



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 11-148

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

## **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Diane da Cunha, Esq., of counsel

## **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Winston Preparatory School (Winston Prep) for the 2011-12 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that Winston Prep was an appropriate unilateral placement. The appeal must be dismissed. The cross-appeal must be dismissed.

The student attended Winston Prep for the 2010-11 school year and at the time of the impartial hearing, was attending Winston Prep (Tr. p. 165; see Tr. pp. 171-72, 180).<sup>1</sup> The Commissioner of Education has not approved Winston Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with a hearing impairment is not in dispute in this proceeding (Tr. pp. 11-12; Dist. Ex. 7 at p. 1; see 34 C.F.R. § 300.8[c][5]; 8 NYCRR 200.1[zz][5]).

## **Background**

The hearing record indicates the student had been previously diagnosed as having a mild to moderate high frequency asymmetrical sensorineural hearing loss, attention deficit hyperactivity disorder (ADHD), central auditory processing disorder (CAPD), and dyslexia (Tr.

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<sup>1</sup> Pursuant to an unappealed impartial hearing officer's order dated August 4, 2010, the district was directed to pay the student's tuition at Winston Prep for the 2010-11 school year (Parent Ex. N).

p. 327; Dist. Exs. 20 at p. 1; 21 at p. 1; 23 at pp. 2-3; Parent Exs. J at p. 1; K; L at pp. 2, 10). Despite having a diagnosis of a hearing loss, the student displayed "excellent" speech discrimination for words presented at normal conversational levels, was able to follow the flow of conversation, and compensated for her hearing loss by "making the most of her residual hearing and speech reading ability" (Dist. Ex. 19 at p. 1). Overall, the hearing record emphasizes the student's educational needs relative to her diagnosis of dyslexia, characterized by her language-based difficulties with mastering and retaining sound symbol relationships for reading, spelling, and writing (Parent Exs. E at p. 1; F at pp. 1-3; G at pp. 1-6; H at pp. 1-11; L at pp. 10-11).

On May 9, 2011, the Committee on Special Education (CSE) convened to develop an individualized education program (IEP) for the student for the 2011-12 school year (Dist. Ex. 7 at pp. 1-2).<sup>2</sup> Attendees at the meeting were the district representative who also acted as the school psychologist; a district special education teacher; a district audiologist; the parents; and by telephone, the student's Focus teacher<sup>3</sup> from Winston Prep (id. at p. 2).

The resultant IEP indicated that the CSE continued the student's eligibility for special education programs and related services as a student with a hearing impairment and recommended that the student attend a 15:1 special class in a community school with related services of individual hearing education services one time per week for 40 minutes, individual speech-language therapy two times per week for 40 minutes per session, and individual counseling one time per week for 40 minutes per session, and use of assistive technology (an FM unit) (Dist. Ex. 7 at pp. 1, 23; see Dist. Ex. 24 at p. 1). The IEP included annual goals, continued recommendations for the student to participate in State and local assessments with testing accommodations of double time, special location, directions read and reread, use of an FM unit, and added the testing accommodation of questions to be read aloud to the student (Dist. Ex. 7 at pp. 1-2, 6-20, 23; see Dist. Ex. 24 at p. 16). In addition, the IEP included a transition plan regarding the student's transition to post-school life (Dist. Ex. 7 at pp. 1, 24).

By notice dated May 9, 2011, the district informed the parents that it was deferring assignment of the student to a specific school until September 2011 in order to allow the student to complete the 2010-11 school year at Winston Prep (Dist. Ex. 8 at pp. 2-3). The student's mother signed and returned the notice to the district, checking boxes to signify her disagreement with the program recommendation, but agreement with the decision to defer the assignment of a specific school (id. at p. 3). The notice also provided the parents with district contact information to arrange to visit "a sample type of program" recommended for the student (id.).

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<sup>2</sup> On January 28, 2011, the parents filed a due process complaint notice, requesting an impartial hearing to adjudicate their claim for continued payment of the student's tuition at Winston Prep for the 2011-12 school year (Dist. Ex. 5 at p. 9). The district challenged the sufficiency of the parents' January 28, 2011 due process complaint notice (id. at p. 14). On March 3, 2011, the district filed a motion to dismiss the January 28, 2011 complaint because, among other reasons, the district had not yet offered the student a program for the 2011-12 school year and therefore, the district argued that there was no program for the parents to challenge (id. at pp. 1-7). The parents subsequently withdrew their January 28, 2011 due process complaint notice (Dist. Ex. 6).

<sup>3</sup> The hearing record reflects that "Focus" refers to a daily 1:1 period of instruction that is part of the student's schedule at Winston Prep (Tr. p. 166). The purpose of the Focus class is to target the student's greatest learning obstacles and work on learning strategies to help the student overcome those challenges (id.).

## **Due Process Complaint Notice and Response**

The parents filed a second amended due process complaint notice on May 24, 2011 (Dist. Ex. 3).<sup>4</sup> The parents asserted that "it would not be in the best interest" for the student to transition to a new school as her placement at Winston Prep was appropriate and she was making progress there (*id.* at p. 1). The parents contended that the district failed to provide the student with appropriate special education and related services designed to meet her unique needs in a public school setting (*id.*). More specifically, the parents contended that the student's needs stemming from her dyslexia could not be met by the district, that the district "does not specifically recognize" dyslexia on an IEP "as a [c]lassification of [d]isability," and that a learning disability was "not the same as" dyslexia (*id.*). According to the parents, they had visited three community high schools and determined that a community high school setting would not be an "academic fit" for the student because it was "designed to teach a broad range of students with a broad range of learning disabilities" and was not specifically tailored to address dyslexic learners (*id.* at pp. 1-2). The parents further asserted that Winston Prep was an appropriate placement for the student because it provided individualized instruction that was designed to meet the student's unique needs and was an "emotional fit" for the student (*id.*). Among other relief, the parents requested payment of the student's tuition costs at Winston Prep for the 2011-12 school year as well as payment for a summer reading program (*id.* at p. 2).

In its June 1, 2011 response to the parents' due process complaint notice, the district asserted that the parents' claim was "not yet ripe" because the district had not yet notified the parents of the specific school to which the district was assigning the student (Dist. Ex. 4).

## **Impartial Hearing Officer Decision**

An impartial hearing convened on July 7, 2011, and concluded on September 9, 2011, after three hearing dates (Tr. pp. 1, 62, 227). The first hearing date was limited to the purposes of determining the student's pendency (Tr. pp. 1-61; Interim IHO Decision at p. 2). In an order on pendency dated July 7, 2011, the impartial hearing officer determined that the student's pendency placement was Winston Prep pursuant to the prior unappealed impartial hearing officer's decision dated August 4, 2010, and she directed the district to pay for the student's tuition costs at Winston Prep (Interim IHO Decision at p. 3).

By decision dated October 6, 2011, the impartial hearing officer found that the district offered a free appropriate public education (FAPE) to the student for the 2011-12 school year (IHO Decision at p. 17). She determined that the May 2011 IEP described the student's present levels of performance and identified the student's special education needs based on information from the various assessments considered by the CSE (*id.* at p. 16). She further found that the IEP contained appropriate goals that addressed the student's areas of need (*id.*). The impartial hearing officer also determined that the recommended placement in a 15:1 special class in a community high school provided sufficient special education teacher support and was designed to address the student's needs and enable her to make meaningful educational progress (*id.*). She

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<sup>4</sup> The parents filed their first due process complaint notice concerning the May 9, 2011 IEP on May 11, 2011, stating only that they disagreed with the "program recommendation" (Dist. Ex. 1). In a May 13, 2011 e-mail, the parents filed an "Amendment" to the May 11, 2011 complaint, adding that they were requesting that the district continue to pay the student's tuition at Winston Prep for the 2011-12 school year (Dist. Ex. 2).

further determined that the district's offered placement was in the least restrictive environment (LRE) (id. at p. 17).

Although the impartial hearing officer found that the district offered the student a FAPE, she also made determinations as to the appropriateness of Winston Prep and whether equitable considerations favored an award to the parents. She determined that given the "totality of the circumstances," Winston Prep was an appropriate placement for the student (IHO Decision at p. 18). She found that Winston Prep staff addressed the student's need for explicit instruction in decoding, expressive language, reading fluency, reading comprehension, and writing (id.). She further found that the staff used strategies with the student such as graphic organizers, margin notes, chapter summaries, repetition of material, and review and editing of written work (id.). The impartial hearing officer also noted that according to the Winston Prep staff, the student had made progress during the prior school year and it was "reasonable to conclude" that the student would continue to make progress during the 2011-12 school year (id.).

Next, the impartial hearing officer determined that since the parents had not provided proof that they had enrolled the student in any educational program during summer 2011, they were not entitled to payment for any summer program (IHO Decision at p. 18). Finally, the impartial hearing officer determined that equitable considerations barred any relief because although the parents cooperated with the CSE, the evidence did not show that they had any intention of sending the student to a district school and instead believed that only Winston Prep could address the student's needs (id. at pp. 18-19). Consequently, the impartial hearing officer denied the parents their requested relief (id. at p. 19).

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

The parents appeal, appearing pro se and asserting that the impartial hearing officer erred in her determinations that the district offered the student a FAPE for the 2011-12 school year and that equitable considerations did not favor an award of the student's tuition costs at Winston Prep. The parents assert that they met their burden to show that Winston Prep was appropriate for the student and that the district failed to meet its burden to demonstrate that the May 9, 2011 IEP was appropriate for the student. According to the parents, the school psychologist who testified on behalf of the district at the impartial hearing was not part of the CSE team that created the student's 2011-12 IEP, did not know the student, had not observed the student, nor had he evaluated the student. The parents also assert that the district's school psychologist "did not mention Dyslexia during his entire testimony" (Pet. at p. 3). The parents challenge the impartial hearing officer's finding that they had no intention of placing their student in a public school and assert that their actions showed that they cooperated with the CSE and visited district programs. In addition, the parents contend that the impartial hearing officer was not impartial and that she improperly denied tuition after an explicit finding that Winston Prep was appropriate. The parents also attach ten documents to their petition, marked as exhibits A-J.<sup>5</sup> Each attachment contains a coversheet explaining the contents of the attachment and how the attachment supports the parents' assertions contained within their petition.

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<sup>5</sup> The majority of the attached documents to the petition are duplicates of exhibits or transcript pages already contained in the hearing record (see Pet. Exs. A-H).

In an answer, the district challenges the parents' attachments to their petition marked as "I" and "J," asserting that those documents could have been produced at the impartial hearing and are not relevant to the issues in the proceeding.<sup>6</sup> The district also asserts that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2011-12 school year and that equitable considerations did not favor an award of tuition to the parents. Specifically, the district contends that the impartial hearing officer correctly determined that the student was offered a FAPE because the May 2011 IEP accurately described the student's present levels of performance and contained appropriate goals. The district also contends that the recommended program was based on the student's needs. The district further asserts that although the school psychologist who testified for the district did not participate in the CSE process, he was qualified to testify to the student's present levels of performance, evaluations, and goals that were on the IEP based on his experience and his review of the IEP. The district also asserts that the impartial hearing officer was not biased.

In its cross-appeal, the district asserts that the impartial hearing officer erred in her determination that Winston Prep was an appropriate placement. Specifically, the district asserts that the student did not receive any related services at Winston Prep during the 2011-12 school year, and that the student does not use an FM unit at Winston Prep and the staff there did not ensure its usage. The district also asserts that the student's progress was not demonstrated with objective evidence and that Winston Prep is overly restrictive.

### **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.

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<sup>6</sup> Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Upon review, I find that attachments I and J to the petition could have been submitted at the time of the impartial hearing and are not necessary in order to reach a decision in this case. Accordingly, I will not consider attachments I and J to the petition.

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).

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**

### **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 a Student with a Disability, Appeal No. 11-144; 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 show that the impartial hearing officer was biased or acted in a manner that did not conform to federal or State regulations. While I note that the impartial hearing officer stated on the record that the district's "job here is to show *we* offered an appropriate program for the [2011-12] school year" (emphasis added) (Tr. p. 160), as discussed below, I do not find that the use of the word "we" by the impartial hearing officer manifested bias toward the district as the parents allege. The parents also contend that although the impartial hearing officer told them several times on the record that their only burden was to prove the appropriateness of Winston Prep and then declined to award

them tuition costs after finding they met their burden. However, I decline to find bias on that basis and note that Burlington/Carter sets forth a three prong inquiry for adjudicating tuition reimbursement claims and here the impartial hearing officer determined that the district met its burden to show that it offered the student a FAPE for the 2011-12 school year. Furthermore, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]) and while the parents claim that these aforementioned statements evidence the impartial hearing officer's bias, I find that they demonstrate the impartial hearing officer's efforts to explain the hearing process to an unrepresented party. Moreover, I find that both parties were afforded an opportunity to be heard and that the impartial hearing was conducted in a manner that was consistent with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]; see Educ. Law § 4404[2]). Although the parents disagree with the conclusions reached by the impartial hearing officer, that disagreement does not provide a basis for finding actual or apparent bias by the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). In sum, upon careful consideration of the hearing record, I find that there is no evidence that the impartial hearing officer displayed bias or prejudice against the parents.

### **May 2011 IEP**

Turning to the impartial hearing officer's substantive determinations with regard to the May 2011 IEP, as set forth in greater detail below, further review of the hearing record supports the impartial hearing officer's conclusion that the district's recommended program and services were reasonably calculated to enable the student to receive educational benefits during the 2011-12 school year.

The hearing record in this case demonstrates that the May 2011 CSE had adequate information with which to determine the student's present levels of performance. Specifically, the hearing record indicates that the CSE utilized information from the student's Winston Prep focus teacher in determining the student's math, reading and writing instructional levels, social/emotional performance, and health and physical development, as well as determining the student's weaknesses and strengths in those areas (Dist. Ex. 7 at pp. 3-6).

Specific to the student's present levels of performance, the May 2011 IEP indicated that according to the Focus teacher from Winston Prep who attended the CSE meeting, academically, the student's decoding was at the third grade level, was very weak in isolation, and was better in context (Dist. Ex. 7 at p. 3). The May 2011 IEP also reflected that the student learned strategies whereby she could divide words into syllables, but did not apply them independently (id.). The student's instructional level for reading comprehension was reflected to be at mid-fifth to early-sixth grade level for literal understanding, and critical reading was more difficult for her (id.). The student's performance was described as variable due to attention difficulties (id.). Her instructional level for spelling in isolation was at a sixth grade level, but spelling skills when writing in context was "more erratic" (id.). The student's instructional level for written expression was at the fourth to fifth grade level, but she was not independent (id.). Although she could write a lot, she did not plan her work ahead of time (id.). According to the May 2011 IEP, the student made grammatical errors such as verb tense switching between past and present tense, and she required a lot of editing with teacher scaffolding and support (id.). The student's

instructional level for math was at a sixth grade level and she had difficulty with fractions, decimals, percents, and algebra (*id.*). The May 2011 IEP also noted that the student had difficulty comprehending word problems and often did not read the directions before starting them, therefore resulting in wrong answers (*id.*).

In regard to the student's social/emotional performance, the May 2011 IEP indicated that according to the Winston Prep Focus teacher who attended the CSE meeting, the student made a good adjustment to Winston Prep, had friends, and was sought after by her peers (Dist. Ex. 7 at p. 4). In addition, the student socialized outside of school with Winston Prep friends (*id.*). The May 2011 IEP noted that the student's attention span tended to break down when a specific task required a lengthier time for completion (*id.*). The IEP also indicated that the student was very organized with her time and materials (*id.*). In regard to behavior and instructional process, the IEP reflected that the student's behavior was age-appropriate and that a behavioral intervention plan was not developed (*id.*).

In regard to the student's health and physical development, the May 2011 IEP indicated that according to reports, the student presented with normal hearing becoming a slight to moderate sensorineural hearing loss in the right ear, and normal hearing becoming a moderate hearing loss in the very high frequencies in the left ear (Dist. Ex. 7 at p. 5). The IEP indicated that the student had worn an FM unit in her previous school, but that she did not perceive that she needed the FM unit any longer and was not using it at Winston Prep (*id.*). The IEP indicated that according to the parents, the student's health was good and she was diagnosed as having an ADHD (*id.*).

As found by the impartial hearing officer, the hearing record demonstrates that the district had sufficient information relative to the student's present levels of academic achievement and functional performance, including information provided by the Winston Prep Focus teacher who participated at the May 2011 CSE meeting, to develop an IEP that identified the student's special education needs (see 34 C.F.R. § 300.306[c][2], 300.324[a][1]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).<sup>7</sup>

Furthermore, the hearing record demonstrates that the May 2011 IEP indicated strategies to address the student's identified needs. The IEP's academic management needs indicated that the student needed graphic organizers and outlines, margin notes, and page and chapter summaries, a proofreading and editing checklist, charts of math steps available as a reminder, use of tables/diagrams to help visualize and break down multistep math problems, highlight keywords in math problems, and use of a calculator when focusing on math problem solving (Dist. Ex. 7 at p. 3). Social/emotional needs noted in the May 2011 IEP included the provision of structure and clear expectations, frequent feedback from teachers, praise and positive reinforcement, and participation encouraged (*id.* at p. 4). Preferential seating and an FM unit

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<sup>7</sup> To the extent that the parents assert that dyslexia is not the same as a learning disability and that the May 2011 CSE failed to classify the student as a student with dyslexia, I note that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (Application of a Student with a Disability, Appeal No. 09-126; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]).

were among the health and physical management needs (*id.* at p. 5). Testimony by the district's school psychologist indicated that the academic management strategies included in the IEP were consistent with the student's organizational, planning, and executive functioning deficits as noted in the February 2009 neuropsychological reevaluation report, as well as strategies to assist the student in her math and reading work (Tr. pp. 117-18; *see* Parent Ex. L at pp. 1-11).<sup>8</sup> Additionally, the director of administration at Winston Prep and the student's Focus teacher agreed that the classroom management strategies of graphic organizers, margin notes, chapter summaries, and praise and reinforcement were appropriate for the student and indicated that Winston Prep used such strategies with her (*compare* Tr. pp. 164, 207-08, 248, 289, *with* Dist. Ex. 7 at p. 3). The May 2011 IEP and CSE meeting minutes also reflected the addition of the testing accommodation of questions read aloud to the student to the other testing accommodations of extended time (double), special location, directions read and reread, and use of an FM unit (Dist. Exs. 7 at pp. 2, 23; 10 at p. 2). Furthermore, the May 2011 also recommended related services of speech-language therapy, hearing educational services, and counseling to address the student's areas of need (Dist. Exs. 7 at p. 23; 10 at p. 3).

Moreover, based upon the hearing record, I find that the goals included in the May 2011 IEP were specific and measurable, addressed the student's needs (particularly those related to her diagnosis of dyslexia), and were consistent with the evaluation reports (Tr. pp. 119-21, 141; Dist. Exs. 7 at pp. 6-20; 15 at pp. 1-2; 18 at pp. 1-10; 20 at pp. 1-2; Parent Exs. G at pp. 1-6; H at pp. 1, 8-10; L at pp. 1, 8-11; *see* 20 U.S.C. § 1414[d][1][A][i][II],[III]; 34 C.F.R. § 300.320[a][2][i],[a][3]; 8 NYCRR 200.4[d][2][iii]). The CSE meeting minutes also reflect that the parents did not disagree with the goals included in the student's IEP for the 2011-12 school year (*see* Dist. Ex. 10 at p. 3).

Regarding the May 2011 CSE's placement recommendation, review of the IEP reveals that the CSE considered a collaborative team teaching (CTT) class for the student, but rejected that option as it was not sufficient to meet the student's academic needs (Dist. Ex. 7 at p. 22). The district school psychologist testified that based on what he reviewed about the student, she was not ready for a CTT class at that time and he agreed with the CSE's rejection of the CTT class for the student for the 2011-12 school year (Tr. pp. 140-41). Additional testimony by the school psychologist indicated that he agreed with the May 2011 CSE's recommendation for the student to attend a 15:1 special class in a community school because given the student's deficits and strengths, she would possibly experience significant difficulties in a less restrictive environment (Tr. pp. 138, 140). The school psychologist described a 15:1 class as consisting of 15 students and one special education teacher (Tr. p. 139). He testified that the 15:1 class focuses more on individual development and would help the student develop confidence and her overall skills (Tr. p. 140). The school psychologist indicated that a special education teacher in a special class in a community school would know how to implement the academic management strategies included in the IEP, and such classroom management needs as those included in the IEP were not unusual for a special education teacher to implement (Tr. p. 119). Although the

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<sup>8</sup> Although the parents contend on appeal that the school psychologist who testified on behalf of the district did not participate in the May 2011 CSE, was not familiar with the student, and did not testify about the student's dyslexia, I note that the hearing record indicates that the school psychologist reviewed the student's file and the May 2011 IEP before testifying, had 31 years of experience, and was familiar with the district's program (Tr. pp. 86-87, 95). Therefore, under the circumstances of this case, I decline to find that the district failed to meet its burden because the school psychologist who testified at the impartial hearing did not participate in the May 2011 CSE meeting.

parents were concerned that a 15:1 class size was too large for the student, the hearing record does not reflect that the student required a smaller class size and testimony by the student's Focus teacher indicates that at Winston Prep, the student's classes might contain as many as 12 to 13 students (Tr. p. 292; Dist. Ex. 10 at p. 3). Accordingly, I find no reason to disturb the impartial hearing officer's determination that the district offered an appropriate placement to the student in the LRE (see IHO Decision at pp. 16-17).

### **Conclusion**

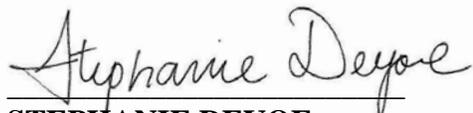
Based on the foregoing, I decline to disturb the impartial hearing officer's conclusion that the district offered the student a FAPE for the 2011-12 school year as the May 2011 CSE appropriately identified the student's needs, included goals to address those needs, and recommended a placement and related services that were reasonably calculated to provide the student with educational benefits in the LRE (Newington, 546 F.3d at 118-19). It is therefore unnecessary to reach the issue of whether Winston Prep was appropriate for the student or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

I have considered the parties' other contentions and find that I need not address them in light of my determinations herein. Furthermore, I need not address the district's cross-appeal based on my findings above; therefore, it is dismissed.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
January 5, 2012

  
**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**