



# The University of the State of New York

## The State Education Department

State Review Officer

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No.12-085

Application of the [REDACTED]  
[REDACTED] for review of  
a determination of a hearing officer relating to the provision of  
educational services to a student with a disability

### Appearances:

Kuntz, Spagnuolo, Murphy & Gronbach, PC, attorneys for petitioner, Vanessa M. Gronbach, Esq., of counsel

McMahon Advocacy Group, attorneys for respondent, Gilbert K. McMahon, Esq.

## DECISION

### I. Introduction

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

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

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

A review of the student's educational history reflects that the student has received diagnoses of an obsessive-compulsive disorder (OCD); a pervasive developmental disorder, not otherwise specified (PDD-NOS); attention deficit hyperactivity disorder (ADHD); and a learning disorder, NOS (LD-NOS) (Dist. Exs. 19 at p. 2; 24 at pp. 23-24; 40 at pp. 29-30). For the 2010-2011 school year, the student attended a special class (8:1+2) in the public school and received related services of occupational therapy (OT), physical therapy (PT), PT consultation, and speech-language therapy (Dist. Exs. 30 at pp. 1-2; 25 at pp. 1-2).<sup>1</sup> The hearing record reflects

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<sup>1</sup> Regarding the student's educational history, the student had previously received special education services

that during the 2010-11 school year, the student attended "mainstream classes"<sup>2</sup> one hour per day for social studies and science, on alternating days, usually accompanied by a teaching assistant (Nov. 18, 2011 Tr. pp. 141-42; Dec. 2, 2011 Tr. pp. 250-51). The hearing record describes the student as cooperative, enthusiastic, motivated to do well, "eager to please," friendly, and "genuinely liked" by many of her peers (Dec. 2, 2011 Tr. p. 311; Jan. 11, 2012 Tr. pp. 196, 222; Dist. Exs. 19 at p. 9; 24 at pp. 1, 25; 40 at p. 29; 59 at p. 11).

On May 27, 2011, the CSE subcommittee convened to conduct the student's annual review and to develop her IEP for the 2011-12 school year (Dist. Ex. 19 at p. 1).<sup>3</sup> The May 2011 CSE subcommittee recommended the student receive a placement consisting of an integrated co-teaching (ICT)<sup>4</sup> setting for math, science, English language arts (ELA) and social studies classes, consultant teacher services for math and writing, a special class for reading (15:1), and a special class for study skills (15:1) in a district middle school (*id.* at pp. 1-2, 14, 17). The May 2011 CSE subcommittee also recommended related services of individual and group speech-language therapy, individual PT, and individual OT (*id.* at pp. 1-2, 14). Recommended supplementary aids and services/program modifications and accommodations included, among other things, a 1:1 aide daily throughout the school day in the student's ICT classes (*id.* at pp. 1-2, 14-15). The CSE subcommittee also recommended assistive technology devices and/or services of "R[EACH] Interface Author with SmartKeys" software for use during writing assignments as needed on a daily basis and an assistive technology consultation (*id.* at pp. 1-2, 15). The May 2011 CSE also recommended testing accommodations for the student (*id.* at pp. 1-2, 16). Comments included in the IEP indicated that the parents believed that the student needed a more "intensive" program and requested referrals for alternative placements outside the district, that the CSE indicated that the programs would be researched, and that the CSE would reconvene if there was a viable program option for the student (*id.* at p. 2). The hearing record further reflects that the CSE explored other options regarding the parents' request for referrals, but that such did not result in a viable program option (*see* Dist. Exs. 8 at p. 2; 14; 17).

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from the district since preschool (Dec. 2, 2011 Tr. pp. 194-95; Dist. Exs. 19; 25; 30; 35; 39; 46; 57; 62; 69; 78; 85; 86; 89).

<sup>2</sup> The class that the student attended for social studies and science during the fifth grade for the 2010-11 school year is frequently referred to in the hearing record as the "mainstream" class (*see, e.g.*, Nov. 18, 2011 Tr. p. 146, Dec. 2, 2011 Tr. p. 274). The class was also described as an "inclusion" class with "students on a variety of different levels" (Dec. 2, 2011 Tr. p. 251). The term "inclusion" class was used at times in the transcript to describe the recommended integrated co-teaching (ICT) classes for the 2011-12 school year (*see, e.g.*, Jan. 11, 2012 Tr. p. 271). For consistency, the term "mainstream" class will be used to refer to the social studies and science class that the student attended in fifth grade for the 2010-11 school year.

<sup>3</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Nov. 18, 2011 Tr. p. 8; Dist. Ex. 1).

<sup>4</sup> State regulations define an ICT class as "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]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]).

In a document dated May 2011, the parents submitted an application for the student's admission to Pathways (Parent Ex. J). In a letter dated June 27, 2011, Pathways accepted the student for the 2011-12 school year (Parent Ex. I at p. 1). The student's father entered into a tuition contract with Pathways on July 14, 2011 (*id.* at pp. 2-3). The student began attending Pathways in September 2011 for the 2011-12 school year (Jan. 13, 2012 Tr. p. 979).<sup>5</sup>

On September 7, 2011, the parents filed a due process complaint notice asserting that the district did not provide the student with a FAPE for the 2011-12 school year based upon the student's May 2011 IEP (Dist. Ex. 11). On September 15, 2011, the CSE subcommittee reconvened to review the student's program (Dist. Ex. 8 at p. 1). The September 2011 IEP was modified to include providing two periods of reading/language arts in a small class 8:1+2 through the IMPACT program in addition to the ICT class for math, social studies, and science (*id.* at p. 2). The September 2011 CSE also added to the student's IEP an additional individual OT session per week and an additional sensory goal (Jan. 12, 2012 Tr. p. 931; Dist. Ex. 8 at pp. 1-2, 14). In addition, the September 2011 CSE included provision for meetings between staff and parents every five weeks, based upon parent concerns (Dec. 2, 2011 Tr. p. 305; Dist. Ex. 8 at pp. 2-3). On October 12, 2011, the parents filed an amended due process complaint notice repeating the allegations set forth in the September 2011 due process complaint notice and adding the assertion that the program recommended by the September 2011 CSE was not appropriate for the student (Dist. Ex. 1).

#### **A. Due Process Complaint Notice**

The parents filed a due process complaint notice on September 7, 2011 (Dist. Ex. 11). In a second amended due process complaint notice dated November 8, 2011, the parents asserted that the district did not provide the student with a FAPE for the 2011-12 school year (Parent Ex. P at pp. 1, 7). The parents specifically asserted that the May 2011 IEP failed to provide for the student in the areas of academic achievement, functional performance and learning characteristics, social development, physical development, and management needs (*id.* at pp. 7-8). The parents further asserted that during the previous seven years, the student has "increasingly failed to advance academically and socially" and has fallen "dramatically and progressive[ly] below grade level" even as she advanced from grade to grade (*id.* at p. 8). The parents further asserted that the program recommended by the September 2011 CSE was not appropriate for the student (*id.* at p. 12). In addition, the parents asserted that Pathways was appropriate for the student (*id.* at pp. 11-12). As relief, the parents sought reimbursement for tuition and transportation costs for Pathways for the 2011-12 school year (*id.* at p. 10). The second amended due process complaint notice also included the allegations in both the initial September 7, 2011 due process complaint notice and October 12, 2011 amended due process complaint notice, and attached a copy of the June 27, 2011 Pathways acceptance letter and tuition agreement (Parent Ex. P; *see* Dist. Exs. 1; 11).<sup>6</sup>

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<sup>5</sup> The Commissioner of Education has not approved Pathways as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

<sup>6</sup> The acceptance letter and tuition agreement are separately marked as exhibits in the hearing record (*see* Parent Ex. I).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on November 18, 2011 and concluded on January 18, 2012, after six days of proceedings (Nov. 18, 2011 Tr. p. 1; Dec. 2, 2011 Tr. p. 187; Jan. 11, 2012 Tr. p. 188; Jan. 12, 2012 Tr. p. 854; Jan. 13, 2012 Tr. p. 943; Jan. 18, 2012 Tr. p. 1130).<sup>7</sup> In a decision dated March 11, 2012, the impartial hearing officer initially found that the May 27, 2011 IEP constituted the IEP in effect for the beginning of the 2011-12 school year and that testimony from witnesses regarding the student's program recommended by the September 2011 CSE was not relevant to the determination of the appropriateness of the district's May 2011 IEP for the 2011-12 school year (IHO Decision at pp. 3-4). The IHO further found that the parent's September 15, 2011 amendment to the original September 7, 2011 due process complaint notice did not alter the date on which the proceeding was commenced and did not constitute a waiver of their challenge to the appropriateness of the May 2011 IEP (*id.* at p. 3).

Regarding the May 2011 IEP, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at p. 17). The IHO specifically found that progress reports indicating a low level of success regarding the student's goals tended to support a conclusion that the program offered by the district was not appropriate (*id.* at p. 10). Also, the IHO found that comparison of evaluation results indicated that the student had not made progress up to the time of the May 2011 IEP (*id.*). Regarding reading and math, the IHO found that the student's skills had regressed (*id.* at p. 11). In addition, the IHO found that testimony that the student benefitted from a fifth grade ICT class did not support the May 2011 CSE's recommendation for placement of the student in an ICT class for four periods per day or indicate that the student was likely to achieve "more than trivial progress" (*id.* at p. 12). The IHO further found that the social benefit of increased exposure to same-age peers was outweighed by the student's need for a smaller class environment to enable her to acquire skills (*id.* at p. 13).

The IHO next found that Pathways provided an appropriate educational program for the student in academics and all related service need areas and that the social skills component of the program was appropriate to meet the student's needs (IHO Decision at p. 16). In addition, the IHO found that "the only element missing" from Pathways was typical age peers, but that balancing the least restrictive environment (LRE) considerations with the requirement that the student receive an appropriate education did not render Pathways inappropriate (*id.* at p. 16). As to equitable considerations, the IHO found that the parents acted reasonably and were entitled to reimbursement for tuition and transportation (*id.* at p. 17). Based on the foregoing, the IHO ordered the district to pay for the cost of tuition for the student at Pathways for the 2011-12 school year and also awarded transportation costs (*id.* at p. 18).

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

The district appeals, asserting that the IHO erred in determining a lack of progress and regression based solely on number of IEP goals achieved and the student's standard scores. In

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<sup>7</sup> The hearing record reflects an irregularity in the pagination of the transcript with duplicative page numbers on Dec. 2, 2011 and Jan. 11, 2012, and a skip in consecutive pagination from January 11, 2012 to January 12, 2012.

addition, the district asserts that the IHO erred in ignoring the testimony of 15 district witnesses and relying on only portions of testimony by the parent's expert witness and ignoring those portions where the witness corrected or contradicted herself. Moreover, the district asserts that the IHO erred in measuring the appropriateness of the recommended program based only on the May 2011 IEP; that the CSE had the right to reconsider its recommendation; and that the parents amended their due process complaint notice alleging that the September 2011 IEP was inappropriate; and that the IHO erred in finding that testimony from a district witnesses regarding changes to the May 2011 IEP made in September 2011 were irrelevant. In addition, the district asserts that the student was able to negotiate mainstream classes and benefit socially and academically from the recommended program and that the IHO erred in finding insufficient evidence to support a finding that the recommended program was the student's LRE. The district further asserts that the IHO erred in finding that Pathways was appropriate for the student because Pathways was more restrictive and provided less academic support and socialization than the district's recommended placement and there were no opportunities for mainstreaming. As to equitable considerations, the district asserts that the parents had no intent of having the student attend the public school. As relief, the district seeks an order reversing the IHO's decision that the district's recommended program for the 2011-12 school year was not appropriate; that Pathways was an appropriate placement; that tuition reimbursement was warranted and that reimbursement for travel was appropriate.

In an answer, the parents deny many of the district's assertions and request that the petition should be dismissed.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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]).

## **VI. Discussion**

### **A. Progress During 2010-11 School year**

As discussed above, the IHO found that the May 2011 CSE's recommendations for the student were not appropriate and based his determination upon finding a lack of progress and regression leading up to the time of the May 2011 CSE meeting (see IHO Decision at pp. 8-13).<sup>8</sup> Upon review of the hearing record, I find that the IHO erred in determining a lack of progress and regression based on the number of IEP goals the student "achieved" rather than focusing on the extent to which the student had progressed (see IHO Decision at p. 10; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, \*31, \*36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). The IHO further erred by failing to consider evidence other than formal testing scores, which are just one measure of a student's progress (see IHO Decision at pp. 10-12). As discussed below, although the hearing record includes results of formal tests showing that when compared to same-age typical peers, the student rate of progress declined regarding her ability to respond successfully to specific formal testing tasks and measures in reading and math (Jan. 18, 2012 Tr. pp. 1146-49; Dist. Ex. 24 at pp. 13-15), an overall review of the hearing record shows that despite a decline in formal test scores, the student functionally made progress in school academically, socially, and emotionally during prior school years leading up to the May 2011 IEP.

Under the IDEA, "a child's academic progress must be viewed in light of the limitations imposed by the child's disability" (H.C. v. Katonah-Lewisboro Union Free Sch. Dist., No. 09 Civ. 10563 [S.D.N.Y. May 24, 2012] quoting Milford, 103 F.3d at 1121). Regarding the standardized test results in the instant case, I note that the student's special education teacher for grades three (2008-09), four (2009-10), and five (2010-11) testified that although the psychologist who conducted the private December 2010 neuropsychological evaluation had a "pretty good handle on [the student] as a learner" with learning disabilities, standardized testing did not adequately explain the student or her abilities, and the student's array of difficulties including dysfluency and very slow pace might affect standardized testing results (Nov. 18, 2011

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<sup>8</sup> Regarding the district's assertion that the IHO erred in analyzing the appropriateness of the recommended program based only on the May 27, 2011 IEP without considering modifications made to the IEP at the September 15, 2011 CSE meeting (see IHO Decision at p. 3), the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]). In the instant case, the May 2011 IEP was the IEP that was prepared to be in effect at the beginning of the 2011-12 school year (see Dist. Ex. 19 at p. 1), and the crux of the parent's claim for reimbursement flows from the student's removal from the public school on the basis of the May 2011 IEP and unilateral placement by the parent for September 2011 (Jan. 13, 2012 Tr. p. 979; see Dist. Ex. 11; Parent Ex. I). Accordingly an analysis as to whether or not the student was offered a FAPE for the 2011-12 school year should be based upon the May 2011 IEP. Nevertheless, I have reviewed the entire hearing record, including the September 2011 IEP, and find that the district did not deny the student a FAPE due to modifications made to the May 2011 IEP after the student was unilaterally placed at Pathways (see Dist. Ex. 8).

Tr. pp. 155-57). Upon review of the hearing record, I find that the standardized test scores on their own do not accurately reflect the student's progress and that although the student may not have learned mathematics or to read at the same rate or as quickly as other students in her grade, or as her nondisabled peers, such does not mean that the student did not meaningfully progress (see H.C., No. 09 Civ. 10563 [noting that district offered the student a FAPE and rejecting assertion that student did not make meaningful progress]; see also Application of the Board of Educ., Appeal No. 09-102).

Testimony of teachers and related service providers who worked with the student during the 2010-11 school year, combined with documentary evidence show that the student adequately advanced toward attaining her annual goals in all of her areas of identified need. In addition, the hearing record reflects that through an array of special education programs, related services and accommodations that changed according to the student's needs from the time she entered the district leading up to the time of the May 2011 CSE subcommittee meeting, the district consistently supported the student's learning while gradually encouraging her independence and socialization with her nondisabled peers (see Dist. Exs. 30 at pp. 1-2, 6; 35 at pp. 1-3, 7; 46 at pp. 1-3; 62 at pp. 1-3; 78 at pp. 1-2, 5; 86 at pp. 1-2; 90 at p. 1).<sup>9</sup>

Testimony of the student's special education teacher indicated that she taught the student for three years in a self-contained classroom (8:1+2) for grades three through five, an environment the teacher described as a specialized program that offered intensive learning opportunities through 1:1, small group, and whole group instruction, and that stressed language and social skills in conjunction with the speech-language pathologist (Nov. 18, 2011 Tr. pp. 96-97). Academic subjects included math, science, and social studies as well as mainstream opportunities as appropriate (id. at pp. 96-97). According to the teacher, when the student first entered her classroom in third grade, she was resistant to instruction and had to learn the teacher's expectations, rules, and boundaries (id. at pp. 101-02). The teacher indicated the student had good days and bad days in terms of her ability to focus, and that the student displayed a full range of emotions and understanding of how she felt, was aware of how others were feeling, and was able to talk about her feelings (id. at p. 101). Socially, the student verbalized that she was anxious to be with other students (id.). Academically, the teacher indicated that in third grade the student could be described as a "non-reader," and that at the time she was only able to consistently read 5 to 10 words (id. at pp. 102-04). Math weaknesses were also noted (id. at p. 104). The teacher indicated that by the end of third grade the student became a reader and was reading consistently at a level equal to about the end of kindergarten to middle of first grade (id. at pp. 109-10). In addition, the teacher noted that progress occurred in math basics, whereby at the end of third grade the student was working on the concept of more, less, and equal to, and was beginning addition (id. at p. 110). The teacher testified that in writing, the

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<sup>9</sup> The hearing record reflects that although the student was enrolled in small self-contained classrooms throughout the elementary grades, she participated in mainstream activities in a kindergarten class two times per week for one hour; "specials" classes including gym, music, art, and library in at least grades one, two, and three; playground where she made two or three friends in third grade; fourth grade chorus where she made a friend that she saw outside of school; as well as participation in student council with support from her speech-language pathologist (Nov. 18, 2011 Tr. p. 57; Dec. 2, 2011 Tr. p. 311). During fifth grade, the student participated in a mainstream science and social studies class for one hour daily (with support of a teacher assistant) and was described as having "done well" in that setting (Dec. 2, 2011 Tr. pp. 250-51; Dist. Ex. 19 at p. 2).

student displayed beautiful cursive handwriting (id. at p. 115). Regarding the student's behavior, the teacher testified that she displayed improvement in study skills, knew exactly what was expected of her, seemed happy, and became more independent (id. at pp. 110-11).

According to the special education teacher, in fourth grade the student continued to make slow progress (Nov. 18, 2011 Tr. p. 120). In math, the student started doing double and triple digit addition and subtraction without regrouping, basic geometry, fractions, and multiplication skills (id. at pp. 120-21). The student continued to work on reading and writing (id.). By the end of fourth grade, the student began to work on multiplication; she participated more during group work and becoming a leader in the group; she was aware of everything going on around her; and she was interested in everybody else and what they were doing (id. at pp. 122-23).

The special education teacher indicated that for fifth grade she worked with the student in writing, spelling, math, reading, independent skills, group work, some science, and some social studies (Nov. 18, 2011 Tr. p. 141). The student was consistently mainstreamed into fifth grade general education classes for science and social studies accompanied by a teacher assistant, and sometimes for other activities that were language and/or social skills based (id. at pp. 141-42). During fifth grade the student was starting to show more interest in reading independently than she did in either third or fourth grade, and was reading a series book that the teacher estimated to be at a second grade reading level about which she was able to answer questions posed by the teacher (id. at pp. 144-45).<sup>10</sup> In math, the student continued to work on multiplication and division (id. at p. 145). The teacher indicated the student was excited about going to the mainstream class (id. at p. 146). According to the special education teacher, the teacher of the mainstream class was excited about the student's ability to socialize with the other fifth graders (id. at p. 149). The special education teacher indicated that the teacher of the mainstream class recognized that writing was tedious for the student, and provided opportunities for the student to speak her answers rather than write them down, and that the student made progress (id.). In order to assist the student to contribute to the class at a speed that was more typical, the teacher assistant that accompanied the student in the mainstream class would scribe for the student so that she could keep pace with the program (id. at p. 150). Academically, the special education teacher indicated that the student did well in the mainstream classroom and work was brought back to the special education classroom that accommodated the student's learning needs and learning style, while addressing the same subject matter as the mainstream students (id.).<sup>11</sup>

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<sup>10</sup> The psychologist who conducted the December 2010 private neuropsychological evaluation testified that for reading, despite that the student's standardized test scores showing regression or a lack of progress commensurate with her age and developmental level, the growth in her functional reading levels from that of a non-reader in the beginning of third grade to reading at an end of second grade/beginning third grade reading level at the end of fifth grade was "not regression" (Jan. 18, 2012 Tr. at pp. 1203-04).

<sup>11</sup> The hearing record reflects the parents were asked permission for the student to participate in a test involving states and their capitals (Nov. 18, 2011 Tr. p. 151; Parent Ex. K at pp. 1-10). Among other things, the student's father responded that the parents were "very pleased" that the student would have opportunity to participate in the test and provided suggestions for modifications as to how the student might respond to questions (Parent Ex. K at p. 11). Upon taking the test, the student scored 24 items correctly out of a possible 25 items, without modifications or assistance (Nov. 18, 2011 Tr. at pp. 151-53; Parent Ex. K at p. 12).

The fifth grade teacher of the mainstream class that the student attended one hour daily for science and social studies testified that the student displayed "a lot of growth" in her social interactions with the class from the beginning of the 2010-11 school year to the end of the year (Dec. 2, 2011 Tr. pp. 250-51, 253). The fifth grade teacher indicated that when the student first entered her classroom, she did not seem to understand space between two people when engaged in conversation (id. at p. 252). By the end of the school year, the student maintained appropriate interpersonal space when engaged in conversation with her communication counterpart (id.). The teacher noted that when the student first came into the classroom she seemed anxious, but as the school year progressed, the student said hello to everyone upon entering the classroom and interacted well with other students (id.). The student also worked on a project involving a PowerPoint presentation with the other students, and stood up in front of the classroom and read one of the slides during the actual presentation (id.). The teacher noted that on various occasions, she observed the student delegating jobs to other students during group activities (id.). The teacher described the student as "a very good auditory learner," in that when exposed to any kind of lecture work or discussion of a particular topic, the student tended to listen intently and tended to raise her hand in response to questions (id. at p. 253).

The speech-language pathologist for grades three (2008-09) and five (2010-11)<sup>12</sup> testified that she knew the student through her work with her in speech-language therapy, which included work in the areas of fluency, oral-motor, sentence structure, narratives, paragraph writing, and pragmatic communication with peers and teachers (Nov. 18, 2011 Tr. pp. 35-36, 38-41). The speech-language pathologist indicated that in third grade the student appeared to want to learn and be in school, but had difficulty understanding her routine, understanding expectations, and adjusting to the program (id. at p. 79). The speech-language pathologist indicated that by the end of third grade, the student became more confident in her ability to navigate through her school day as her routine was established and she knew exactly what was expected of her; that her speech dysfluency decreased a lot; and that she was able to generalize pragmatic communication strategies learned in speech-language to reading, math, science or other subject classes (id. at pp. 42-44, 54). The speech- language pathologist indicated that when she started working with the student again during individual speech-language therapy session at the beginning of fifth grade she noticed that the student's confidence level was "very different" (id. at pp. 64-65). By the end of fifth grade, the student was "very ready to go, ready to learn;" and displayed an attitude of "I got this, I can do it" (id. at p. 65). The speech-language pathologist indicated that she saw a lot of progress in the student from the time she started working with her in third grade to the time she knew her in fifth grade (id. at p. 79). The speech-language pathologist testified that by the time the student was in fifth grade she appeared happy, content, confident, and often helped other students in the classroom (id. at p. 80). She described the student as a "remarkable young lady" who "never gave up and ... worked very, very hard to get to where she was in fifth grade" (id.).

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<sup>12</sup> The speech-language pathologist testified that although a different related service provider delivered the student's speech-language therapy services in fourth grade (2009-10), she communicated with the student every morning about subjects including the student's experiences on student council (Nov. 18, 2011 Tr. p. 57). She indicated that she did not have any information with regard to how the student progressed in fourth grade, but she did testify that several of the student's scores on formal testing administered during a spring 2010 speech-language reevaluation conducted by the student's speech-language pathologist for fourth grade were in the average range and demonstrated progress (Nov. 18, 2011 Tr. pp. 58-59; see Dist. Ex. 31 at pp. 7-10).

Regarding the student's progress for the 2010-11 school year, the annual goals report for 2010-11 included "goal progress report marks" for the four quarters of the 2010-11 school year (Dist. Ex. 15 at pp. 1-7).<sup>13</sup> In the area of study skills, the student was progressing gradually (PG) in her ability to independently complete her daily spelling, math, and reading work in the time allotted, and progressing inconsistently (PI) in her ability to attend to task without distraction for ten minutes during individual seatwork activities (id. at p. 1). Despite her inconsistent progress with attention, the student achieved all of her annual goals and objectives in the area of reading, whereby she made one grade level of progress in reading decoding in one school year's time (from beginning of second grade level to end of second grade level), and upon listening to a teacher-read story the student answered five wh-questions 90 percent of the time (id. at pp. 1-2). In the area of writing, the student achieved her spelling annual goal and objective, whereby she made one grade level of progress in spelling (from end of second grade level to end of third grade level) (id. at p. 2). Also in writing, the progress report indicated the student improved from progressing gradually (PG) to progressing satisfactorily (PS) by the end of the school year in her ability to write three complete sentences using nouns and verbs, and in her ability to write a short paragraph about one subject that included a topic sentence (id.).

In the area of mathematics, the student achieved annual goals and objectives involving her ability to solve three-digit addition problems with regrouping, and solving three-digit subtraction problems with regrouping (Dist. Ex. 15 at pp. 2-3). The student improved from progressing gradually (PG) to progressing satisfactorily (PS) by the end of the school year, in her ability to solve single-digit multiplication problems without the use of a calculator, solve two-digit by two-digit multiplication problems, solve single-digit division problems, and solve one-step word problems (id. at p. 3). Regarding the student's basic cognitive/daily living skills, the annual goals progress report for 2010-11 indicated that the student was progressing gradually (PG) in her ability to add and subtract money problems on a worksheet (id. at p. 7). The annual goals progress report also indicated that the student was progressing satisfactorily (PS) in her social/emotional/behavioral annual goal that targeted the student's ability to communicate and interact in a socially acceptable manner with peers (e.g., nonaggressive verbalizations or body language, appropriate eye contact, appropriate turn taking, and listening without speaking) (id. at p. 5).

Regarding the student's progress toward achieving annual goals specific to related services, the measurable annual goals progress report indicated that for most of the school year in speech-language, the student was progressing gradually (PG) in her ability to express conclusions, discuss main ideas, convey extended explanations, and provide detailed descriptions to accurately answer questions about a story or event posed by the therapist (Nov. 18, 2011 Tr. pp. 78-79; Dist. Ex. 15 at p. 4). The student consistently was progressing satisfactorily (PS) in

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<sup>13</sup> The goals report contained a rubric specific to goal progress indicating that "A" means "Achieved," the student achieved the goal; "NA" means "Not Achieved," the student has not achieved the goal; "PG" means "Progressing Gradually," the student is making less than anticipated progress but may still achieve the goal; "PI" means "Progressing Inconsistently," the student is making inconsistent progress and may not achieve the goal; "PS" means "Progressing Satisfactorily," the student is making satisfactory progress and is expected to achieve the goal; and "SC" means "See Comments" (Dist. Ex. 15 at p. 1). The same report contained a rubric specific to objective/benchmark progress report marks that indicated "A" means "Achieved," the student achieved the objective/benchmark; "NA" means "Not Achieved," the student has not achieved the objective/benchmark; and "SC" means "See Comments" (id.).

her ability to use specific strategies and techniques to various factors that affect the fluency of her speech; in her ability to follow three multi-step directions presented orally that incorporated basic and more complex linguistic language structures; and in her ability to sequence and relate information presented orally in a logical manner using appropriate word and sentence order during connected discourse (Dist. Ex. 15 at p. 4). The student improved from progressing gradually (PG) to progressing satisfactorily (PS) by the end of the school year, in her ability to use concise, meaningful language and clarify miscommunications when providing directions or describing an event or topic (*id.*). A comment included in the progress report indicated that the student made good progress on all of her speech-language goals during the 2010-11 school year (*id.*; *see* Nov. 18, 2011 Tr. pp. 78-79).

The annual goals progress report for 2010-11 indicated that the student achieved (A) PT goals related to ambulation on the right side of the hallways in school and accommodating for obstacles in her path with a heel/toe gait and arms at her sides, and following verbal directions to correctly complete a three-step task (Dist. Ex. 15 at pp. 5-6). The student was progressing gradually (PG) in her ability to stand on one foot and maintain balance for ten seconds 70 percent of the time, and had achieved (A) the goal for six seconds 70 percent of the time (*id.* at p. 6).<sup>14</sup> She was also progressing satisfactorily (PS) in her ability to squat to pick up an object from the floor and then re-erect for ten repetitions with good eccentric mid-range control 80 percent of the time, and achieved (A) such ability 65 percent of the time (*id.*). The student's physical therapist for the 2010-11 school year indicated that at the beginning of the school year, the student displayed difficulties with coordination of muscle movements, ataxia (jerky body movements), awareness of her body in space, endurance, overall muscle weakness, dynamic balance, and motor planning (Jan. 11, 2012 Tr. pp. 193-94). In the classroom the student would upon standing, bump into classmates or knock books off the table, lean on walls, bump into people, stumble, was unaware of where her arms were, and had jerky movements as she walked down the hall, was unstable motorically on stairways, and had problems with balance on unstable surfaces (*id.* at pp. 194-97). By the end of the 2010-11 school year, the student displayed the ability to walk to and from her classroom by herself, negotiate staircases by herself with her arms at her side and without stumbling or bumping into anything, and displayed her biggest improvement in her awareness of her body in space (*id.* at pp. 197, 199-200). The student made small improvements in motor planning and endurance, and although she continued to require rest periods during a 30-minute PT session, she required fewer of them (*id.* at pp. 197-98). The physical therapist indicated that the student improved in her ability to make eye contact, to listen and follow three-step directions, and in her use of compensatory strategies to deal with her ataxia (*id.* at p. 199). In addition, the physical therapist noted improvements in the student's gross motor function, muscle strength, and upper body strength (*id.* at pp. 200-201, 212).

Regarding OT goals and objectives, by the end of the 2010-11 school year, the student achieved (A) goals targeting her ability to direct and maintain eye contact without head movement toward the therapist or object while moving in a horizontal, vertical, and diagonal

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<sup>14</sup> The annual goals progress report for the 2010-11 school year indicated that the "psychologist" was responsible for the goal targeting the student's ability to stand on one foot and maintain balance (Dist. Ex. 15 at p. 6). However, the student's physical therapist during the 2010-11 school year testified that she was responsible for that particular motor goal, and she was unable to explain the error in the progress report (Jan. 11, 2012 Tr. at p. 207).

plane for five minutes; her ability to correctly identify differences in visual details by visually discriminating among three identical and one similar shape; her ability to exhibit correct posture (e.g., keep head in neutral position, maintain appropriate body alignment) during fine motor tasks for a minimum of five minutes; and her ability to negotiate a multi-step obstacle course (e.g., balance beam, tunnels, climbing equipment) for four repetitions (Dist. Ex. 15 at pp. 5-6). The student was progressing satisfactorily (PS) in her ability to correctly follow directions in a "Simon Says" game for four repetitions (id. at p. 6). The student's occupational therapist for the 2010-11 school year indicated that the student developed good postural control; was able to sit for longer periods of time; her handwriting was smaller and legible; and keyboarding, fine motor, and in particular, visual perceptual skills were improving (Jan. 11, 2012 Tr. pp. 223-24). In conjunction with improvements in sight word recognition and spelling skills, the student improved in her ability to copy words from the board (id. at p. 225).

Review of the student's June 15, 2011 fifth grade progress report, which included grade level performance ratings for all four quarters of the 2010-11 school year, shows that the student improved in moving toward or reaching proficiency at grade level standards for several specific skills in language arts, mathematics, science/health, and social studies (Dist. Ex. 16 at p. 1).<sup>15</sup> The progress report reflected that by the end of the 2010-11 school year in reading, the student improved from approaching proficiency at grade level standards to proficient at grade level standards in "comprehension" (id.). In the area of writing, the student improved from approaching proficiency at grade level standards to proficient at grade level standards in "grammar/sentence structure" and in "writing mechanics: capitalization and punctuation" (id.). She consistently performed as proficient at grade level standards for handwriting (id.). In the area of listening, the student improved from approaching proficiency at grade level standards to proficient at grade level standards in "responds with understanding" (id.). In the area of speaking, the student progressed from below grade level standards to approaching proficiency at grade level standards for "organization and expression of ideas" (id.). In mathematics, the student progressed from below grade level standards to approaching proficiency at grade level standards for "concepts" (estimation, probability, measurement, fractions, geometry, patterns, number sense); "computation" (addition, subtraction, multiplication, division); "problem solving" (analyzing, decision making, predicting); and "mathematical reasoning" (explains thinking) (id.). In each of the areas of science/health and social studies, the student progressed from approaching proficiency at grade level standards to proficient at grade level standards for "understands concepts" (id.). Regarding effort/work study habits, by the end of the 2010-11 school year, the student had progressed from "satisfactory" to "good" pertaining to classroom effort in language arts, mathematics, and social studies, and maintained a rating of "good" throughout the school year for classroom effort in science (id.). Regarding social skills and work habits, the student improved from "good" to "outstanding" for "follows classroom rules and directions," and "follows playground rules and directions" (id.). The student advanced from "improving" to "satisfactory" for "uses time appropriately," and "completes classwork" (id.). The student

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<sup>15</sup> The June 15, 2011 fifth grade progress report included a grading key rubric whereby "4" meant "[e]xcelling at grade level standards;" "3" meant "[p]roficient at grade level standards;" "2" meant "[a]pproaching proficiency at grade level standards;" and "1" meant "[b]elow grade level standards" (Dist. Ex. 16 at p. 1). An additional rubric specific to effort/work study habits indicated that "O" meant "[o]utstanding," "G" meant "[g]ood," "S" meant "[s]atisfactory," "I" meant "[i]mproving," and "N" meant "[n]eeds [i]mprovement" (id.).

improved from "satisfactory" to "good" for "completes homework," and maintained a rating of "good" throughout the year for "respects rights and property of others" (*id.*). In addition, the student maintained a rating of "satisfactory" for effort/work study habits the subjects of art, library, music, and physical education (*id.*).

Accordingly, upon review of the hearing record, I find that the evidence in the hearing record does not adequately support the IHO's conclusion that the student exhibited a lack of progress and regression, and I find that an overall review of the hearing record shows that the student made meaningful progress in school academically, socially, and emotionally during the period of time leading up to the May 2011 CSE meeting (*see Cerra*, 427 F.3d at 195, quoting *Walczak*, 142 F.3d at 130 [citations omitted]; *see Newington*, 546 F.3d at 118-19; *Perricelli*, 2007 WL 465211, at \*15).

## **B. May 2011 IEP**

### **1. Present Levels of Performance**

To the extent that the parents assert that the student failed to progress in past years with greater supports than those offered by the May 2011 CSE thereby rendering the May 2011 IEP inappropriate, I find that the weight of the evidence in this case supports a finding that the student made meaningful progress during the 2010-11 school year, as discussed above.

Moreover, while, an appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (*see* 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), I note that the information contained in the student's May 2011 IEP, such as the student's present levels of academic achievement, social development, physical development, and management needs (*see* Dist Ex. 19) are not contested on appeal.<sup>16</sup> Nevertheless, I have reviewed the May 2011 IEP, and as discussed below, I find that the hearing record demonstrates that the May 2011 CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs and that the description is consistent with the evaluative information that was available to the CSE.

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<sup>16</sup> Although the parents asserted in their November 8, 2011 second amended due process complaint notice that the May 2011 IEP failed to "provide" for the student in the areas of academic achievement, functional performance and learning characteristics, social development, physical development, and management needs (Parent Ex. P at pp. 7-8), and the IHO indicated in his decision the student's learning characteristics, abilities, strengths and weaknesses as delineated on the student's May 2011 IEP, I note that the IHO did not find that the included information in the IEP was inaccurate (although he noted a discrepancy between the district's identification of the student as a strong auditory learner and the parents' witness who found that the student has deficits with sustained auditory attention) (*see* IHO Decision at pp. 5-8). Since the parents do not cross-appeal the IHO's failure to rule on any claims, whether or not the district failed to "provide" on the student's May 2011 IEP for the student in the areas of academic achievement, functional performance and learning characteristics, social development, physical development, and management needs is not at issue on appeal (*see* 8 NYCRR 279.4[b] ["[a] respondent who wishes to seek review of an [IHO's] decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer"]).

In determining the student's present levels of performance and developing the IEP for the 2011-12 school year, the May 2011 CSE subcommittee considered a variety of evaluation results and reports, and progress reports, including the December 2010 private neuropsychological evaluation report provided by the parents, as well as related services information discussed during the CSE subcommittee meeting (Dist. Exs. 19 at pp. 2-10; 24 at pp. 1-34).<sup>17</sup>

Consistent with the December 2010 private neuropsychological evaluation report, the May 2011 IEP included information about the student's diagnoses (Dist. Exs. 19 at pp. 2, 10; 24 at p. 23). In addition, the student's IEP included information from the December 2010 private neuropsychological evaluation as to the student's areas of strength, noting that her abstract verbal reasoning skills were within high average limits and verbal comprehension was within average limits (Dist. Exs. 19 at p. 2; 24 at p. 23).

I further note that the May 2011 IEP characterized the student's auditory learning abilities as one of the student's strengths (Dist. Ex. 19 at p. 8) and that this is consistent with the testimony of the student's speech-language pathologist, special education teacher, fifth grade mainstream classroom teacher, and the district supervisor of special education (Nov. 18, 2011 Tr. pp. 62, 138; Dec. 2, 2011 Tr. at pp. 253, 285). While the private psychologist who conducted the December 2010 neuropsychological evaluation and the assistant co-director of Pathways indicated that the student was a multi-modality learner with strength in the visual modality (Jan. 13, 2012 Tr. at p. 973 ; Jan. 18, 2012 at pp. 1187-88), I note that recommendations regarding the student's learning needs, and for modifications, accommodations, and supplementary aids and services included on the May 2011 IEP were consistent with the majority of the recommendations included in the private neuropsychological evaluation report (see Dist. Exs. 19 at pp. 2, 6-9; 24 at pp. 25-29).

Regarding the student's deficits, weaknesses were noted in working memory and processing speed (Dist. Ex. 19 at p. 2). Fine motor difficulties and anxiety were also noted (Dist. Exs. 19 at p. 2; 24 at p. 24). Academic difficulties were noted compared to the student's cognitive abilities, which were reported to be within the average range (Dist. Exs. 19 at pp. 2, 8; 24 at pp. 23-24).

The IEP noted that the student's academic, developmental, and functional needs included the student's ability to complete tasks in the required amount of time, as that was something that could "vary dramatically" from one day to the next, and from one task to another (Dist. Ex. 19 at p. 9). In general, the student displayed an increase in her ability to complete assignments correctly and in an appropriate amount of time (id.). However, the student needed to be encouraged to continue reading and practicing her writing skills and she benefited from an environment with same age peers in which there were opportunities to increase skills using her auditory learning abilities (id.).

A review of the student's levels of knowledge and development in subject and skill areas reflects that in mathematics, the student mastered triple digit addition and subtraction with

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<sup>17</sup> The May 2011 CSE subcommittee included the CSE chairperson, school psychologist, the student's special education teacher, the student's regular education teacher, the student's speech-language pathologist, the parents, and the student's neuropsychologist (via telephone conference) (Dist. Ex. 19 at p. 1).

regrouping, she learned multiplication facts from one to five and began basic division with those facts, and she continued working on fractions and one-step addition and subtraction word problems (Dist. Ex. 19 at p. 8). In reading, the student showed an increased confidence in reading, decoding skills had become more fluent, and comprehension skills had grown using strategies that allowed her to hear herself or others read (id.). In speech-language, the student worked hard toward all of her speech goals (id.). The IEP indicated that the student was able to complete most language tasks given to her when she was focused and motivated, and at times, her distraction level was inconsistent making the quality of her work inconsistent (id.). In addition, the student enjoyed speech-language groups the most when the unit focused on literature, she enjoyed listening to stories read to her, and she often was the first to answer comprehension questions and offer her opinion about the story (id.). Regarding the student's dysfluency, she showed the most difficulty maintaining fluency during times of excitement, stress, or when she appeared very tired (id.). The student's dysfluency was described as "inconsistent and few" during activities when she was comfortable and confident with her work (id.). The student continued to work on breathing techniques to help regain control during times of dysfluency (id.).

Regarding the student's social development specific to the extent and quality of her relationships with peers and adults, feelings about self, and social adjustments to school and community environments, the May 2011 IEP indicated that during the 2010-11 school year the student spent time in a general education fifth grade classroom for science and social studies, accompanied by a teaching assistant (Dist. Ex. 19 at p. 9). Socially, the student made "good progress" with her same age typical peers, worked in groups, did research, planned a PowerPoint presentation, and participated in classroom discussions (id.). In addition, the May 2011 IEP indicated that the teacher assistant who accompanied the student to the general education fifth grade classroom reported that the student tried very hard to fit in and complete her work like the other fifth-grade students; and that the student often made it clear verbally that she preferred to ask peers or the regular education teacher for assistance when needed (id.). The student's May 2011 IEP noted as strengths that the student liked to be included with the general education fifth grade class; that the student was friendly and "genuinely liked" by many of the students in the class; and that she fit in "very well" and was interested and enthusiastic, as reported by the regular education teacher (id.). Regarding social development needs, the IEP indicated that the student sometimes became quiet or hesitated to contribute to group activities, that she needed more practice in a general education setting to feel accepted, and that she needed encouragement to build confidence and regular feedback from the classroom teacher (id.).

Regarding the student's physical development and the extent and quality of her motor and sensory development, health, vitality and physical skills or limitations which pertain to the learning process, the May 2011 IEP indicated that by April 2011, the student had displayed slow gradual progress in PT (Dist. Ex. 19 at p. 10). Regarding OT, the May 2011 IEP indicated that by April 2011 the student showed improvement (id. at p. 9). In regard to the student's physical development strengths, the student was described as pleasant, cooperative, and willing to try all activities, including new and different gross motor activities (id. at p. 10). Physical development needs of the student included that she would benefit from continued PT to improve functional mobility in her school setting as well as posture, gross motor skills, and endurance; and

continuation of OT to address visual motor skills, handwriting, motor planning skills and keyboarding (id.).

The May 2011 IEP identified the student's management needs for a structured classroom environment with consistent routine and clear teacher expectations, as well as a schedule that would assist her in developing the ability to navigate through her day with greater independence (Dist. Ex. 19 at p. 10). Regarding the effect of the student's needs on involvement and progress in the general education curriculum, the May 2011 IEP indicated that the student showed an ability to learn alongside her same-age peers when provided with adult support when she experienced difficulty understanding what was being asked of her, with expressing her ideas, and when she was experiencing difficulty staying focused (id.). Although the student struggled with word retrieval and sometimes appeared self-conscious about this difficulty, she continued to work on this skill (id.).

Accordingly, upon review of the hearing record, I find that the May 2011 IEP accurately described the student's present levels of academic achievement, social development, physical development, and management needs; and that the May 2011 IEP accurately reflected the available evaluative information, including the December 2010 private neuropsychological evaluation provided by the parents.

## **2. ICT Classes**

Regarding the May 2011 CSE subcommittee's recommended placement for the student in ICT classes in a district middle school, the student's special education teacher who participated in the CSE meeting indicated she was familiar with the program and opined that the student would benefit from the recommended program (Nov. 18, 2011 Tr. at pp. 153-54). She noted that the student had already demonstrated she was able to function in a general education environment, and as long as she was provided with adult support for safety and to accommodate her slow processing needs (id.). The teacher's testimony also indicated that prior to the May 2011 CSE subcommittee meeting, she looked into other district programs for the student (id.). However, one program at another district middle school which she helped develop at its onset was very similar to the student's fifth grade program, but she explained that the students admitted to that program still required work on social skills that the student in this case no longer needed (id.). The teacher indicated that by the time of the May 2011 CSE subcommittee meeting, she felt the student was progressing "at a pretty good pace" (id.).

Additionally, the student's speech-language pathologist indicated that she attended the May 2011 CSE subcommittee meeting in order to discuss the student's progress during the 2010-11 school year (fifth grade) (Nov. 18, 2011 Tr. p. 69). She indicated that she commented "very directly" on the student's progress on her goals during the fifth grade school year (id. at p. 70). The speech-language pathologist testified that she thought the recommended program would appropriately meet the student's needs, that she did not have concerns that the student would be going from an 8:1+2 setting in fifth grade to an ICT setting for sixth grade because she felt that the student was ready to be in the mainstream with other students, and that the student demonstrated she enjoyed being in the mainstream fifth grade class (id. at pp. 71, 80). Furthermore, the speech-language pathologist noted that the student appeared excited about

school, and that results of formal language testing (obtained during a 2010 multidisciplinary reevaluation) were mostly in the average range (id. at pp. 58-63, 71; Dist. Ex. 31 at pp. 7-9).

Accordingly, upon review, I find that the hearing record reflects that the May 2011 CSE subcommittee developed an IEP for the 2011-12 school year that was designed to continue to support the student's special education needs and progress academically and socially while providing her with appropriate access to her nondisabled peers (see Dist. Ex. 19 at pp. 1-2, 14). In light of the student's meaningful progress during the 2010-11 school year, the student's present levels of performance identified in the May 2011 IEP, and a review of the hearing record, I find that the IHO's conclusion that the recommended ICT placement was inappropriate for the student to be unsupported by the hearing record and that the district's recommended program consisting of ICT classes, consultant teacher services, special classes and related services was designed to address the student's instructional needs and was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07).

### **C. Least Restrictive Environment**

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

The hearing record shows that the recommendations of the May 2011 CSE were made with consideration of the IDEA's requirement that a student's recommended program must be

provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining the LRE for the student, I note testimony of the student's fifth grade special education teacher that she believed access to same age peers was "critical" for the student, and that with adult support, the student would continue to progress with such access (Nov. 18, 2011 Tr. p. 154). According to the teacher of the student's fifth grade mainstream class, the student benefitted from being in the class because she was able to learn how to interact with other students through modeling their behaviors and by participating in group work (Dec. 2, 2011 Tr. pp. 253-54). The teacher indicated that she believed the May 2011 CSE subcommittee's recommendation for the student to be placed in a typical school setting with co-teaching services with a consultant teacher was appropriate for the student because the student would have benefitted from being with different types of students; that she would be able to learn from them and they would be able to learn from her (id. at p. 256).

I have reviewed the hearing record and considered the student's needs, including difficulties with anxiety and mood changes, word retrieval, gross motor, fine motor, visual-motor skills, and executive functions (Jan. 13, 2012 Tr. at p. 1056; Jan. 18, 2012 Tr. at pp. 1156-157; Dist. Exs. 19 at pp. 6-8; 24 at pp. 24-25). I have also considered reported weaknesses in auditory processing, expressive and pragmatic language, fluency, dysarthria (low tone), and oral apraxia characterized by inconsistent oral motor planning difficulties which sometimes affected speech intelligibility (Dist. Exs. 24 at p. 7; 40 at pp. 29-30; 42 at p. 3; 59 at p. 13). I note that the hearing record describes the student as having enjoyed mainstreaming into a general education fifth grade class for science and social studies (Dist. Ex. 19 at p. 8). The hearing record further reflects that the student worked hard to stay focused and to participate in the mainstream setting during fifth grade, that she was actually able to contribute in the typical fifth grade setting, and that her determination resulted in a rewarding fifth grade experience (id. at p. 9). Upon an independent review of the hearing record, I find that the evidence described above supports a finding that the student was capable of receiving educational benefits while being educated with together with general education students and that the placement recommended in the May 2011 IEP balanced the student's need for supportive educational services with the district's obligation to ensure that the student was placed with nondisabled peers to the maximum extent appropriate and, therefore, it constituted the LRE for the student.

## **VII. Conclusion**

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed. The hearing record contains evidence showing that the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether Pathways 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; C.F., 2011 WL 5130101, at \*12; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a

Disability, Appeal No. 05-038). I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated March 11, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year, and directed the district to pay for the student's tuition and transportation costs related to her attendance at Pathways during the 2011-12 school year.

**Dated:** Albany, New York  
July 06, 2012



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