



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-021

**Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

### **Appearances:**

Law Offices of Neal H. Rosenberg, attorney for petitioners, Neil H. Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Neha Dewan, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which found that respondent (the district) correctly determined that the student was ineligible for special education and related services and denied the parents' request to be reimbursed for their son's tuition costs at the Gateway School (Gateway) for the 2009-10 school year. The appeal must be dismissed.

During the 2009-10 school year, the student attended seventh grade at Gateway (Tr. p. 219). According to the hearing record, Gateway is a school for students of average to above average overall intellectual ability who demonstrate some degree of learning disability and have not historically performed in school commensurate with their abilities (Tr. p. 297). Gateway has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities at the elementary level, but has not received such approval at the upper level (see Tr. pp. 72-73; 8 NYCRR 200.1[d], 200.7).

The student has received diagnoses of a nonverbal learning disability, a reading disorder, an attention deficit hyperactivity disorder (ADHD) with inattention, and a generalized anxiety disorder (Parent Ex. N at p. 2). The student's eligibility for special education and related services as a student with an other health-impairment (OHI) is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

## Background

According to the parents, the student attended a private preschool from two and a half to five and a half years of age (Dist. Ex. 12 at p. 3). Although the student initially exhibited separation anxiety upon entering the private preschool, the parents indicated that the student was able to play and socialize well during this time (id.). The student attended kindergarten through fifth grade at a private elementary school where, according to the parents, the student exhibited anxiety related to academic challenges (id.). In fourth grade, he received on-site tutoring by teachers "trained in special education techniques" (Tr. p. 212). The student's father stated that despite this support, the student was "barely getting by" (id.). During the course of that year the student was absent from school for a few days due to an injury (id.; Dist. Ex. 12 at p. 3; Parent Ex. Q at p. 7). Subsequent to the injury, the student refused to return to school and received home instruction for approximately three months (id.). The parents reported that the student received therapy from a psychiatrist and a cognitive behavior therapist in order to transition back to school at the end of his fourth grade year (Dist. Ex. 12 at p. 3; Parent Ex. Q at p. 7).

Following the student's return to school, the parents procured a private psychoeducational evaluation of the student to assess his needs for the upcoming school year (Tr. pp. 211-13; Parent Ex. Q at pp. 3, 7). The psychoeducational evaluation took place over six days, beginning June 18, 2007 and ending July 12, 2007 (Parent Ex. Q at p. 3). The resultant report reflected the results of a battery of tests including the administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), which revealed a full scale IQ of 94, in the average range, and index scores in the low average and average ranges (id.). With regard to academic achievement, the report reflected the student's performance on the administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), which yielded percentile ranks in reading and math subtests that ranged from the low average range to the high end of the average range (id. at p. 6). With regard to social/emotional functioning, the evaluating psychologist indicated that the student displayed "overlapping symptoms" of several disorders that share a central difficulty with regulation and response inhibition (id. at p. 20). The report reflected that the student met the criteria for multiple diagnoses including a nonverbal learning disability, a reading disorder, ADHD with inattention, and a generalized anxiety disorder (id. at pp. 21-23). The evaluator recommended immediate steps to "soften his worry" and facilitate the student's return to school, including working with learning resource center (LRC) support staff; providing academic accommodations such as extra time, preview of key terms, and reducing the volume of homework; as well as continued work with the student's therapist and ongoing monitoring of medication prescribed for attention, anxiety, and depression (id. at p. 22). To address the student's long-term needs, the psychologist recommended a small, comprehensive, highly structured, special education setting for students with language-based disabilities that offered small classes, two teachers in a classroom, and consistent, trained support from all staff (id. at pp. 22-23).

The hearing record reflects that the student returned to his then-current private school for fifth grade during the 2007-08 school year because it was agreed that the emotional stress of removing him from that school was not in his best interest and there was no availability in the special education schools the parents had explored (Tr. pp. 214, 241). According to the student's father, the student continued at his then-current school with the stipulation that he receive a

modified curriculum and support through the school's LRC and take medication to address his anxiety disorder (Tr. pp. 238, 241; Parent Ex. I at p. 4). The student's father indicated that during the student's fifth grade year, he was "barely getting by" and was "just being propped up for the year because [the school] knew he was out of there after fifth grade" (Tr. p. 240).

In a June 24, 2008 letter addressed to whom it may concern, the private psychologist who performed the July 2007 psychoeducational evaluation of the student indicated that she had monitored the student's educational performance during the 2007-08 school year and that the student struggled to meet grade level expectations despite a "substantially modified curriculum" and the support of the LRC at his private school (Parent Ex. Q at p. 24; see Tr. p. 238). She opined that the student's difficulty confirmed the recommendation she had made in her July 2007 report and indicated that the student continued to require a full-time special education program in a small class setting with personnel trained to work with children with learning disabilities (Parent Ex. Q at p. 24).

The hearing record reflects that the parents referred the student to the committee on special education (CSE) for the 2008-09 school year (sixth grade) (Parent Ex. M at p. 2). On July 3, 2008, the student's father wrote to the CSE, provided them with the July 2007 private psychoeducational evaluation report described above, and requested that the CSE accept the report in lieu of an evaluation which was scheduled to be conducted by the district on July 15, 2008 (Parent Ex. Q at p. 2; see Dist. Ex. 12 at p. 1). The parents subsequently participated in a social history interview on July 15, 2008 with a district social worker (Dist. Ex. 12 at p. 1). The social history report reflected that the student had also been scheduled for educational testing at the CSE on that day, but due to "significant anxiety precipitated by academic stressors," the student refused to participate (id. at p. 2). It further reflected the parents' account of the student's developmental history including his anxiety related to academic pressures and transitions, their belief that his poor coping mechanisms lead to avoidance behaviors, and that the student was taking medication to address his anxiety (id.). The social history report reflected that the parents also indicated that the student was well liked and had a "huge cohort of friends" (id. at p. 4). The parents also reported that the student was willing to work hard "'in the right setting'"(id.). The social history report referenced the July 2007 psychoeducational report, noting the student's history of school avoidance and a learning disability, and the parents' request that the student receive "the appropriate program/services to address his academic needs" (id.). The report also indicated that the parents believed that Gateway offered the appropriate support for the student and that the student had been accepted by Gateway for the 2008-09 school year (sixth grade) (id. at pp. 1, 3).

On August 6, 2008, the student's private psychiatrist wrote to the CSE regarding the student's history of an anxiety disorder related to learning difficulties and academic pressures, and the student's recent refusal to participate in the district's July 15, 2008 CSE testing (Parent Ex. M at pp. 1-2). The psychiatrist opined that further attempts to test the student at that time would be harmful to the student and would undermine attempts to transition him to a new school in September (id. at p. 2). He indicated that he believed placement in a full-time special education school in a small classroom with staff who are trained to work with students with learning disabilities and related social/emotional needs was crucial to address the student's

anxiety disorder, and that he agreed with the diagnoses reflected in the private 2007 psychoeducational evaluation report (id.).<sup>1</sup>

The hearing record reflects that the student attended Gateway during the 2008-09 school year (sixth grade) (Dist. Exs. 5 at p. 1; 7 at p. 1; Parent Ex. I at p. 4). The student was reported to have a smooth transition to the new school, a significant reduction in his anxiety level, and was "weaned off" psychotropic medication at the end of the first semester (Parent Ex. I at p. 4).

On June 8, 2009, a district social worker conducted a 50-minute classroom observation of the student to determine if the student required special education services to address areas of academic concern (Dist. Ex. 7 at p. 1). The observation occurred in the student's sixth grade classroom at Gateway in a small group comprised of one teacher and five students, while the students worked individually on an essay and the teacher moved around the room assisting students as needed (id.). The observation report reflected that although the student was initially distracted by a peer, he was refocused by the teacher and worked in a diligent and focused manner, despite other distractions (id. at pp. 2-3). When the student realized other students had completed their work, he worked harder and increased his focus of attention (id. at p. 3). The observation report reflected that it was evident that he wanted to please his teacher (id.). During the observation, the student demonstrated appropriate classroom behavior, raised his hand and waited quietly for the teacher's assistance, was respectful, and followed her recommendations in completing his work (id.). The teacher reported that the student's distracted behavior was not typical, and she attributed it to the fact that they were going on a class trip at the end of the class period (id.). She further reported that the student was doing well academically, completed all assigned work, and was in the mid-level reading group and the higher level group for math and writing (id.). She opined that the student benefited from the 1:1 attention he received in the small class setting and expressed that he might not do as well in a larger class setting (id.).

On June 15, 2009, a district school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 5).<sup>2</sup> The resultant report reflected that administration of the WISC-IV yielded a full scale IQ of 100, indicating that the student's intellectual/cognitive functioning was in the middle of the average range (id. at pp. 8, 11). The student achieved composite scores ranging from high average to low average (id. at pp. 2-3). The evaluator noted that there was no significant difference between the student's verbal comprehension index score and his perceptual reasoning index score (id. at p. 11). The student's academic skills were assessed via administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II), which revealed subtest standard scores that were all within the average range of functioning and grade equivalent scores ranging from 6.8 to 7.8 (id. at pp. 5, 13). According to the evaluation report, the district school psychologist conducted an ability-achievement discrepancy analysis which revealed that the student's actual WIAT-II scores were either above or not significantly different from his predicted scores in all academic areas assessed (id. at p.

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<sup>1</sup> The hearing record does not include evidence regarding whether district testing was completed or whether the CSE met to consider special education programs or services for the student for the 2008-09 school year.

<sup>2</sup> The June 2009 district psychoeducational evaluation was reportedly conducted pursuant to an impartial hearing officer's June 3, 2009 order (Dist. Ex. 5 at pp. 1, 18). The June 3, 2009 prior impartial hearing officer's order is not part of the hearing record.

16). As a result, the school psychologist determined that the student was doing academic work in all areas assessed at or above the level expected or predicted, given his age and intellectual/cognitive ability and that there was no ability-achievement discrepancy in any area (id. at pp. 16, 19). The student's social/emotional development was assessed using projective tests including the Rorschach, the Thematic Apperception Test (TAT), and figure drawing (id. at pp. 2, 17). The evaluation report reflects that student demonstrated the ability for conventional thinking, good reality testing, and a sensitive, caring and loving side; as well a significant need to prove himself, achieve and be successful (id. at p. 17). The district school psychologist reported that the student was able to relate well to others when he felt trusting and secure and that he worked well with the school psychologist during the testing, demonstrating a strong motivation to be successful (id. at p. 19).

At the end of the 2008-09 school year, the student's progress in his sixth grade classroom at Gateway was documented in a report card prepared by his Gateway teachers (Dist. Ex. 8 at p. 1).<sup>3</sup> The report card indicated that the student earned ratings of "M" (meets expectations) or "E" (exceeds expectations) for all skills rated in the areas of reading, writing, and mathematics except for "read[ing] with expression," for which he earned a rating of "W" (working toward expectations) (id. at pp. 1-3). Teacher comments reflected that the student was a diligent and eager worker, had increased his level of participation, was able to advocate for himself, and was "up for challenges" (id.). The teachers indicated that the student utilized a rubric in reading and had begun to use various writing templates and methods of organization to scaffold his writing independently, and that he was able to transfer information learned in a group lesson to independent work given scaffolding and explicit instruction to begin his work (id.). The student's math teacher reported that the student learned best when expectations were clearly defined and understood, positive reinforcement was provided, immediate feedback was given, and when tasks were "success-oriented" (id. at p. 3).

On June 29, 2009, the CSE met for a review of the student and to determine his eligibility for special education and related services (Tr. pp. 116, 118; Parent Ex. O at p. 1). Meeting attendees included the district school psychologist who also served as the district representative, a district regular education teacher, a district special education teacher, an additional parent member, and the student's mother (Tr. pp. 118, 217; Parent Ex. O at p. 2). The Gateway school psychologist and two of the student's Gateway teachers participated telephonically (id.). The academic performance and learning characteristics section of the resultant June 2009 individualized education program (IEP)<sup>4</sup> reflected information from the June 15, 2009 district psychoeducational evaluation and indicated that the student's cognitive and academic functional levels were in the average range (Parent Ex. O at p. 3). With regard to the student's social/emotional functioning, the June 2009 IEP described the student as friendly; personable; having a good sense of humor; respectful; compliant; responsible; able to manage time, advocate for himself, and face a challenge; and as a diligent, engaged, and motivated student (id. at p. 4).

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<sup>3</sup> I note that the report card included in the hearing record is not complete and reflects the student's performance only in the areas of reading, writing, and mathematics (Dist. Ex. 8 at pp. 1-3).

<sup>4</sup> Although the student was found ineligible for special education and related services, the resultant documents issued by the CSE were characterized in the hearing record as the student's IEPs (see Dist. Ex. 9; Parent Ex. O). For purposes of this decision, I will continue to refer to the documents as IEPs.

The IEP also reflected that the student's mother and staff at Gateway indicated that the student was anxious; however, the IEP further reflected that the student's anxiety was not affecting him academically at that time (id.). The IEP also stated that during recent psychoeducational testing the student participated willingly, related well to the evaluator, showed interest in the tests presented, and accommodated well to the full day of testing, although he initially insisted on knowing all about the tests and when he could take breaks (id. at p. 5). The IEP reflected academic management needs including that the student benefited from writing prompts such as scaffolding, outlines and graphic organizers; small group instruction and scaffolding in math; teacher assistance; well structured lessons; and teacher preparation for transitions to help him deal with his anxiety (id. at p. 3). The CSE determined that the student was not eligible for special education and related services and recommended a general education program for the student for the 2009-10 school year (id. at p. 1).

The minutes of the June 29, 2009 CSE meeting noted that the student's mother informed the CSE that the student was seeing a psychiatrist to address his attention deficits and anxiety, but that the parents did not have an updated report from the psychiatrist and there was no other documentation indicating that anxiety affected the student academically (Dist. Ex. 11 at p. 1). The meeting minutes further reflected that the CSE considered a classification of an OHI for the student but ruled it out because there were no medical concerns, no documentation of an anxiety disorder; and since the student was performing at grade level, anxiety was not affecting him academically (id.).<sup>5</sup> The parent insisted that the student was currently in a special education school and needed special education services (id.). The CSE meeting minutes also reflected that the CSE listened to the parent and the Gateway staff and read all of the clinical data presented (id.).

The following day, on June 30, 2009, the parents wrote two letters to the CSE indicating that many of the concerns they had raised at the June 29, 2009 meeting were not adequately addressed, and they requested another CSE review meeting and a placement for the student for the 2009-10 school year (Parent Ex. L at pp. 1-2).

The hearing record reflects that the student attended Gateway for the 2009-10 school year (seventh grade) (Tr. p. 297; Parent Ex. P at pp. 1-9).

On September 1, 2009, the student's psychiatrist wrote a letter to the CSE providing an update of the student's psychiatric care (Parent Ex. N at p. 1). He indicated that since his last communication in July 2008, the student had remained under his psychiatric care for the management of an anxiety disorder and related conditions of a nonverbal learning disability, a reading disorder, and an ADHD with inattention (id. at pp. 1-2). The psychiatrist reported that the student was weaned from psychotropic medication at the end of 2008 and that during the 2008-09 school year, his behavioral and attention needs were successfully managed by the Gateway school psychologist, teachers, and staff members (id. at p. 1). The letter indicated that although the student displayed some maladaptive behavior after discontinuing the medication, he was able to complete a productive school year during which he made academic and emotional

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<sup>5</sup> Although the handwritten CSE meeting minutes are partially illegible, it appears that the CSE also considered whether the student was eligible for special education and related services as a student with a learning disability and concluded he was not (Dist. Ex. 11 at p. 1).

progress (id.). The psychiatrist further reported that the student continued with weekly psychotherapy sessions during the 2008-09 school year to assist him in dealing with stressors associated with school (id.). The psychiatrist maintained his recommendation for placement in a full-time special education school in a small classroom with staff trained in working with a student with learning disabilities and related social/emotional needs (id.).

According to the student's father, a CSE meeting took place in September 2009 but an IEP was not finalized because of a difference of opinion regarding placement (Tr. pp. 246-48).<sup>6</sup> According to the parent, although the district's school psychologist at the meeting agreed to a classification for the student of an OHI, the school psychologist believed that the student's placement should be in a public school with "some specific services" while the parent believed a nonpublic school was more appropriate (Tr. pp. 248-49). The school psychologist reportedly indicated to the parents that in order to justify a recommendation for a nonpublic placement, more detailed information was needed from the student's psychiatrist (Tr. p. 249).

In a letter dated September 28, 2009, the student's psychiatrist provided the CSE with additional information regarding the student's psychiatric and attention problems, and their effect on his ability to function in an academic environment (Parent Ex. I at pp. 2-5). The psychiatrist indicated that he had known the student professionally for over nine years and reiterated the details of the student's history with regard to a learning disorder, attentional problems, and an anxiety disorder characterized by maladaptive coping mechanisms (avoidance and oppositional behavior) (id. at pp. 4-5). He indicated that the student's anxiety resulted in avoidance and opposition, which in turn made it difficult for the student to overcome his learning problems (id. at p. 5). The psychiatrist opined that prior to sixth grade, all educational strategies implemented had proven unsuccessful; including a mainstream small classroom, a small classroom with special education tutoring, and enrollment in a "special education tract" and that even coupled with psychiatric support, these settings proved ineffective and ultimately resulted in the student's "implosion" in fourth grade (id.). The psychiatrist indicated that it was the consensus of the student's teachers, the psychologist who conducted his 2007 psychoeducational evaluation, and himself that the "only correct approach" to help the student was placement in a small nonpublic school with small classroom sizes and staff trained to deal with children with learning and related social/emotional needs (id.). He further indicated that he believed that if the student was placed in a school without that level of support, he would experience academic failure and would require a "restart" of psychotropic medication "in order to prevent a catastrophic psychiatric event" (id.). The psychiatrist added that he believed the student required "at least two more years of well coordinated special education" in order to develop the tools the student needed to overcome his learning needs and grow academically, and that he required ongoing therapy to assist him in developing positive coping mechanisms to deal with his anxiety disorder so that it did not prevent him from learning (id.).

By email and facsimile dated November 5, 2009, the student's father notified the district that he was waiting for the CSE to schedule an appointment to complete an "updated social work

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<sup>6</sup> In a letter and facsimile dated September 4, 2009, the student's father informed the CSE that the student's Gateway teachers would not be available to participate in the CSE meeting scheduled for September 9, 2009, but that the psychologist at Gateway would be available by telephone later that day (Parent Exs. J; K).

intake" and a parental consent form, and he requested that the CSE expedite the appointment in order to proceed with the student's application process (Parent Ex. G at pp. 1-2).

On December 4, 2009, the CSE met at the parents' request to consider additional information provided in the September 28, 2009 letter from the student's psychiatrist and to determine if the student was eligible for special education programs and services (Tr. pp. 132-33; Dist. Ex. 9 at p. 1). Meeting attendees included a district special education teacher who also served as the district representative, a district regular education teacher, the district school psychologist, the student's mother, and an additional parent member (Tr. pp. 133, 265; Dist. Ex. 9 at p. 2). Two of the student's teachers from Gateway participated telephonically (id.). The resultant December 4, 2009 IEP was similar to the June 29, 2009 IEP in that it reflected similar information in the academic and social/emotional performance section and the academic management needs section (compare Dist. Ex. 9 at pp. 3-4, with Parent Ex. O at pp. 3-5). The December 2009 IEP added social/emotional management needs, including reminding the student to structure his time in order to alleviate anxiety, providing praise and positive reinforcement, answering his questions when there were changes in routine, and prompting the student to use strategies to cope with anxiety such as asking for breaks as needed, counting to ten, and taking deep breaths (Dist. Ex. 9 at p. 4). The December 2009 IEP also reflected a medical alert for an ADHD and anxiety (id. at p. 1).

The meeting minutes from the December 2009 CSE meeting reflected that the student's mother reported that the student was no longer taking medication, and that although the letter from the student's psychiatrist indicated that the student exhibited anxiety, his teachers reported that they were not seeing the level of anxiety reported by the psychiatrist (Dist. Ex. 10 at pp. 1-2). The student's teachers from Gateway indicated to the CSE that the student had made "great progress" academically and socially and, although he reportedly felt anxious when things changed or when new information was presented without his knowing ahead of time, he could be helped to cope by the classroom teacher (id.). The meeting minutes reflected that the CSE ruled out a classification of a learning disability because the student demonstrated age appropriate and average academic and cognitive ability, and also ruled out a classification of emotional disturbance because the student did not exhibit any behavior problems and reportedly got along with peers and teachers (id. at p. 2). The CSE also ruled out a classification of an OHI because the student was healthy and although he experienced anxiety and an ADHD, both could be managed by the classroom teacher in the general education environment (id.). The CSE explained to the parent that the student did not have an "educational handicapping condition" because his anxiety and attention deficits were not adversely affecting him academically (id.). The meeting minutes reflected that the parent and Gateway personnel were "allowed to express their thoughts and concerns," and that they felt the student should be classified as OHI; however, the CSE indicated that the student's needs could be addressed by implementing strategies in the general education environment (id.). The December 2009 CSE ultimately determined that the student was ineligible for special education and related services (Dist. Ex. 9 at p. 1).

In a letter dated February 16, 2010 and transmitted to the CSE by facsimile on February 18, 2010, the parents indicated they had additional information relevant to determining the student's educational plan and requested another CSE meeting to discuss his educational needs (Parent Exs. E; F). In a letter dated May 29, 2010 and transmitted to the CSE by facsimile on

June 3, 2010, the parents informed the CSE that due to an "unavoidable scheduling conflict" they would be unable to attend the CSE meeting scheduled for June 16, 2010 and requested that the meeting be rescheduled (Parent Exs. C; D).

On June 16, 2010, the parents again contacted the CSE requesting a CSE review and placement for the student for the 2010-11 school year (Parent Exs. A; B). The CSE convened on June 25, 2010 to discuss the student's eligibility for special education and related services for the upcoming school year (Dist. Exs. 2 at p. 1; 3 at pp. 1-2; 4).<sup>7</sup>

The student's performance at Gateway during the 2009-10 school year was reflected in a report card dated June 2010 (Parent Ex. P at pp. 1-9). The report card showed that the student earned ratings of "meets expectations" (M) or "exceeds expectations" (E) in all areas rated for all subjects during his third semester at Gateway (id.).

### **Due Process Complaint Notice**

The parents filed a due process complaint notice dated June 29, 2010, in which they alleged that the June 2009 CSE failed to find the student eligible for special education and related services and therefore failed to provide a free appropriate public education (FAPE); failed to consider the reports and recommendations of people working with student that detailed his need for a small special education class and school to address his academic and social/emotional needs; failed to comply with appropriate procedures in conducting the CSE meeting; and failed to appropriately consider the evaluative data submitted by the parents reflecting the student's learning, attention, and social issues (Dist. Ex. 1). The parents further alleged that the district failed to comply with mandated IEP timelines, and therefore failed to provide a FAPE, by not holding a review until December 4, 2009, after it was requested by the parents on June 30, 2009 (id.). The parents also alleged that the December 2009 CSE failed to find the student eligible for special education and related services; "failed to comply with appropriate procedure;" and failed to consider the reports and recommendations of people working with student that detailed his need for full-time special education and how the progress he was making was due to the individualized special education he was receiving at the time of the review (id.). The parents again alleged that the district failed to comply with mandated IEP timelines, and therefore failed to provide a FAPE, by not scheduling a review until June 16, 2010, after it was requested by the parents on February 16, 2010 (id.). The parents alleged that the district failed to offer the student a FAPE in the 2009-10 school year as the student needed a small nurturing school and a small class environment with full-time special education to make academic and social progress (id.). As a proposed resolution, the parents requested that the district pay the costs of the student's tuition for Gateway, as well as transportation and related services (id.).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on September 13, 2010 and concluded on November 17, 2010, after three days of proceedings (Tr. pp. 1-341). In a decision dated January 25, 2011, the

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<sup>7</sup> The June 2010 CSE found the student to be ineligible for special education and related services and recommended general education with no special education services (Dist. Exs. 2-3).

impartial hearing officer found that the district correctly determined that the student was not eligible for special education and related services and denied the parents' request for reimbursement of the student's attendance at Gateway (IHO Decision at pp. 14-15). The impartial hearing officer noted in his decision that the "relevant testimony proffered by the parties in this proceeding [was] significantly sparse" (id. at p. 7). He identified the issue before him as whether the information that the June 2009 and December 2009 CSEs had before them at the time of the meetings supported a finding that the student did not require special education and related services and, therefore, was ineligible to receive them (id. at p. 8).

Regarding the June 2009 CSE meeting, the impartial hearing officer found the composition of the CSE to be proper (IHO Decision at p. 8). Next, he found that the parents had raised the issue of whether the district complied with appropriate procedures in conducting the CSE meeting, and that the failure of the district to obtain a physical examination and a social history of the student, in accordance with State regulations, were procedural inadequacies that should not have occurred but did not rise to the level of depriving the student of a FAPE (id. at pp. 9-11). The impartial hearing officer noted that the failure of the June 2009 CSE to have before it certain other documents relating to the student's health was "unfortunate," but he could not speculate on why those documents were not before the CSE (id. at p. 11). He determined that to the extent that the June 2009 CSE was aware of the student's attention or anxiety concerns, it was correct in determining that those concerns did not adversely affect the student's educational performance based on the information that the CSE had before it (id. at pp. 11-12). The impartial hearing officer therefore found that the June 2009 CSE correctly determined that the student was not in need of special education and related services (id. at p. 12). He also found that the district granted the parents' request to have the June 2009 CSE's determination reviewed, and that review was held in late September 2009 (id. at p. 13).

Regarding the December 2009 CSE meeting, the impartial hearing officer stated that the CSE reiterated its prior determination that the student was ineligible to receive special education and related services since, while the student might have been displaying some anxiety, the anxiety was not having an adverse affect on his educational performance (IHO Decision at pp. 13-14). He found that the December 2009 CSE again made the appropriate determination as it was consistent with applicable provisions of law (id. at p. 14). The impartial hearing officer found "all other challenges" by the parents to the actions of the CSE and the district to be without merit and, since the district correctly determined that the student was ineligible for special education and related services, denied the parents' claim for tuition reimbursement (id.).

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

This appeal by the parents ensued. The parents allege that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2009-10 school year, maintaining that he failed to adequately consider the district's procedural errors and how those errors created a denial of a FAPE, and that his stated grounds for his decision were erroneous. The parents request that the decision of the impartial hearing officer that the district offered the student a FAPE for the 2009-10 school year be overturned. The parents also seek determinations that their unilateral placement of the student was appropriate and that equitable considerations

support an award of tuition reimbursement.<sup>8</sup> Specifically, the parents allege that the impartial hearing officer erroneously determined that the student was ineligible for special education and related services because his academic performance was not adversely affected at Gateway. Moreover, the parents contend that the CSE failed to consider the "substantial documentation and medical opinions detailing [the student's] need for full[-]time special education," and that the lack of a social history or physical examination denied the student a FAPE. The parents also contend that the student's anxiety was not affecting his academics only because he was attending "Gateway's special education individualized program and smaller class size."

The district answers and denies many of the parents' allegations. The district alleges that it properly determined that the student did not require special education services, specifically arguing that the CSE was correct in determining that the student was not disabled and that the impartial hearing officer correctly determined that the district's alleged procedural errors did not result in a denial of a FAPE. The district also alleges that the parents' unilateral placement was inappropriate as Gateway was overly restrictive and the student required more mainstreaming opportunities. Further, the district alleges that the equities in this case favor the district because the parents did not truly consider a public school placement, the parents failed to provide the requisite notice of unilateral placement, and they did not express specific concerns with the student's IEP. The district requests dismissal of the parents' petition.

### **Applicable Standards**

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

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

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<sup>8</sup> Although the parents state that the impartial hearing officer erred in finding that the parents were not credible witnesses, they do not further develop this argument in their petition.

of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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]). 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; 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **Discussion**

### **Relevance of Testimony at the Impartial Hearing**

As an initial matter, I note that it is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074). An impartial hearing officer may limit examination of a witness whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]). In this matter, the impartial hearing officer noted that the "truly relevant testimony proffered by the parties in this proceeding [was] significantly sparse" (IHO Decision at p. 7). Upon review of the testimony at the impartial hearing, I note that the impartial hearing officer permitted a substantial amount of testimony at the impartial hearing regarding the year following the school year at issue in this case (2010-11), and in addition, multiple exhibits germane only to the subsequent school year were entered into evidence (see Tr. pp. 23-103; Dist. Exs. 2-4; Parent Exs. A-D). I remind the impartial hearing officer of his responsibility to develop an adequate hearing record containing information that is relevant to the matters at issue while appropriately limiting testimony and documentary evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]-[e]).

### **Evaluation - Adequacy**

I will now address the parents' claim that the impartial hearing officer failed to consider the district's procedural errors and how those errors resulted in a denial of a FAPE. The parents allege that the lack of a social history and a physical examination of the student amounted to a denial of a FAPE for the 2009-10 school year. The district identified the June 2009 CSE review of the student as an "initial" review, which characterization was noted by the impartial hearing officer (Tr. pp. 116-18; Dist. Exs. 5 at p. 1; 7 at p. 1; Parent Ex. O at p. 2; IHO Decision at p. 10).<sup>9</sup> State regulations require that an initial evaluation must include at least

- (i) a physical examination in accordance with the provisions of sections 903, 904 and 905 of the Education Law;

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<sup>9</sup> I note that the impartial hearing officer appears to have misstated the date of the June 2009 CSE meeting as June 2008 in his decision (see IHO Decision at p. 10).

(ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student, pursuant to paragraph (2) of this subdivision, that further evaluation is unnecessary;

(iii) a social history;

(iv) an observation of the student in the student's learning environment (including the regular classroom setting) or, in the case of a student of less than school-age or out of school, an environment appropriate for a student of that age, to document the student's academic performance and behavior in the areas of difficulty; and

(v) other appropriate assessments or evaluations, including a functional behavioral assessment for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b]).

The impartial hearing officer determined that the failure of the district to obtain a physical examination and a social history of the student did not constitute a denial of a FAPE. As discussed in detail below, I agree with his conclusion.

Regarding the social history, the hearing record reflects that the district had previously conducted an "Initial Social History" of the student on July 15, 2008 (Dist. Ex. 12). The parents acted as the informants for the social history (*id.* at p. 1). The hearing record reflects that the student's mother was in attendance at the June 2009 and December 2009 CSE meetings (Tr. pp. 118, 133, 217, 265; Dist. Ex. 9 at p. 2; Parent Ex. O at p. 2). The hearing record also reflects that the parent was given the opportunity to participate in those meetings and provided information regarding the student (*see* Dist. Exs. 10 at p. 2; 11). The CSE had available to it at the time of the June 2009 and December 2009 meetings both an adequate source from which to obtain social history information and the information that would likely have been contained in a 2009 social history update. I find that in this case, the student was not deprived a FAPE based on the lack of a 2009 social history.

Regarding a physical examination, the hearing record reflects that the student had a physical examination in February 2008 (Dist. Ex. 12 at p. 2). A reported summary of the physical examination, which was contained in the district's July 2008 initial social history, reflected that the student did not wear glasses, did not have asthma or allergies, had a good appetite, and had no sleep disturbances (*id.*). It also reflected that the student took medication in the "p.m." to address anxiety (*id.*). The June 2009 IEP reflects that the student was healthy and that his hearing and vision were adequate (Parent Ex. O at p. 6). The December 2009 IEP reflected that the student was reported to be in good health, was of age appropriate physical development, did not have any history of asthma or seizures that were treated, had no seasonal

allergies, was not on medication for attention and focusing difficulties or for anxiety, had hearing and vision reported within normal limits, had his immunizations up to date, and had no history of hospitalizations or major accidents that would prevent him from participation in school activities (Dist. Ex. 9 at p. 6). The hearing record does not reflect that the student had physical needs that required special education services, nor have the parents made such an allegation. Based on the information contained in the hearing record, I find that the evidence does not support the conclusion that a new social history and a new physical examination of the student were required for the CSE's 2009 reviews of the student's eligibility to receive special education services and therefore did not result in a denial of a FAPE for the 2009-10 school year.

### **CSE Meeting**

The parents allege that the CSE failed to consider documentation and medical opinions detailing the student's need for full-time special education. Specifically, the parents reference an August 2008 letter from the student's treating psychiatrist and a psychoeducational report from a 2007 private evaluation of the student (Parent Exs. M; Q at pp. 3-23). As stated above, State regulations set forth what must be included in an initial evaluation of a student (8 NYCRR 200.4[b]). Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 C.F.R 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926, 931 [D. Conn. 1992]; aff'd, 10 F.3d 87, 90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at \*19 [D. Minn.]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

The hearing record reflects that the June 2009 CSE considered the district's June 15, 2009 psychoeducational evaluation, the June 8, 2009 classroom observation of the student at Gateway, a teacher report, and input from the student's mother and Gateway staff (Tr. pp. 118-19, 122, 124, 129, 130; see Dist. Exs. 7 at p. 3; 11; see also Parent Ex. O at pp. 3-4).<sup>10</sup> The hearing record also reflects that, in addition to the documents the CSE had at the time of the June 2009 CSE meeting; the December 2009 CSE considered a September 28, 2009 letter from the student's psychiatrist and further input provided by the student's mother and his teachers at Gateway (Tr. pp. 135-36; Dist. Exs. 9 at pp. 3-4; 10 at pp. 1-2). The hearing record reflects that the June 2009 and December 2009 CSEs considered adequate evaluative data in its review of the student's eligibility for special education services. Accordingly, I find that the documentation considered by the June and December 2009 CSEs was sufficient to render a determination as to the student's eligibility to receive special education and related services and did not lead to a denial of a FAPE for the 2009-10 school year.

### **Special Education Eligibility – Other Health-Impairment**

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<sup>10</sup> The "teacher report" referred to in testimony by the school psychologist who conducted the June 2009 CSE meeting included a portion of the student's 2008-09 report card from Gateway, which reflected the student's performance in reading, writing, and mathematics (Tr. pp. 116-18, 122; Dist. Ex. 8 at pp. 1-3).

I now turn to whether the district properly determined that the student was not eligible to receive special education services. The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Bd. of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

A child with a disability having an OHI, pursuant to federal regulations, means "a child evaluated . . . as having . . . an other health impairment . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a][1]). OHI, in turn, is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

(34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at \*9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294 [S.D.N.Y. 2010]; Application of the Dept of Educ., Appeal No. 08-042; Application

of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]; see also K.M. v. Wappingers Cent. Sch. Dist., 2010 WL 451046 [S.D.N.Y. Feb. 9, 2010]; A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist., 2010 WL 126034 [E.D.N.Y. Jan. 8, 2010]).

In this case, the hearing record reflects that the student's mother informed the June 2009 CSE that the student was seeing a psychiatrist for an ADHD and anxiety although the CSE did not have medical documentation of the student's anxiety at that time (Tr. pp. 121-124; Dist. Ex. 11). The hearing record also reflects that the December 2009 CSE considered the September 28, 2009 letter from the student's psychiatrist which contained such medical documentation (Tr. p. 135; Dist. Exs. 9 at pp. 3-4; 10 at pp. 1-2). Testimony by the school psychologist who attended both the June and December 2009 CSE meetings indicated that the parent believed that the student should be classified as OHI due to his anxiety and ADHD (Tr. pp. 122-23, 137). The district does not dispute that the student has ADHD and generalized anxiety that results in limited alertness with respect to his educational environment, and I am persuaded by the hearing record that, the student met the first portion of the OHI criteria for classification as a student with an OHI.

#### **Educational Performance – Adverse Affect**

I now turn to the second portion of the OHI criteria, whether the student's educational performance was adversely affected by his ADHD or anxiety, which inquiry must be made by a CSE "even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]). With regard to the student's academic performance, the June 15, 2009 psychoeducational testing completed by the district demonstrated that the student was performing solidly within the average range of functioning in all academic areas tested by the WIAT-II, as evidenced by percentile ranks ranging from 45 to 58 (Dist. Ex. 5 at p. 5). The corresponding grade equivalents for the student's performance reflected that, at the time of the testing at the end of sixth grade, the student was functioning at a grade equivalent of 6.8 in reading comprehension and spelling; 7.0 in numerical operations; 7.5 in written expression; 7.7 in math reasoning; and 7.8 in word reading (*id.*). I note also that the ability-achievement discrepancy evaluation included in the psychoeducational report indicated that the student was doing academic work in all areas assessed at or above the level expected or predicted given his age and his average intellectual-cognitive ability, and that there was no ability-achievement discrepancy noted in any area (*id.* at pp. 7, 16, 19).

The student's 2008-09 end of year report card from Gateway confirmed that at the time of the June 2009 CSE meeting, the student was demonstrating an appropriate level of work in the classroom setting (Dist. Ex. 8 at pp. 1-3). As noted above, the report card reflected that the student almost exclusively earned ratings of "meets" or "exceeds" expectations (*id.*). The report card also reflected that the instructional levels of the students in the student's reading group

ranged from mid-fifth to mid-sixth grade, and that the student received ratings of "exceeds" expectations for seven of thirteen reading areas at this instructional level (id. at p. 1). With regard to mathematics, the instructional level of the students in the student's math group ranged from sixth through seventh grade, and he received ratings of "meets" expectations for six of seven math areas and "exceeds" expectations for the seventh area (id. at p. 3) I find that the student's school performance is not inconsistent with the WIAT-II grade equivalents discussed above, and that both measures indicate that the student was demonstrating academic success (see Dist. Ex. 5 at p. 5; see also Dist. Ex. 8 at pp. 1-3).

As previously noted, teacher comments in the student's 2008-09 report card and input provided by the Gateway teachers at the December 2009 CSE meeting reflected that the student's academic performance had not been adversely affected and that the student had made progress (Dist. Exs. 8 at pp. 1-3; 9 at p. 3; 10 at p. 1). Additionally, the district's June 2009 classroom observation report indicated that the student's teacher reported that the student was typically focused, worked on tasks in a diligent manner, and was doing well academically (Dist. Ex. 7 at p. 3). I note that the observation report does not reflect that the student exhibited anxiety during the observation or that the student typically exhibited anxiety (see id. at pp. 1-3).

The hearing record also does not support that the student's social/emotional functioning was adversely affected by his ADHD or anxiety. The December 2009 IEP reflects that Gateway staff reported that the student was friendly, respectful, compliant, and had a good sense of humor (Dist. Ex. 9 at p. 4). The meeting minutes of the December 2009 CSE meeting further reflected that both of the student's teachers from Gateway stated that the student had made progress socially, and that he had friends and demonstrated a positive and playful nature (Dist. Ex. 10 at p. 1).

In considering the totality of the evidence, I am not persuaded by the September 28, 2009 letter from the student's psychiatrist with regard to the purported effect of the student's anxiety upon his academic performance (see Parent Ex. I at pp. 2-5). Although the psychiatrist's description of the student indicated that as academic pressures increased, the student exhibited increased anxiety and further "academic underperformance" due to work avoidance and oppositional behavior, neither the letter nor the hearing record included documentation of the student's academic performance during this time that would support the psychiatrist's description of the student with regard to this issue (id. at pp. 3-4). In contrast, the student's Gateway teachers reported that they did not see the level of anxiety reported by the psychiatrist and that, although he felt anxiety when things changed, the student could be helped to cope by the classroom teacher (Dist. Ex. 10 at pp. 1-2). The Gateway psychologist also testified that the student's oppositional behavior was directed toward his parents and not toward staff at Gateway, and that the student did not exhibit oppositional behavior at school (Tr. pp. 331-32).

In his September 28, 2009 letter, the student's psychiatrist referenced a psychoeducational evaluation that was completed after the student finished fourth grade in which the student's performance on a battery of academic testing yielded scores ranging primarily from the low average range to the high average range (Parent Exs. I at p. 3; Q at p. 6). I note that despite these scores, the evaluator determined that the student exhibited verbal and nonverbal learning disabilities, a reading disorder, an ADHD, and a generalized anxiety disorder, and that the

evaluator recommended a "full service special educational setting" (Parent Ex. Q at pp. 22-23). Moreover, although more recent testing in June 2009 again reflected that the student's academic performance was within the average range and the student's 2008-09 report card indicated an overall successful academic year, the student's psychiatrist continued to opine that "the student's anxiety still pose[d] a serious obstacle to his academic development" (Parent Ex. I at p. 4).

I find that the hearing record supports the impartial hearing officer's determination that the student's educational performance was not adversely affected by the student's needs related to attention or anxiety. I also find that the evidence in the hearing record supports the conclusion that the student's educational performance would not have been adversely affected in a general education setting. The hearing record shows that the type and level of assistance that the student required to address his anxiety could have been provided in a general education setting. Testimony by the district's school psychologist reflected that successful teaching strategies utilized by the student's Gateway teachers included outlining, graphic organizing, and scaffolding to assist the student with writing; small group instruction and scaffolding or breaking down problems in math; teacher assistance and well structured lessons; and opportunities to ask questions in order to prepare for and frame what was coming next to help the student cope with his anxiety (Tr. pp. 127-28; see Parent Ex. O at p. 3). The district's school psychologist testified that all teachers working with the student would be alerted to make sure they continued to help the student build his personal strategies for handling anxiety (Tr. p. 128). Testimony by the Gateway psychologist indicated that in addition to the strategies noted above, the student also benefited from the use of an agenda and checklists to structure his time, periodic refocusing, and reassurance (Tr. pp. 322-24). Similar to the testimony of the district's school psychologist, the Gateway psychologist testified that a regular education teacher would have the skills to utilize these strategies and that many students in the general education population need some or all of these supports at some point in their academic career (Tr. pp. 324-26). He further testified that it was his professional opinion that the student would have experienced some growth without the support that he received at a school like Gateway, albeit not as much (Tr. pp. 312-13).

The hearing record also reflects that the student was able to independently employ a variety of strategies to support himself academically, and therefore reduce his anxiety. At the time of the June 2009 CSE meeting, the student was reported to have the ability to advocate for himself and to tell the teacher when something did or did not work for him; apply writing templates on his own; create his own outline and use it to organize information on a topic; listen attentively; participate in class by offering his own ideas and consider others' ideas thoughtfully; transfer information learned in a group lesson to independent work using scaffolding; and apply the structure of solving one and two-step algebraic equations, referring to his notes when he got "stuck" (Dist. Ex. 8 at pp. 1-3).

Based on the above, I am persuaded that the hearing record demonstrates that the student was able to participate in the general education environment without adverse effect on his educational performance.

## Need for Special Education

Even assuming for the sake of argument, that the student met the criteria for OHI insofar as his educational performance was adversely affected by his ADHD or anxiety, and thereby fell under one of the 13 enumerated disabilities under the IDEA, the hearing record does not show that "by reason thereof" he needed special education and related services within the meaning of the IDEA (20 U.S.C. §1401[3][A]; see Educ. Law § 4401[1], [2][k]; J.D., 224 F.3d at 66; Maus, 688 F. Supp. 2d at 295; A.J., 679 F. Supp. 2d at 306; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 639-40 [7th Cir. 2010]). As previously discussed, at the time of the 2009 CSE meetings the student achieved scores on standardized testing within the average range of academic functioning, was meeting or exceeding expectations in all core academic subject areas in school, and was demonstrating the ability to utilize strategies to successfully reduce his anxiety related to academics, doing so independently at times (see Dist. Exs. 5 at p. 5; 8 at pp. 1-3). With regard to his social/emotional functioning, the hearing record demonstrates that the student's Gateway teachers believed that the student had made progress socially, had friends, exhibited a positive playful nature and a good sense of humor, and was friendly, respectful and compliant (Dist. Exs. 9 at p. 4; 10 at p. 1). I note also that the hearing record does not reflect that the student required counseling services during the 2009-10 school year while at Gateway (Tr. pp. 337-38). Based on the above, the evidence does not lead me to the conclusion that the student needed or was eligible for special education programs and services during the 2009-10 school year.

## Conclusion

In accordance with the forgoing determinations, the hearing record supports the impartial hearing officer's decision that the district did not deprive the student of a FAPE in determining that the student was not eligible to receive special education and related services as a student with an OHI during the 2009-10 school year. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
April 22, 2011

  
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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**