



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-144

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] School District

Appearances:

Harris Beach PLLC, attorneys for respondent, David W. Oakes, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational programs and services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2011-12 school year is appropriate. The appeal must be dismissed.

At the time the impartial hearing convened in September 2011, the student had completed ninth grade at a district high school, where, among other classes, he had been enrolled in a ninth grade integrated co-teaching (ICT) English class (Tr. pp. 44, 141-43; Dist. Ex. 7 at p. 1).^{1, 2} The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

¹ "Integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). The terms "ICT", and "co-taught" are used interchangeably in the hearing record to describe the student's program for the 2010-11 school year. For consistency within this decision, I will use the term ICT.

² Pursuant to pendency, the student has continued in an ICT class for tenth grade English (see Tr. p. 255).

Background

Regarding the student's educational history, he was reportedly enrolled in a multigrade self-contained English class for sixth and seventh grade, which had a student-to-teacher ratio of 12:1 (Tr. pp. 246, 247, 252, 256, 259; see Parent Exs. 3; 4). His sixth and seventh grade math classes were taught by a single teacher and there were two persons assigned to the student's social studies and science classes (Parent Exs. 3; 4). In eighth grade (2009-10), the student was enrolled in ICT classes in English, social studies, and science; a 15:1+1 special class for "core support;" a 15:1+1 special class for reading and writing support due to the student's participation in the ICT English class; and he also received speech-language therapy (Dist. Exs. 14 at pp. 2, 3-4, 11; 13 at pp. 3, 4, 11).³ During eighth grade, the student was also enrolled in a Regents level math class (Parent Ex. 2).

The CSE convened on November 4, 2010 for the student's annual review and to develop an individualized education program (IEP) for his ninth grade (2010-11) school year (Dist. Ex. 7). The CSE recommended that the student attend an ICT class for English and social studies, resource room two times per day for 40-minutes per session, and a 15:2 special class for math (id. at p. 1). The IEP also recommended multiple program modifications, services and supports including a "hard copy" of notes to be given to the student whenever notes were taken; modified curriculum in reading, writing, and math; revised test length and format on teacher-generated tests; accommodations regarding homework; and preferential seating (id. at p. 2). The IEP recommended that the student have access to a word processor and that a speech-language consultation be provided to school personnel, as well as a service coordinator (id.). The IEP further recommended multiple testing accommodations (id. at p. 3).

During ninth grade (2010-11), the student attended a general education 8:1 ICT Regents level English class with 12 to 13 students (Tr. pp. 44, 46; Dist. Ex. 7 at pp. 1, 3). The student's other ninth grade classes included a general education 8:1 ICT Regents level social studies class, a 15:2 special class in math, a three-semester general education earth science class, a 5:1 resource room twice per day for 40 minutes each to support content area skills, concert band, a leadership development seminar, and physical education (Dist. Exs. 5; 7 at pp. 1, 3, 9).

The CSE convened on June 7, 2011 for the student's annual review and to develop his IEP for his tenth grade (2011-12) school year (Dist. Ex. 4).⁴ The June 2011 CSE recommended that the student be placed in a special class for English and math with a student-to-teacher ratio of 15:1 (id. at pp. 11-12). The CSE also recommended an ICT class for social studies, direct and indirect consultant teacher services once per week for two hours in the student's science class, resource room (5:1) once per day for 40 minutes each, and a 5:1 "communication" resource room twice per week for 40 minutes each (id.).

³ The November 24, 2009 CSE increased the frequency of the student's 15:1+1 special class for "core support" as the CSE believed that the student needed such additional support to be successful in his "co-taught" classes (Dist. Ex. 13 at pp. 1, 11).

⁴ The CSE previously met on May 5, 2011 (Dist. Ex. 6).

The June 2011 IEP contained detailed information regarding the student's present levels of performance and individual needs relating to his academic achievement, functional performance, and learning characteristics; including information relating to skills and/or abilities in mathematics, reading, speech-language, writing, social development, physical development, and management needs (Dist. Ex. 4 at pp. 3-9). The June 2011 IEP also included annual goals in the areas of reading, writing, mathematics, speech-language, and social/emotional skills (id. at pp. 10-11). It also included recommendations for program modifications and accommodations, as well as testing accommodations (id. at pp. 12-15). Additionally, the June 2011 IEP included long-term goals for living, working, and learning, as well as transition activities (id. at pp. 10, 15).

Due Process Complaint Notice

In a due process complaint notice dated June 13, 2011, the parents asserted that the student was being moved into a "multi-grade special class" for tenth grade English (Dist. Ex. 1 at p. 2). The parents further asserted that this was a "higher level of service when he [had] been successful in a co-taught setting" for ninth grade and that there was no data to support an increase in services (id.). According to the parents, the student preferred to be in the ICT English class, the special class would repeat material from his ninth grade class, and the special class was "disproportionately male" (id.). As a proposed solution, the parents requested that the student be placed in an ICT setting for English where "leveled readers and inclusive strategies" would be used "to achieve success," and that he be provided with one to two hours of 1:1 writing tutoring weekly (id.).

In a response to the parents' due process complaint notice dated June 21, 2011, the district detailed its reasons for recommending a special class for English for the 2011-12 school year (Dist. Ex. 3). Among other things, the district contended that while the student received passing grades in his ninth grade ICT English class, the CSE determined that an ICT English class for tenth grade would not be appropriate because of the student's difficulties organizing his ideas, working with abstract information, and recalling information that he has previously worked on, as well as his "need for considerable individual support" (id. at p. 1). According to the district, the tenth grade Regents curriculum was more difficult than the ninth grade curriculum and the CSE determined that the student's skills were comparable to the other students who were in the tenth grade special class for English (id.). The district further asserted that individualized writing support would be provided in the special class for English; therefore, it was unnecessary that weekly 1:1 writing tutoring be included in the student's IEP (id.). Moreover, the district asserted that the CSE "carefully considered" the parents' input at the CSE meetings and summarized the information that the CSE considered in making its recommendations (id. at p. 2). The response further indicated that the district was in the process of working with the parents regarding a resolution meeting and that the district hoped that the matter could be resolved without the necessity of a hearing (id.).

Impartial Hearing Officer Decision

The impartial hearing was held on September 9, 2011 (Tr. pp. 1, 3-4, 272).⁵ In a decision dated September 26, 2011, the impartial hearing officer ordered that the student be placed in a special class for English during the 2011-12 school year and found that the district met its burden to show that the June 2011 IEP provided the student with a free appropriate public education (FAPE) (IHO Decision at p. 2). The impartial hearing officer further found that the district's recommendation to place the student in a 15:1 special class for English for the 2011-12 school year was reasonably calculated to provide the student with educational benefits (*id.* at p. 9). The impartial hearing officer concluded that since the student was beginning tenth grade in the 2011-12 school year and was "so far below grade level skills in English," it was "critical" for him to be in a special class (*id.*). The impartial hearing officer concluded that the student "must be taught starting at his current skills level" and provided with "support to develop from that level," and that this was the only way that the student would have "any reasonable chance to develop sufficient skills" (*id.*). With respect to the tenth grade ICT English class requested by the parents, the impartial hearing officer concluded that the evidence showed that the student would not benefit educationally from instruction in such a class because even with extensive modifications, services, and supports, the student "would be lost and faced with instruction and expectations far beyond his abilities and skills" (*id.*).

The impartial hearing officer further concluded that the recommended placement in the English special class for tenth grade was also the least restrictive environment (LRE) for the student (IHO Decision at p. 10). The impartial hearing officer determined, among other things, that: (1) the student "did not meet his IEP goals" in his ninth grade ICT English class; (2) the district's school and its staff made "consistent and reasonable efforts" to accommodate the student in the ICT general education setting by, among other things, modifying the curriculum and providing 1:1 assistance; (3) the educational benefit to the student in the general education ICT setting desired by the parents would be "insignificant," but in the special class recommended in the June 2011 IEP, the student would be "likely to reach his IEP goals;" (4) the students in the special class were more similar to the student in their academic needs and abilities than were the students in the general education ICT setting; and (5) if the student were to be included in a general education setting for tenth grade, there would be "little likelihood of negative educational effect" on the student's nondisabled classmates (*id.*).

Appeal for State-Level Review

The parents appeal the decision of the impartial hearing officer to place the student in a special class for English during the 2011-12 school year and request that the student remain in an ICT class and be provided with one hour of tutoring for writing per week. The parents contend that the impartial hearing officer's decision did not address their request in the due process complaint notice for tutoring and also that the impartial hearing officer showed bias. With respect to the recommended tenth grade special class for English, the parents allege that: (1)

⁵ Although the impartial hearing officer states in her decision that the parties held a prehearing conference on July 25, 2011 (IHO Decision at p. 1), no record of the conference appears in the hearing record. I remind the impartial hearing officer of her obligation to enter a transcript or summary of the prehearing conference into the hearing record (8 NYCRR 200.5[j][3][xi]).

contrary to the impartial hearing officer's conclusion, there was no proof in the hearing record that instruction in that special class would be "highly individualized;" (2) the impartial hearing officer did not consider the effect of placement of the student in a special class for English on the student's social development; (3) the student would be negatively affected by placement in the special class for English because it would require a change in his schedule; and (4) the impartial hearing officer did not address the negative impact of the students in the recommended special class on this student. The parents further assert that the impartial hearing officer erred in concluding that the district complied with the student's ninth grade IEP as it relates to an inferencing goal and that contrary to the impartial hearing officer's finding, the student did make progress in that class. The parents also assert that they disagree with the impartial hearing officer's conclusion that the student would be better able to meet his goals in a special class and assert that whether a student with a disability might make greater academic progress in a special class may not warrant excluding the student from a general education program. The parents offer to provide additional evidence to a State Review Officer for consideration.

In its answer, the district denies many of the parents' allegations and objects to the proposal by the parents that they provide to a State Review Officer additional evidence referenced in their petition.⁶ The district requests that the petition be dismissed in its entirety and that the impartial hearing officer's decision be upheld. Specifically, the district denies that the impartial hearing officer failed to consider the parents' request for tutoring and asserts that the impartial hearing officer did not show any bias in favor of the district. According to the district, the recommendation for a special class for English for the 2011-12 school year is appropriate because, among other things, the student's experience in the ninth grade ICT English class showed that he was at a disadvantage in such a class; (2) the student's skills, achievement, and progress had been far below standards for a ninth grade ICT English class, and (3) a tenth grade special class in English would address the student's level of skills more appropriately than an ICT class.

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.

⁶ There is no additional evidence to consider as neither party submitted any evidence with their pleadings.

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 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, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 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).

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

Preliminary Matters

Allegations of Impartial Hearing Officer Bias

As a preliminary matter, I will address the parents' assertion that the impartial hearing officer showed bias in favor of the district. It is well settled that an impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An impartial hearing officer must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

After reviewing the entire hearing record, I find that the evidence does not support the parents' contention that the impartial hearing officer was not impartial or acted in a manner that did not conform to federal or State regulations. While I note that at the conclusion of the district's witnesses' testimony, the impartial hearing officer characterized the testimony as "good" or "great" (Tr. pp. 141, 221, 245), and such characterizations are superfluous and not necessary, I do not find that this manifested bias on the part of the impartial hearing officer. Additionally, it was not improper for the impartial hearing officer to advise the district's witness that she wanted to "move along" (Tr. p. 234), as it is her responsibility to ensure that the impartial hearing proceeds in a timely manner in accordance with State regulations (8 NYCRR 200.5[j][3][xiii]) and she "may limit the examination of a witness . . . whose testimony [she] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]). Nor does the hearing record support the parents' contention that during the presentation of their direct case, the impartial hearing officer did not allow them to ask each other questions but told them that they had to "just talk." The impartial hearing officer advised the parents that they could either ask questions or they could set forth their concerns at the hearing by "just" talking and that it was their choice as to how they wished to proceed (Tr. pp. 249-50). Nor upon review do I find that

the impartial hearing officer "shut down" the parents, as the hearing record indicates that the impartial hearing officer understood the parents' position and properly wished to proceed with the impartial hearing (Tr. pp. 211-12). Finally, regarding the parents' contention that the impartial hearing officer "sided" with a district witness when asked a question, the hearing transcript indicates that the impartial hearing officer appropriately qualified the parent's question and then asked the witness to answer the question to the extent to which it could be answered (Tr. pp. 242-43).

Scope of Review

I turn now to the parents' allegations that the impartial hearing officer's decision did not give due consideration to the impact of the student's social development and also failed to address the negative impact of the other students in the special class on this student.

It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parents' due process complaint notice asserted that the recommended special class was "disproportionately male;" therefore, I find that the complaint can be reasonably read to raise the issue of the impact of the gender composition in the recommended class on the student's social development (Dist. Ex. 1 at p. 2). However, I note that neither federal nor State regulations require that students be grouped by gender (see 200.1[ww][3][i], 200.6[a][3], [h][2], [3]; see also Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 1256 [E.D. Va. 1992]; Bales v. Clarke, 523 F. Supp. 1366, 1371 [E.D. Va. 1981]).

With respect to the parents' other claims relating to the student's social development, I note that the due process complaint notice does not contain any claims that may be reasonably read to assert that the change in the student's schedule due to the special class placement would have a negative impact on him (see Dist. Ex. 1). Additionally, while the hearing record contains some testimony relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Likewise, the due process complaint notice cannot be reasonably read to include a claim regarding the negative impact of the other students in the special class on this student and there is no showing that the district agreed to expand the scope of the impartial hearing to include this issue. Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized an amendment of the parents' June 2011 due process complaint notice to include any additional issues. Accordingly, I will not address these issues (see R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-010; Application of a Student with a Disability, Appeal No. 11-008; Application

of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).⁷

Impartial Hearing Officer Timeline

On appeal, the parents assert that they were not informed that by agreeing at the July 25, 2011 prehearing conference to a September 9, 2011 hearing date, they had "automatically agreed" to an extension of the time by which the impartial hearing officer was required to render a decision and that such delay would adversely affect the student (Pet. ¶ 1; see 34 C.F.R. § 300.515[a], [c]; NYCRR 200.5[j][5]), [i]). The impartial hearing officer explained on the record that the parties had agreed at the prehearing conference to schedule the impartial hearing on September 9, 2011 and that on August 2, 2011, the district requested a 30-day extension of time to the date by which the impartial hearing officer was required to render a decision (Tr. p. 8). The impartial hearing officer further stated on the record that the parents had previously objected to the district's extension request (Tr. p. 9). On August 4, 2011, the impartial hearing officer granted a 30-day extension of the period by which she was required to render a decision over the parents' objection (IHO Decision at p. 1; Tr. p. 10).

The hearing record establishes that the impartial hearing officer did not comply with State regulations regarding the granting of extensions in this matter. Both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). Regulatory requirements also set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

"(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

⁷ I note that at the impartial hearing, the district indicated its understanding of the actual and possible impacts of changing the student's tenth grade English class placement to a special class could have on the student's schedule, including when he would eat lunch, as well as to the importance of social interactions among the student and his classmates in the recommended tenth grade special education English classroom and also represented that any problems, issues, or negative interactions would be appropriately addressed and mitigated (Tr. pp. 261, 266-71; see Tr. pp. 249, 252-54). In its answer, the district also stated that it was "committed to providing assistance to the [s]tudent should [he] feel uncomfortable with lunch period or in making transition to a different lunch period or any class" (Answer ¶ 1).

Further, an extension "shall be for no more than 30 days" and absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). Moreover, an "[a]greement of the parties is not a sufficient basis for granting an extension" (*id.*). State regulations further provide that "[t]he impartial hearing officer shall respond in writing to each request for an extension" and that "[t]he response shall become part of the record" (8 NYCRR 200.5[j][5][iv]). Additionally, impartial hearing officers are not permitted to accept appointment unless they are available to conduct an impartial hearing in a timely manner (8 NYCRR 200.5[j] [3] [I] [b]). State regulations further set forth that each party shall have "up to one day" to present its case and additional hearing days shall be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][xiii]).

In this case, the hearing record does not contain a written response by the impartial hearing officer responding to the district's August 2, 2011 request for an extension of the 45-day period (8 NYCRR 200.5[j][5][ii], [iv]). Nor does the decision of the impartial hearing officer to grant the district's extension request, which was made on the basis of "witness unavailability" (Tr. p. 8), indicate what "compelling reason" or "specific showing of substantial hardship" would support a finding by the impartial hearing officer to grant an extension on such a basis (8 NYCRR 200.5[j][5][iii]). I caution the impartial hearing officer to comply with the State regulations regarding extensions in the future. However, under the circumstances of this case where the student continued to receive special education programs and services and remained in the parents' preferred ICT class for tenth grade English pursuant to pendency (*see* Tr. p. 255), and because the impartial hearing officer timely issued a decision on September 26, 2011—less than one month after the impartial hearing was convened—I find any harm to the student for the 30-day extension is *de minimis*. Therefore, I will not set aside her decision on this basis, but will engage in an independent review of the hearing record and render a decision on the parents' claims as set forth below.

15:1 Special Class for English

Initially, I note that in this case, the parents are not challenging the present levels of performance, goals or other recommendations contained in the student's IEP; the sole issue before me is whether the CSE's recommendation for a special class for English for the 2011-12 school year was appropriate. For the reasons discussed below, I find that the hearing record shows that the district's recommendation in the June 2011 IEP that the student be placed in a tenth grade special class for English was appropriate to meet the student's needs in the LRE.

The present levels of performance identified in the student's June 2011 IEP indicate that the student possessed significant deficits in communication, writing, certain reading skills, and in the area of speech-language (Dist. Ex. 4 at pp. 3, 4). Specifically, the IEP reflects that January 2010 parent responses to the Vineland Adaptive Behavior Scales, which were reviewed by the June 2011 CSE, resulted in a communication domain standard score and percentile of 79 and 8, respectively (*id.* at p. 3). The IEP further indicates that the January 2010 completion of the Vineland Adaptive Behavior Scales by the teacher resulted in a communication domain standard score and percentile of 76 and 5, respectively (*id.*). The IEP shows that on the Wechsler Individual Achievement Test – III (WIAT III), the student's January 2010 standard and percentile

scores in reading comprehension were 75 and 12, respectively; and in sentence building was 72 and 3, respectively (id.). Moreover, completion of the pragmatics profile checklist of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) in January 2010 showed that the student achieved a total raw score of 52 points under the criterion score for the student's age (id.). The IEP also reflects that the student's standard and percentile scores on the pragmatic judgment subtest of the Comprehensive Assessment of Spoken Language (CASL), administered in January 2010, were 66 and 1, respectively (id.). The June 2011 IEP also reported that the student's score on the New York State Eighth Grade English language arts (ELA) examination, which the student took in April 2010, was at a "Level 1" (id.).

Additionally, with respect to the student's reading skills, the June 2011 IEP reported that testing in 2010 indicated that the student was reading independently at the third grade level and instructionally at the fourth grade level (Dist. Ex. 4 at p. 6). Specifically, the June 2011 IEP indicated that in his ICT English class, the student "struggle[d] to remember specific details within passages" and that as the text became more challenging and sophisticated, he "struggle[d] to respond accurately to questions that access basic comprehension even with access to the printed material" (id.). The June 2011 IEP also reported that in the ICT English class, the student "rarely participate[d] in class discussion" and that it appeared "processing information spontaneously at the rate that is required to engage in class discussion is an area that requires further development" (id.). Moreover, with regard to the ICT English class, the IEP reflected that the student often said that he knew what he was thinking but that he did not know how to say it and that classroom discussion was "challenging," (id.). The June 2011 IEP also indicated that, among other things, in the ICT English classroom, the student "shie[d] away from direct teacher support" and was "reluctant to share his answers after independent work" (id.). The June 2011 IEP also indicated that the student also had "difficulty processing what he reads," needed "ample time to respond," and that "formulating an answer to a question is an area where support is needed" by the student (id.).

Further, with respect to the student's speech and language abilities, the June 2011 IEP reported that speech services for the student had been "discontinued at the high school level by parent request" (Dist. Ex. 4 at p. 7). The June 2011 IEP further reported that the student "continue[d] to exhibit difficulty both understanding language and expressing himself during academic tasks as well as informal conversation with peers and adults;" that he "often need[ed] to have questions repeated," "frequently with clarification;" that he did not "easily recall information from day to day;" that at times when called on in class, after raising his hand, he forgot what he wanted to say; that he appeared to have difficulty keeping up with the pace of conversation, even between peers; and that he often forgot what he was asked or what he wanted to say (id.). The June 2011 IEP also reported that the student's comments during conversations were "frequently repetitive or off-topic," that he chose topics that had already been discussed when initiating a conversation, and that he did not always understand "the subtleties of language and may misinterpret what is being said" (id.). The IEP additionally indicated that the student's social language skills were "impacted by his difficulties with comprehension, retrieval and expression" and that his difficulty in applying new information impacted his ability to problem solve, both in academic areas and in social situations (id.).

Moreover, with respect to the student's writing skills, the June 2011 IEP indicated that the student's then-current writing level was "below the expected level for [ninth] grade" and that the student needed "significant individualized support throughout the entire writing process" to communicate his ideas in written format (Dist. Ex. 4 at p. 7). Additionally, the June 2011 IEP reported that the student had difficulty "even when directions ha[d] been reviewed and models ha[d] been presented" (*id.*). The June 2011 IEP further stated that the student's responses could be off-topic and unrelated (*id.*). The June 2011 IEP indicated that the student's writing goal for the 2010-11 school year, which was to write a multi-paragraph essay, had not been met (*id.*). According to the June 2011 IEP, the student's "written work at the independent level [fell] well below grade level expectations" (*id.*).

The June 2011 IEP also stated that with respect to the student's social development, among other things, working in groups could be difficult for the student "because he misunderstands his group members and/or they misinterpret what he says" (Dist. Ex. 4 at p. 8). It also indicated that "[s]ome social language situations may also present difficulties" for the student and that he had difficulty following along with and participating in informal conversations between both peers and adults (*id.*).

With respect to the effect of the student's needs on his involvement and progress in the general education curriculum, the June 2011 IEP indicated that the student's "difficulty with language comprehension, retention, and abstract reasoning hinders his ability to understand concepts in the academic areas;" that he "has difficulty with listening/reading comprehension and needs additional time to process information;" that he "needs preteaching, repetition, and reteaching in order to comprehend content material and retain the information once it is learned;" and that the student "has difficulty applying and generalizing learned material and implementing strategies" (Dist. Ex. 4 at p. 9). The IEP reflected that the student would not participate in a general education classroom in English an in math due to his "difficulty with language comprehension, retention, and abstract reasoning," which hindered his ability to understand concepts in the academic areas (*id.* at p. 16). The IEP further reflected that the student had difficulty with "listening/reading comprehension" and needed additional time to process information, that he needed preteaching, repetition, and reteaching in order to comprehend material and retain information once it is learned, and that he had difficulty "applying and generalizing learned material and implementing strategies" (*id.*). CSE meeting notes indicated that among other things, the student's regular education teacher in his ninth grade ICT English class advised the CSE that she "worked one on one" with the student and "practically dictated every word;" that even with a prompt from her to start a sentence, he "can't get it;" that he did not have any "recall;" and that she believed that it would be a "disservice" to the student to place him in an ICT class for the 2011-12 school year (Dist. Ex. 6 at p. 4).

Regarding whether the student could be educated satisfactory in a general education English class with supplemental aids and services, the hearing record shows that the district made reasonable efforts to accommodate the student in a general education classroom for English with the use of supplemental aids and services. The student's ninth grade ICT English class included a regular education teacher as well as a special education teacher and provided instruction to general education and special education students in the classroom (Tr. pp. 44, 46, 142-43; Dist. Ex. 7 at p. 1). In addition, during ninth grade as a part of the student's IEP, the

district provided him with two periods per day of resource room instruction in order to focus on the student's content area skills, including those in English (Tr. p. 119; Dist. Exs. 7 at p. 1; 8). Moreover, the student's ninth grade IEP indicated that he was provided with program modifications, classroom modifications, and supplementary aides and services in addition to his resource room program (Dist. Ex. 7 at pp. 2-3). These included checking for understanding; modified curriculum in the form of revised test lengths and format as appropriate; the use of an agenda book; preferential seating; access to a word processor; a speech-language consultation; a special education service coordinator; and testing accommodations including extended time (2x), the administration of tests in a setting with minimal directions, simplified language in directions, directions to be read to the student, repeated oral instructions, and revised test formats to include single sided tests and word banks (*id.*).⁸ The student's ninth grade ICT English class teachers also provided him with class notes, as reflected on the IEP, by providing him with completed "study guides" for that class (Tr. pp. 49-50, 53, 69-71, 146-49, 165-66, 206; see Dist. Ex. 7 at p. 2).

Furthermore, the hearing record reflects that the student would not be able to receive meaningful educational benefits in a general education ICT class during the 2011-12 school year, as the parents request.⁹ Although the parents assert that the student received passing grades in his ninth grade ICT English class and did "relatively well on the objective tests," both of his ICT English teachers testified that the student's work was not at a level which justified a passing grade, that he received a passing grade because of his work and effort, and that he was not making a satisfactory amount of educational progress, meeting classroom expectations, and was below grade-level, notwithstanding the supports provided in the IEP for the 2010-11 school year (Tr. pp. 45, 52, 115-16, 118, 120-21, 125-26, 138-39, 143, 156-57, 190, 202-03, 214, 220; see Dist. Exs. 5; 7 at pp. 1-3).

With respect to the possible negative effects of the inclusion of the student in a tenth grade ICT class for English on the education of the other students in the class, I agree with the impartial hearing officer that there is "little likelihood of negative educational effect" on the student's nondisabled classmates if he were placed in a general education setting for the 2011-12 school year (IHO Decision at p. 10). While the hearing record indicates that the placement of the student with general education students in his ninth grade ICT English class resulted in some frustration and irritation (see Tr. pp. 106-07, 153, 208, 215; Dist. Ex. 4 at p. 8), the hearing record does not show that the student's placement in a class with general education students would have been "so disruptive" to the classroom "that the education of other students [would be] significantly impaired" or that the teachers' efforts to educate the student in such a placement would result in a situation where the other students were ignored or the rest of the class suffered (Oberti, 995 F.2d at 1217; Greer, 950 F.2d 688, 697 [11th Cir. 1991]; Daniel R.R., 874 F.2d at 1049-50). In this case, however, in light of the discussion above, I find that overall, the student cannot be educated satisfactorily in a general education classroom with the use of supplementary

⁸ The student's 2010-11 IEP also allowed for the "pace, content, and length" of the student's curriculum to be "modified/reduced to essential key components" (Dist. Ex. 7 at p. 2).

⁹ I have considered the parents' request for one to two hours of 1:1 tutoring in writing and find that the hearing record does not support that such additional assistance would be sufficient such that the student would be able to be educated satisfactorily in an ICT class in tenth grade English (see Dist. Ex. 1 at p. 2; see also Pet. ¶ 2).

aids and services. Moreover, the June 2011 IEP provided for the student to be enrolled in general education ICT classes for social studies and science, and participate in a regular physical education program during the 2011-12 school year (Dist. Exs. 4 at pp. 11, 16).

Based on the foregoing, I concur with the impartial hearing officer that based on the information in the hearing record, the recommended special class placement of the student in English for the 2011-12 school year was an appropriate educational setting, which was reasonably calculated to provide the student with meaningful educational benefits in the LRE (see Mrs. B., 103 F.3d at 1120; see also Rowley, 458 U.S. at 192).

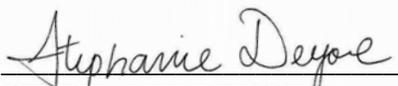
Conclusion

Based on the above, I find that the hearing record supports the impartial hearing officer's determination that the district's recommendation in the June 2011 IEP that the student be placed in a 15:1 special class for English for the 2011-12 school year was designed to confer educational benefits to the student in the 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 111).

I have considered the parties' other contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 7, 2011**


**STEPHANIE DEYOE
STATE REVIEW OFFICER**