriate and addressed the student's needs, the evidence in the hearing record indicates that the student had difficulties in the areas of expressive and receptive language, reading, math, fine motor, visual perceptual, social/emotional, and pragmatic language skills (see Dist. Ex. 2 at pp. 1-2). Consistent with the description of the student's abilities and needs, the April 2012 IEP contained approximately 15 annual goals to address the student's areas of need, all of which included the required evaluative criteria (i.e., 80 percent accuracy, four out of five trials), evaluation procedures (i.e., teacher made materials, class activities, teacher/provider observation), and schedules to be used to measure progress (i.e., one time per month) (id. at pp. 3-6). In view of the foregoing, the evidence in the hearing record supports the IHO's determination that the annual goals in the April 2012 IEP were appropriate for the student based on her identified needs and present levels of performance. 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]).

With regard to the parents' claim that the April 2012 IEP recommendation of a 12:1+1 special class placement at a community school was not appropriate to meet the student's needs, the evidence in the hearing record supports the IHO's determination that the 12:1+1 special class placement was appropriate. State regulation provides that the "maximum class size for special classes containing 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, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). The evidence in the hearing record reveals that the student's learning and management needs were significant enough to interfere with the instructional process; therefore, in accordance with State regulation and in order to address the student's academic, language, and attentional delays, the April 2012 CSE appropriately recommended a 12:1+1 special class placement at a community school (see Dist. Ex. 2 at p. 1-7).<sup>3</sup>

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<sup>2</sup> A comparison of the evaluative information before the April 2012 CSE with the April 2012 IEP present levels of performance indicates that the management needs described in the April 2012 IEP were directly reflective of those discussed in the progress reports available to the April 2012 CSE (compare Dist. Ex. 2 at pp. 1-2, with Dist. Exs. 3-6).

<sup>3</sup> With regard to the parents' contention that the April 2012 CSE predetermined the 12:1+1 special class placement,

Turning next to the parents' contentions regarding the promotion criteria in the April 2012 IEP, neither federal nor State regulations require that an IEP include promotion criteria (see 8 NYCRR 200.4 [d][2]; see also 34 CFR 300.320). State guidance from the Office of Special Education indicates that "[i]f the [CSE] determines that the criteria for the student to advance from grade to grade needs to be modified, the IEP would indicate this as a program modification," and further, that such "information would most appropriately be indicated in the IEP in the 'Supplementary Aids and Services/Program Modifications/Accommodations' section of the IEP" ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Documents," at p. 51, Office of Special Educ. [Apr. 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). Nothing in the April 2012 IEP's description of the promotion criteria alters how instruction should be delivered to the student, and there is no evidence in the hearing record indicating that the promotion criteria would impede the student's ability to receive educational benefits.

With regard to the parents' claim that the district did not provide prior written notice to the parents regarding the April 2012 CSE recommendation to place the student in a larger class than her current setting, the evidence in the hearing record supports the claim that prior written notice was required. It is clear from the hearing record that the parents wanted the student to attend a smaller class size than the 12:1+1 special class placement recommended by the April 2012 CSE (see Tr. pp. 274, 360-61; Dist. Ex. 2 at p. 10). The district was required to provide the parent with prior written notice in conformity with State regulations on the form prescribed by the Commissioner of Education that explains any action that it takes or refuses to take and the basis for that decision (see 34 CFR 300.503[a]; 8 NYCRR 200.5[a]). However, while the district did not provide the parents with prior written notice, the evidence in the hearing record shows that the parents' were aware of the recommendations in the April 2012 IEP by virtue of their attendance at the April 2012 CSE meeting and as evidenced by their correspondence to the district (see Tr. pp. 89, 274, 360; Dist. Ex. 2 at p. 10-11; Parent Ex. L). Furthermore, by final notice of recommendation (FNR), dated July 25, 2012, the district summarized the special education and related services recommended in the April 2012 IEP, and identified the particular school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 8).<sup>4</sup> Consequently, even if the district's failure to provide the parents' with prior written notice constituted a procedural violation, the evidence in the hearing record does not show 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]).

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the evidence in the hearing record shows that the April 2012 CSE considered and rejected a general education setting with special education teacher support services (SETSS) as not supportive enough, as well as considering and rejecting a special class placement at a specialized school as too restrictive (see Tr. p. 79; Dist. Ex. 2 at p. 10; Parent Ex. C at p. 3).

<sup>4</sup> The parents claim that they did not receive the FNR until August 21, 2012; however, the hearing record indicates that the July 2012 FNR was sent to a different address than the one that appeared on the parents' letter dated August 22, 2012 (compare Dist. Ex. 8, with Parent Ex. L). Furthermore, the "events" document indicates that an FNR was re-sent to the parents' new address on August 17, 2012 (see Dist. Ex. 11 at p. 1).

With respect to the parents' claims relating to the assigned public school site, which the parties continue to argue on appeal, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' assertions are without merit. The parents' claims regarding the class size and staff ratio at the assigned public school site and the functional grouping of the students (see Parent Ex. A at pp. 2-3), turn on how the April 2012 IEP would or would not have been implemented, and as it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. L), the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

## **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 for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at JCSE was an appropriate placement or whether equitable considerations 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]). I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.<sup>5</sup>

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
December 10, 2014**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**

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<sup>5</sup> With regard to the parents' claim that the April 2012 IEP recommendation for the student to participate in State assessments was not appropriate, all students with disabilities must be included in State or district-wide assessment programs. If the CSE determines that the student will participate in an alternate assessment on a particular State or district-wide assessment of student achievement, the IEP must provide a statement of why the student cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the student. In this instance, there is no evidence in the hearing record to support the parents' contention that the student could not participate in State assessments ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem., at 53 [Feb. 2010; Revised Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>; see 8 NYCRR 200.4 [d][2][vii]; see generally "The State Alternate Assessment for Students with Severe Disabilities," Office of Special Educ., Policy No. 01-02, available at <http://www.p12.nysed.gov/specialed/publications/policy/alterassess.htm> [Jan. 2005]).