



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-235

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

### **Appearances:**

Pamela Anne Tucker, PC, attorney for petitioners, Pamela Anne Tucker, Esq., of counsel

Guercio & Guercio, LLP, attorneys for respondent, Douglas A. Spencer, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at Fusion Academy (Fusion) for the 2012-13 school year and determined that a sufficient basis existed for respondent (the district) to evaluate the student without their consent. The appeal must be dismissed.

### **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 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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

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

In this case, the student attended the district's public schools from kindergarten through 10th grade (2011-12 school year) (see Tr. pp. 1310, 1318-19; IHO Ex I at p. 7).<sup>1</sup> In kindergarten,

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<sup>1</sup> For the purpose of clarity, the IHO conducted two prehearing conferences in this matter on April 8 and June 7, 2013, which are reflected in two separate transcripts that are not consecutively paginated (see April 8, 2013 Tr. pp. 1-20; June 7, 2013 Tr. pp. 1-9). Thus, any citations to the information found in the prehearing conference transcripts will include the date of such transcript. On June 27, 2013 through August 30, 2013, the IHO received testimonial evidence in this matter, and the testimony is reflected in eight separate transcripts that are consecutively paginated throughout (see Tr. pp. 1-1400); therefore, any citations to testimonial evidence found in transcripts dated between June 27, 2013 and August 30, 2013, will be referenced without particular impartial

the student was diagnosed as having Tourette's syndrome (Tr. p. 1308). According to the hearing record, the student performed well academically during elementary school (see Dist. Ex. 32 at p. 1-2). In fall 2011 for 10th grade, the student was enrolled in advanced placement (AP) classes for World History and Algebra 2, as well as Honors classes for trigonometry, English, chemistry, and French 3; the student was also enrolled in physical education, wind ensemble, and choral ensemble (see Dist. Ex. 32 at p. 2). During the first week of September 2011, the parents began communicating with district staff regarding the student's "issues associated with his Tourette's syndrome last year"—including anxiety—and indicated that although the student was "doing fine lately," it might be beneficial to have a plan in place similar to the plan that had been established during the previous school year with the district guidance counselor to assist the student if he required "help or a place to decompress" (Dist. Ex. 1; compare Dist. Ex. 1, with Tr. pp. 15-16, 21-22). Subsequently, the student began experiencing difficulty with anxiety in school, which resulted in several visits to either the guidance counselor's office or the nurse's office, and the student would either return to class or return home with his parents (Tr. pp. 329, 331, 433, 640-47, 659-60, 663-65, 670-74, 1323, 1327-29; see Dist. Exs. 33 at pp. 3, 7, 10; 34 at pp. 7, 39, 41; 39 at pp. 5, 7; Parent Ex. A at pp. 36, 39, 42-43).

Over the course of September, October, and November 2011, the parents extensively communicated with district staff through an exchange of emails and meetings regarding the student's difficulties with anxiety at school (see Dist. Exs. 1-10; Parent Ex. A at pp. 1-54). In an email dated November 1, 2011, the parents indicated that they "decided" that a plan under section 504 of the Rehabilitation Act of 1973 (section 504 plan) "would best suit [the student's] needs" and had contacted the district's Office of Pupil Services to "start this process," further noting that additional meetings "at this time" were not necessary in light of this decision (Dist. Ex. 8). In a letter dated November 2, 2011, the parents referred the student for the development of a section 504 plan (see Dist. Ex. 17; see also Dist. Ex. 19). On November 16, 17, and 18, 2011, the parents completed an application for homebound instruction with the district, which the student began receiving on or about November 18, 2011 (see Dist. Exs. 11-12; 30 at pp. 1-3; 39 at pp. 4-7; see also Tr. p. 143).<sup>2, 3</sup> On December 7, 2011, the parents provided the district with consent to evaluate the student with respect to the section 504 referral (see Dist. Ex. 18 at p. 4). On February 2, 2012, the section 504 committee met, but decided to table the meeting due to a lack of evaluative information; the section 504 committee did not determine whether the student was eligible for accommodations under a section 504 plan at this meeting (see Dist. Exs. 20 at pp. 1-2; 21; 22 at pp. 1-3; 23; Parent Ex. A at p. 57). In an email to the district dated April 17, 2012, the parents indicated that the student would not be "returning to school until next September," and he remained in homebound instruction through the conclusion of the 2011-12 school year in June 2012 (Parent Ex. A at p. 63; see Tr. pp. 1009-10).

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hearing dates.

<sup>2</sup> In November 2011, the student began receiving treatment—including both psychotherapy and medication—for an obsessive compulsive disorder (OCD) and "secondary symptoms" such as "anxiety, panic disorder, Tourettes (sic) syndrome, hypochondriasis, clinical depression and phobias" (Dist. Ex. 22 at p. 2; see Parent Exs. O; Z at pp. 1-2).

<sup>3</sup> While on homebound instruction, the student dropped his AP chemistry class, but continued to attend the district public school almost daily to participate in wind ensemble and "lessons" through the conclusion of the 2011-12 school year (Tr. pp. 59-60, 143-44, 1358-59).

By letter dated June 19, 2012, the parents—pursuant to their attorney—referred the student for a "full evaluation for possible classification under [the] IDEA" (Dist. Ex. 34 at p. 1). On June 29, 2012 the parents provided the district with consent to conduct the following evaluations and assessments of the student: a social history, a psychological evaluation, a medical examination, a classroom observation, and a psychiatric evaluation (see id. at pp. 32-35).<sup>4</sup>

By letter dated July 9, 2012, the parents expressed concern that the student had not yet been evaluated pursuant to their June 19, 2012 written referral (see Dist. Ex. 34 at p. 36). Additionally, the parents expressed that they were "extremely concerned about placement" for the student "by September," and as a result, the parents notified the district of their intentions to enroll the student at Fusion and to seek reimbursement (id.).<sup>5</sup>

By August 27, 2012, the district had conducted and received an August 2012 social history, an August 2012 psychological evaluation, an August 2012 medical (physical) examination, and an August 2012 Level 1 Career Assessment (transition planning/student interview) of the student (see Dist. Exs. 32 at pp. 1-14; 34 at pp. 3-31, 37-46).<sup>6</sup> On September 5, 2012, the district received a summary report (September 2012 teacher report) from the student's home instructors from the 2011-12 school year (see Dist. Ex. 34 at pp. 47-48).

On September 6, 2012, the CSE convened to determine the student's initial eligibility for special education services (see Dist. Ex. 36 at pp. 1-2, 6).<sup>7</sup> The parents described the student's social/emotional difficulties that prevented the student from "attending school," and informed the September 2012 CSE that the student's "doctors recommended that the student have a neuropsychological and psychiatric evaluation" (id. at p. 1). The September 2012 CSE reviewed the results of the psychological evaluation, and expressed its concern about the student's "psychiatric issues and the need for [an] updated evaluation" in order to "review all aspects of the student's diagnoses, current symptoms, medication and therapeutic treatment so that the student's needs could be identified and addressed in an appropriate manner" (id.). At that time, the parents indicated that "this would be too much for the student to deal with" and would not provide consent to the district's request for a psychiatric evaluation request (id.). However, the parents agreed to obtain a report from the student's psychiatrist synthesizing the student's "diagnoses,

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<sup>4</sup> The district received the parents' consent for the student's evaluations on July 11, 2012; notably, the district received the parents' notice of unilateral placement—dated July 9, 2012—either on July 9, 2013 pursuant to a handwritten notation on the bottom of the document or on July 10, 2012 pursuant to the district's date stamp (see Dist. Ex. 34 at pp. 35-36).

<sup>5</sup> In a letter dated July 27, 2012, the district notified the parents that it had not received a letter, which purportedly requested that a particular district staff member not be allowed to administer the assessments needed to determine whether the student was eligible for special education and related services and that they would be "discussing this and other concerns with [their] attorney" (see Dist. Ex. 43).

<sup>6</sup> The student began attending Fusion for the 2012-13 school year on September 4, 2012 (see IHO Ex. I at p. 7).

<sup>7</sup> The district's attorney and the parents' attorney both attended the September 2012 CSE meeting (see Dist. Ex. 36 at p. 1).

interventions and psychiatric needs" to share with the district (id.).<sup>8</sup> Based upon the information presented, the September 2012 CSE found that the student was not eligible for special education and related services as a student with a disability under the IDEA at that time, and indicated that it would refer the student to the section 504 committee for consideration of accommodations (id.).

On September 18, 2012, the parent executed an enrollment contract with Fusion for the student's attendance during the 2012-13 school year (see Parent Ex. D at pp. 14, 20-27, 31).<sup>9</sup>

On December 7, 2012 the CSE convened again to determine the student's initial eligibility for special education services (see Dis. Ex. 37 at pp. 1-3).<sup>10</sup> The parents provided the December 2012 CSE with a privately obtained neuropsychological evaluation (neuropsychological evaluation) of the student (id.; see Parent Ex. V at pp. 1-15). In order to allow the CSE members an opportunity to review the neuropsychological evaluation, the CSE decided to table the meeting and agreed to reconvene at a later date to review and discuss the neuropsychological evaluation and its recommendations (see Dist. Ex. 37 at p. 1). As a result, the December 2012 CSE's eligibility determination remained "pending" (id.).

#### **A. The Parents' Due Process Complaint Notice**

In a due process complaint notice dated February 25, 2013 the parents alleged that the district failed to develop a section 504 plan; and failed its obligation to identify, evaluate, and classify the student (see IHO Ex. I at pp. 4, 7). In particular, the parents asserted that the district should have found the student eligible for special education and related services as a student with an other health impairment (OHI) (id. at p. 7). The parents also alleged that Fusion was an appropriate unilateral placement for the student in the least restrictive environment (LRE), and they timely notified the district of their intention to unilaterally place the student at Fusion for the 2012-13 school year (id. at pp. 6-7). As relief, the parents requested reimbursement of the costs of the student's tuition and related services at Fusion for the 2012-13 school year, and requested that the district either provide transportation services or reimburse the parents for the costs associated with the student's transportation to Fusion (id. at p. 7).

#### **B. Facts Post-Dating the Parents' Due Process Complaint Notice**

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<sup>8</sup> In an undated letter to the parents following the September 2012 CSE meeting, the district acknowledged that "it was agreed" that the parents would provide an "up-to-date report" from the student's former psychiatrists "in light of [their] refusal to grant the District consent to refer [the student] for a psychiatric evaluation" (Dist. Ex. 42).

<sup>9</sup> In October 2012, the district received a letter indicating that the student had been diagnosed as having a major depressive disorder, OCD, and Tourette's syndrome as a result of an evaluation that occurred in May 2012 (see Parent Ex. N at p. 2).

<sup>10</sup> The district's attorney and the parents' attorney both attended the December 2012 CSE meeting (see Dist. Ex. 37 at p. 1).

On May 3, 2013 the CSE reconvened to continue the student's initial eligibility determination meeting from December 2012 (see Dist. Ex. 38 at pp. 1-5).<sup>11, 12</sup> The May 2013 CSE reviewed the "reports, letters and evaluations submitted by the student's private therapist and evaluators as well as the assessments conducted by district staff" (id. at p. 3). In addition, the parents' attorney discussed the student's background, and a representative from Fusion discussed the student's progress (id.). With regard to the neuropsychological evaluation report, the May 2013 CSE members "noted inconsistencies," but the evaluator who drafted the report "declined to attend the meeting absent" the parents' request (id.; see Dist. Exs. 44-48). At that time, the May 2013 CSE requested parental consent for the previously requested psychiatric evaluation of the student, but the parents and their attorney "declined the request" because they did not believe it was required and subsequently left the meeting (id. at p. 3). After the parents' and their attorney's departure, the May 2013 CSE reviewed the following documents: an April 2013 school attendance record, an April 2013 progress report, an April 2013 report card, an October 2012 neuropsychological evaluation, a September 2012 teacher report, an August 2012 social history, an August 2012 physical examination, an August 2012 Level 1 career assessment, an August 2012 psychological evaluation, a June 2012 classroom observation, a June 2012 report card, and a November 2011 clinical summary (id. at pp. 3-4). Based upon a review of these documents, the May 2013 CSE found that the student was not eligible for special education and related services as a student with a disability under the IDEA (id. at pp. 1-4).

### **C. The District's Due Process Complaint Notice**

In a due process complaint notice dated May 30, 2013, the district sought to override the parents' refusal to consent to a psychiatric evaluation of the student and to compel the parents to produce the student for a psychiatric evaluation of the student by a psychiatrist of the district's choosing (see IHO Ex. IV at pp. 1, 10-11).

### **D. Impartial Hearing Officer Decision**

As noted previously, on April 8 and June 7, 2013, the IHO conducted prehearing conferences, and on June 27, 2013, the parties proceeded to an impartial hearing, which concluded on August 30, 2013 after eight days of proceedings (Apr. 8, 2013 Tr. pp. 1-20; June 7, 2013 Tr. pp. 1-9; Tr. pp. 1-1400).<sup>13</sup> By decision dated November 12, 2013, the IHO concluded that the district correctly determined that the student was not eligible for special education and related services as a student with a disability under the IDEA, and thus, the IHO denied the

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<sup>11</sup> The district's attorney and the parents' attorney both attended the May 2013 CSE meeting (see Dist. Ex. 38 at p. 3).

<sup>12</sup> District Exhibit 38 is listed as having 9 pages; however, the exhibit includes pages that are double-sided, and it does not appear that this was taken into account when listing the number of pages comprising the exhibit. For clarity, citations to District Exhibit 38 in this decision will refer to it as though both sides of each page have been counted in the pagination of the exhibit for a total page count of 14 pages.

<sup>13</sup> On June 12, 2013, the IHO granted the district's motion to consolidate the two pending due process complaint notices in this matter (see IHO Exs. VII-IX; IHO Decision at p. 2).

parents' request for reimbursement of the costs of the student's tuition at Fusion for the 2012-13 school year (see IHO Decision at pp. 13-22).<sup>14</sup>

To support these conclusions, the IHO focused her analysis on the recommendations made by the September 2012 CSE as the relevant inquiry in this case (see IHO Decision at pp. 15-19, citing R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187 [2d Cir. 2012] [finding that "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision"]). Accordingly, the IHO found that although the student's diagnosis of Tourette's syndrome fell within the "enumerated conditions" of the OHI disability category, the "Tourette's was not adversely impacting his educational performance" (id. at p. 15).

Noting, however, that the student struggled with symptoms related to his additional diagnoses of OCD, anxiety, and depression, the IHO considered whether the student met the criteria for eligibility under the disability category of an emotional disturbance (ED) (see IHO Decision at pp. 15-18). After a review of the information available to the September 2012 CSE, the IHO similarly concluded that the student's "emotional issues were not adversely affecting his educational performance," and moreover, the hearing record did not indicate that the student required special education or related services at that time (id. at pp. 16-18). The IHO noted that by the time of the September 2012 CSE meeting the student was no longer in "crisis," the student continued to make progress in therapy, and the student had increased his grade point average of 85 earned while "in crisis" to a grade point average of 89 at the end of the 2011-12 school year (id. at pp. 16-17).

The IHO also noted that as a "direct result" of the parents "refusal" to allow the district to obtain a psychiatric evaluation of the student, the September 2012 CSE did not have the "benefit" of a psychiatric evaluation or "any information regarding a psychiatric treatment plan" to address the student's "mental health or social/emotional issues" (IHO Decision at p. 17). As a result, no basis existed upon which the September 2012 CSE could determine whether the student required "special education services" to address those issues or to determine "what special education services, if any, were necessary" to address those issues in a "school setting" (id.). Furthermore, the IHO indicated that based upon the "only" information available to the September 2012 CSE—specifically identifying a November 2011 letter and a February 2012 letter prepared by two of the student's providers—did not include recommendations for special education instruction, special education services, or related services, but rather, both documents recommended "only accommodations" (id. at pp. 17-18).

Although unnecessary for her determination, the IHO also discussed facts and events that occurred subsequent to the September 2012 CSE meeting since the parties had raised these issues

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<sup>14</sup> Initially, the IHO determined that although the parents' due process complaint notice appeared to raise issues related to the 2011-12 school year regarding the student's referral for a section 504 plan, and, by implication, "child find" issues under the IDEA, the parents did not request any relief for any alleged violations of section 504 or the IDEA for the 2011-12 school year (see IHO Decision at pp. 12-13). Consequently, the IHO found that she need not address whether the district violated either section 504 or the IDEA for the 2011-12 school year (id. at p. 12).

(see IHO Decision at pp. 19-22). In particular, the IHO indicated that although the student's psychiatric nurse practitioner drafted an October 2012 letter in which she indicated that the student "needed to be classified under the IDEA," the IHO gave little weight to the conclusory statement and further noted that the letter did not include any recommendations for special education services (id. at pp. 19-20). With regard to a December 2012 CSE meeting, the IHO noted that it had been "tabled" to allow the CSE to review the neuropsychological evaluation report submitted by the parents at that meeting (id. at p. 19). Turning to the May 2013 CSE meeting, the IHO indicated that despite "diligent efforts" the district could not secure the participation of the neuropsychologist who conducted the evaluation submitted to the December 2012 CSE (id.). The IHO also noted that the parents left the May 2013 CSE meeting when the "CSE raised the issue of a psychiatric evaluation," and the May 2013 CSE continued the meeting and reviewed the neuropsychological evaluation report (id. at pp. 19-20). Finally, the IHO indicated that a review of the neuropsychological evaluation report revealed that the evaluator made no recommendations for special education services within the report (id. at p. 21).

Based upon the foregoing, the IHO concluded that neither the September 2012 CSE nor the May 2013 CSE erred in its findings that the student was not eligible for special education and related services as a student with a disability under the IDEA (see IHO Decision at p. 22). Moreover, the IHO indicated that she had considered the parents' "various other challenges" to the district's decision and "handling" of the referral, and found them to be "without merit" (id.).

Having determined that the parents were not entitled to reimbursement for the costs of the student's tuition at Fusion for the 2012-13 school year, the IHO nonetheless determined that the student's unilateral placement at Fusion for the 2012-13 school year was not appropriate (see IHO Decision at pp. 22-27). The IHO found that Fusion did not provide the student with "educational instruction specially designed" to meet the student's unique needs, but instead provided the student with a setting nearly identical to the homebound instruction the student received during the 2011-12 school year, namely, individual tutoring (id. at pp. 24-26). In addition, the IHO found that Fusion was an overly restrictive placement for the student because he had no interactions with either typically-developing peers or students with disabilities when receiving instruction (id. at pp. 26-27). Finally, the IHO found that Fusion's use of caffeine to address the student's lethargy and provision of "ad hoc" counseling by staff that lacked counseling training was not appropriate (id. at pp. 24-25, 27).

Turning to equitable considerations, the IHO found that, among other things, the parents failed to cooperate with the district's evaluation process because they consistently and repeatedly refused to allow the district to obtain a psychiatric evaluation of the student, the parents failed to provide the district with the student's October 2011 and May 2012 psychiatric evaluations, and the parents interfered with the district's efforts to secure the participation of the evaluator who conducted the neuropsychological evaluation of the student at the May 2013 CSE meeting (see IHO Decision at pp. 27-33). The IHO also indicated that the parents "prevented" the district—noting both the section 504 committee and the CSEs—from having access to a psychiatric evaluation (id. at pp. 28-29). Additionally, the IHO found that the parents' refusal to participate in a section 504 meeting in June 2012 and their submission of the 10-day notice of unilateral placement prior to the district's evaluation of the student were unreasonable actions that warranted a denial of tuition reimbursement in this case (id. at pp. 33-34). Based upon the

evidence, the IHO found that the parents never had any intention of enrolling the student in a district public school for the 2012-13 school year, and accordingly, concluded that equitable considerations did not weigh in favor of their requested relief (*id.* at pp. 34-35).<sup>15</sup>

Finally, the IHO turned to the issues raised in the district's due process complaint notice regarding the need to obtain a psychiatric evaluation of the student despite the parents' lack of consent (*see* IHO Decision at pp. 36-40). While unable to discern a specific date upon which the parents ultimately revoked their initial consent on June 29, 2013 allowing the district to conduct a psychiatric evaluation of the student, the IHO found that the parents clearly indicated that they no longer consented to the same by the time of the September 2012 CSE meeting and throughout the remainder of the 2012-13 school year (*id.* at pp. 37-39). Finding that the hearing record established that the neuropsychological evaluation of the student was not a substitute for a psychiatric evaluation, the IHO found that a psychiatric evaluation was warranted in order to provide the district with "current information" about the student's "mental health issues and mental status" and without the same, the district did not have sufficient evaluative information available during the 2012-13 year upon which to make recommendations, if any, with regard to the student's "mental health and social/emotional issues" (*id.* at pp. 39-40). Accordingly, the IHO authorized the district to conduct a psychiatric evaluation of the student without parental consent and directed the parents to produce the student for the same (*id.* at pp. 40-41).

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

The parents appeal, and assert that the IHO erred in finding that the district properly determined that the student was not eligible for special education and related services as a student with a disability under the IDEA, and denying their request for reimbursement of the costs of the student's tuition at Fusion for the 2012-13 school year. The parents also assert that the IHO erred in finding that the student was not "classifiable" because the parents did not request a special education program or services. In addition, the parents contend that the IHO erred by not finding that the district was responsible to "determine program and services after classification." Finally, the parents allege that the IHO erred in authorizing the district to conduct a psychiatric evaluation of the student without parental consent, and by ordering the parents to produce the student for such evaluation.<sup>16, 17</sup>

In an answer, the district responds to the parents' allegations with general admissions and denials and argues to uphold the IHO's decision in its entirety. The district contends that the

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<sup>15</sup> The IHO also denied the parents' request for reimbursement of the student's transportation costs (*see* IHO Decision at pp. 35-36).

<sup>16</sup> The parents indicate in the petition that although the petition summarized the "essential facts," the facts of the case and the relevant law were more "completely discussed" in the accompanying memorandum of law (Pet. ¶ 6).

<sup>17</sup> To the extent that the parents did not appeal the IHO's finding that they were not entitled to reimbursement for the student's transportation to Fusion during the 2012-13 school year and that the December 2012 CSE properly tabled the meeting to consider newly submitted evaluative information, these determinations are final and binding and will not be addressed (*see* 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see also* IHO Decision at pp. 22 n.6, 35-36, 40).

student was not eligible for special education and related services as a student with a disability under the IDEA, that Fusion was not an appropriate unilateral placement for the student, that equitable considerations did not weigh in favor of the parents' requested relief, and that the IHO properly determined that a psychiatric evaluation of the student was supported by the hearing record.<sup>18</sup>

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009

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<sup>18</sup> The district also asserts that the parents violated regulations regarding the service of the Notice of Intention to Seek Review and by failing to adequately cite to the hearing record to support the allegations in the petition (see 8 NYCRR 275.8; 279.8[b]). However, in this case these alleged violations, neither alone nor cumulatively, are sufficient to warrant dismissal of the petition.

WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Eligibility**

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). In order to be eligible for special education and related services, a student must not only have a specific physical, mental or emotional condition, but in most of the disability categories enumerated under the IDEA, such condition must adversely affect or impact upon a student's educational performance to the extent that he or she requires special services and programs (34 CFR § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of the Dep't of Educ., Appeal No. 11-152; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Bd. of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

Assuming for the sake of argument that the student met the initial criteria to be deemed eligible as a student with either an OHI or an ED, a determination must also be made regarding the second criterion for these two particular disability categories: whether the student's purported conditions or deficits adversely affected his educational performance (see 34 CFR 300.8[4][i]; 9[ii]; 8 NYCRR 200.1[zz][4]; [10]). For the reasons set forth below, the hearing record supports the IHO's conclusion that the student was not eligible for special education and related services

as a student with either an OHI or an ED because the hearing does not demonstrate that the student's reported conditions or deficits adversely affected or impacted his educational performance.

## **1. Adverse Educational Impact**

Without elaboration, the parents assert that the IHO erred in finding that the student was not eligible for special education and related services as a student with a disability, and the district rejects the parents' assertion. Contrary to the parents' allegations, a review of the hearing record supports the IHO's finding.

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson Cnty. Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; Application of the Dep't of Educ., Appeal No. 11-152; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; see also C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009][finding insufficient evidence that student has suffered an adverse impact on educational performance because the student continuously performed well and tested above grade level on the district's psychoeducational evaluation and a psychological evaluation]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535 [2d Cir. Nov. 12, 2008][holding that there is insufficient evidence that the student's educational performance was adversely impacted because the student did not fail any of his classes and his grade-point average (GPA) declined only nine points]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]; Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009] [finding that the SRO's conclusion that there was insufficient evidence of an adverse effect on the student's educational performance was "directly contradicted by [the student's] failing grades,

repeated expulsions, suspensions, need for tutors and need for summer school]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems –which manifested chiefly as truancy, defiance and refusal to learn – were the product of depression or any similar emotional condition"]).

In making its determination that the student was not eligible for special education and related services, the district initially convened a CSE in September 2012, which reviewed and considered the following documentation: a November 2011 clinical summary, a June 2012 classroom observation, a June 2012 report card, an August 2012 physical examination report, an August 2012 social history, an August 2012 Level 1 career assessment (student interview), an August 2012 psychological evaluation, a September 2012 teacher report, and a February 2012 letter from the social worker (see Tr. 757-70; Parent Ex. T at pp. 1-2).

According to the November 2011 clinical summary, the student had received diagnoses of "Tourette (sic) syndrome" and a "concurrent mood disorder with prominent anxiety" (Dist. Ex. 19). The letter indicated the student had recently experienced an "exacerbation of anxiety," which "negatively impacted his academic performance," and noted that the "initiation of 504 modifications would no doubt be of great benefit for him" (id.).

A review of the student's June 2012 report card for the 2011-12 school year indicated that the student's grades for all subjects were consistent across all four marking periods for the 2011-12 school year (see Dist. Ex. 28; see also Tr. p. 143).<sup>19</sup> The student's grades for the 2011-12 school year in English 10R Honors were as follows: 90, 97, 96, and 90, with a final grade of 93 (Dist. Ex. 28). The student achieved the following grades in AP World History: 81, 81, 88, and 85, with a final grade of 86 (id.). In Algebra 2/Trigonometry, the student earned the following grades: 76, 78, 70, and 62, with a final grade of 75 (id.). The June 2012 report card also indicated that the student achieved a grade of 84 on the Regents exam in Algebra 2/Trigonometry and a grade of 96 on the Regents exam in Global History (id.). Additionally, the student's teachers commented on the report card that the student demonstrated steady progress academically and exhibited a good attitude (see id.).

An August 2012 social history (with the parents serving as informant) indicated that the student's symptoms related to OCD and anxiety prevented the student from writing down assignments, completing homework, and speaking with teachers after class when needed (see Dist. Ex. 34 at pp. 5, 12). The social history indicated that the student was placed on homebound instruction because he could not remain in school due to his anxiety and depression (id. at p. 7). According to the social history, the student's difficulties at school worsened in ninth grade, and "got to an extreme point" since September 2011 (id.).<sup>20</sup> As reported by the parents, the student was "extremely intelligent" but required "supportive services" to participate in school (id. at p. 11).

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<sup>19</sup> Although the student did not complete the chemistry course, he earned a grade of 71 for the first marking period (see Dist. Ex. 28).

<sup>20</sup> The hearing record indicated that when the student began experiencing difficulties in fall 2011, the district offered to allow the student to attend Regents classes, rather than AP and Honors classes to lessen his anxiety, but the parents and the student opted to remain in the more rigorous classes (see Tr. pp. 1339-41).

An August 2012 Level 1 career assessment (student interview) was also completed, which indicated that the student planned to attend college and become a sports journalist, and reported information regarding the student's interests, skills, and abilities (see Dist. Ex. 34 at pp. 29-31). An August 2012 physical examination report of the student indicated that the physician approved the student for physical education, the student had no limitations, and the physician recommended a neurological evaluation (see Dist. Ex. 34 at p. 13).

Based upon the August 2012 psychological evaluation report, the student had been diagnosed as having OCD, Tourette's syndrome, and a concurrent mood disorder with prominent anxiety (see Dist. Ex. 32 at p. 2). The report indicated that the student also received treatment for symptoms of anxiety, a panic disorder, hypochondriasis, clinical depression, an attention deficit disorder (ADD), and phobias (id.). The Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV), the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Beery-Buktenica Development Test of Visual-Motor Integration, and the Behavioral Assessment System for Children-Second Edition (BASC-2) were administered as part of the August 2012 psychological evaluation (id. at p. 1).

With respect to the BASC-2 results, with the student serving as informant, the student's T-scores fell within the at-risk range in attitude towards school, anxiety, depression, hyperactivity, inattention, self-esteem, self-reliance, emotional symptoms, and personal adjustment (see Dist. Ex. 32 at pp. 7-8). The student's interpersonal relations T-score fell within the clinically significant range (id. at p. 8). In all other areas, the student's T-scores fell within the average range, including attitude towards teachers, sensation seeking, school problems, atypicality, locus of control, social stress, sense of inadequacy, somatization, internalizing problems, attention problems, and relations with parents (id. at pp. 7-8). The BASC-2 was administered again, with the parents serving as informant, wherein the evaluator noted discrepancies between the results of the parents' rating when compared to the student's self-report scales, which the evaluator explained by noting that the student completed the assessment during the summer while experiencing less stress and the parents' responses were based on the student's performance and behavior throughout the school year (id. at pp. 9-10).

Despite the student's diagnosed conditions and related social/emotional difficulties, overall the student performed well on standardized measures of cognition and academics (see Dist. Ex. 32 at pp. 1-14). An administration of the WAIS-IV to the student yielded the following standard scores: verbal comprehension, 120 (superior range); perceptual reasoning, 104 (average range); working memory, 122 (superior range); processing speed, 76 (borderline range); and a full scale IQ of 108 (average range) (id. at p. 3). The student's verbal reasoning and working memory skills fell within the superior range, while he demonstrated average nonverbal reasoning skills and below average skills in processing speed (id. at pp. 3, 5).

In addition to overall average to above average performance in the area of cognition, the student also achieved in the average to above average range in all academic areas, including reading comprehension, math problem solving, sentence composition, word reading, essay writing, spelling, and written expression (see Dist. Ex. 32 at p. 6). With respect to the WIAT-III, the student achieved the following standard scores: reading comprehension, 117 (above average

range); math problem solving, 120 (above average range); sentence composition, 109 (average range); word reading, 107 (average range); essay writing, 109 (average range); spelling, 113 (average range); and written expression, 113 (average range) (id. at p. 6). With respect to visual-motor integration, the student's skills fell within the low range (id.). After summarizing the evaluation results, the evaluating school psychologist recommended a psychiatric evaluation of the student to "further assess emotional functioning and to assist in determining the most appropriate educational supports" (id. at pp. 10-13). In addition, the school psychologist recommended extended time and use of calculator based on the student's slow work rate, as well as occupational therapy (OT) and assistive technology evaluations (id. at p. 13).

According to the September 2012 teacher report, the student's home instructor for English Honors class indicated the student actively participated and offered insights into reading assignments (see Dist. Ex. 34 at p. 47). The report indicated the student completed all assignments in a timely manner, including homework assignments (id.). The report also indicated the student was actively involved in learning and well prepared for quizzes and tests (id.). The report indicated the student read extra books and engaged in active discussions, as he was working ahead of the class (id.). The student's home instructor for AP World History indicated the student was always prepared, completed all homework and class assignments, demonstrated a good understanding of course content, and interacted during the tutoring sessions (id.). The September 2012 teacher report also indicated the student asked and answered questions; was cooperative; and demonstrated excellent skills in reading comprehension, verbal expression, organization, and written expression (id. at p. 48).

A February 2012 letter from the social worker that the September 2012 CSE reviewed discussed the student's OCD diagnosis and related symptoms of anxiety, panic disorder, Tourette's disorder, hypochondriasis, clinical depression, phobias, and ADD, among others (Dist. Ex. 22 at p. 2). The social worker indicated that the "emotional disturbances aforementioned, adversely affect [the student's] educational performance and home life" (id.). The social worker indicated that the student exhibited difficulties with distractibility, memory, organization, planning, mood, and anxiety (id.). The social worker recommended several accommodations for the student including extended time, teacher reminders to submit homework, late pass for classes, universal "safe haven" pass, weekly parent/teacher communication, and opportunities to resubmit homework (id. at pp. 2-3). According to the social worker's testimony, the 2012 letter did not indicate how the student's diagnoses adversely affected his educational performance (Tr. p. 1150). The letter was only a review of the student's diagnoses and only generally described how the diagnoses affected his educational performance rather than stating specifically the adverse educational impact.

Subsequent to the September 2012 CSE meeting, the district received an October 2012 letter indicating that the student had been diagnosed as having a major depressive disorder, OCD, and Tourette's syndrome as a result of an "evaluation" in May 2012 (see Parent Ex. N at p. 2). The letter further indicated that due to the student's "illness," he needed "to be classified under [the] IDEA" and to receive the following accommodations: "home work (sic) reminders and prompts to hand in his work, the lesson plan and required homework/test for the following week, a pass to be able to speak to a teacher after class if he has questions re[garding] schoolwork, and time and [a] half testing" (id.).

According to the hearing record, the district also convened a CSE in December 2012 to determine whether the student was eligible for special education and related services, at which time the parents presented the CSE with an October 2012 neuropsychological evaluation of the student (Tr. pp. 782-91; Dist. Ex. 37 at p. 1; see Dist. Ex. 35 at pp. 1-15; Parent Exs. N at p. 2; T at p. 2). As mentioned previously, the December 2012 CSE tabled the meeting because the district needed additional time to review the neuropsychological report (Tr. pp. 786, 791-93; see Dist. Ex. 37 at p. 1).

Next, the hearing record indicated that the district reconvened a May 2013 CSE, which reviewed the reports before the September 2012 CSE meeting, as discussed above, as well as an October 2012 letter, the October 2012 neuropsychological evaluation, and an April 2013 Fusion progress report (see Dist. Ex. 35 at pp. 1-15; 38 at pp. 1, 3-4; Parent Exs. N at pp. 1-2; DD 1-5).<sup>21</sup>

The October 2012 neuropsychological evaluation of the student assessed the student using multiple standardized assessments in the areas of cognition, academics, and social/emotional functioning (Dist. Ex. 35 at p. 1). The evaluators reported that the neuropsychological assessment results were consistent with the previous assessment completed in August 2012 (id. at pp. 11, 13). Specifically, the evaluators noted the student achieved in the overall average to above average range in the area of cognition (id. at pp. 10-11). Further, with respect to the results of the neuropsychological assessment, the student also performed well in the area of academics including average to above average skills in reading, spelling, and math (id. at p. 12). The October 2012 neuropsychological evaluation reported the following diagnoses: Tourette's disorder; anxiety disorder, not otherwise specified(NOS), with generalized anxiety features; dysthymic disorder-by history; and a possible autism spectrum disorder (ASD)-Asperger's disorder (id. at p. 13). Recommendations included possible behavioral strategies to address inattention, counseling, and consideration of parent training to address the attention deficit hyperactivity disorder "journey" (id. at pp. 14-15). The evaluators also noted that the student's then-current educational placement appeared "appropriate" for the student (id. at p. 15). Notably, the October 2012 neuropsychological evaluation indicated that although the student's records indicated significant difficulties with emotional control, anxiety, social skills, and OCD behaviors, the student's "[c]linical presentation [wa]s not currently suggestive of significant emotional compromise" (id. at p. 12).

In addition, the May 2013 CSE reviewed an April 2013 Fusion progress report, which indicated that the student was enthusiastic, actively engaged, and showed insight into his English assignments (see Parent Ex. DD at pp. 2). The student's pre-Calculus teacher indicated the student was "passionate, eager, engaged, curious, [and] hard working" (id. at p. 3). In Chemistry, the teacher reported that although the student was sometimes fatigued in class, he worked well with the material presented (id.). The US History teacher reported the student was "highly intelligent," and processed information and ideas very well (id. at p. 4). The student's grades for the first semester at Fusion ranged from A- to A (id. at pp. 2-4).

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<sup>21</sup> The April 2013 school attendance record and the April 2013 report card referenced as documents reviewed at the May 2013 CSE meeting were not included in the hearing record (see Dist. Ex. 38 at pp. 3-4).

The director testified that based upon the evaluative information and input from the May 2013 CSE members—including input from Fusion—the May 2013 CSE found that the student was not eligible for special education and related services as a student with a disability (Tr. pp. 800-802, 814-15).

In this case, the results of the October 2012 neuropsychological evaluation were consistent with the results of the August 2012 psychological evaluation, indicating that overall the student's skills were average to above average in both academics and cognition, which further indicated the student's health and emotional conditions did not have an adverse impact on his educational performance. In addition, testimony of the director, the student's report card grades for the 2011-12 school year, and the 2013 Fusion Academy progress reports all supported the September 2012 and May 2013 CSE determinations that the student was not eligible for special education and related services as a student with a disability.

In summary, the hearing record indicates that notwithstanding the evidence of the student's diagnoses and related mental health conditions, the district properly concluded that the student's social/emotional issues and mental health conditions did not have an adverse impact on his educational performance. The hearing record reflects that although the student received homebound instruction during a time of crisis, he continued to demonstrate progress in his high level courses. Based on the foregoing, the hearing record supports a conclusion that the student should not have been classified as a student with a disability under the IDEA because the evidence does not reflect that the student's purported conditions or deficits adversely affected his educational performance (see C.B., 2009 WL 928093, at \*2; N.C., 2008 WL 4874535, at \*2; Maus, 688 F. Supp. 2d at 294, 298; A.J., 679 F. Supp. 2d at 308-11; see also R.B., 496 F.3d at 946; Application of a Student Suspected of Having a Disability, Appeal No. 12-097; Application of the Bd. of Educ., Appeal No. 11-152; Application of a Student with a Disability, Appeal No. 11-115; Application of a Student Suspected of Having a Disability, Appeal No. 11-084; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of a Student Suspected of Having a Disability, Appeal No. 10-106).

Having determined that the student was not eligible for special education and related services as a student with a disability, the necessary inquiry is at an end and there is no need for a further analysis to determine whether the student required special education and related services with the meaning of the IDEA as a result of his alleged disability (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]; J.D., 224 F.3d at 66; P.C. v. Oceanside Union Free Sch. Dist., 818 F. Supp. 2d 516, 524 [E.D.N.Y. 2011]; Maus, 688 F. Supp. 2d at 295; A.J., 679 F. Supp. 2d at 306; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 639-40 [7th Cir. 2010]).<sup>22</sup>

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<sup>22</sup> The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz, 307 F. Supp. 2d at 400 n.13). The "child find" requirements apply to "children who are

## B. Psychiatric Evaluation

The parents assert that the IHO erred in authorizing a psychiatric evaluation of the student without parental consent and in ordering them to produce the student for a psychiatric evaluation. The district asserts that the hearing record supported the IHO's determination that a psychiatric evaluation of the student was warranted, arguing that the extent to which the student's mental health issues affected his educational performance and required special education services remains at issue.

Prior to evaluating a student, a district must provide the parent with prior written notice that "describes any evaluation procedures [the district] proposes to conduct" (20 U.S.C. §§ 1414[b][1]; 1415[b][3], [c][1]; 34 CFR 300.300[a][1][i]; 300.503[a], [b][1]; 8 NYCRR 200.5[a][1], [2], [5][i]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation (14 U.S.C. § 1414[a][1][D][i][I]; 34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]).<sup>23</sup> Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain the parent's written informed consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii], [d][5]). The IDEA and federal and State regulations permit the use of consent override procedures, providing that:

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation . . . , or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing [among other options, the due process procedures], if appropriate, except to the extent inconsistent with State law relating to such parental consent.

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suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41). Here, there is no evidence in the hearing record that the district failed to have procedures in place to recommend students it suspects of being eligible to receive special education programs and services to its CSE for an evaluation and that district staff failed to follow these procedures.

<sup>23</sup> Consent is defined in federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[1]).

(34 CFR 300.300[a][3][i]; see 20 U.S.C. § 1414[a][1][D][ii][I]; 34 CFR 300.300[d][4], [5]; 8 NYCRR 200.4[a][8]; 200.5[b][1][i][b], [b][1][i][c], [b][3]).<sup>24</sup>

The procedure for conducting an initial evaluation provides that a group that includes the CSE and other qualified professionals may, if appropriate, conduct an initial review of existing evaluation data, including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 CFR 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Such review may take place without a meeting (8 NYCRR 200.4[b][5][i]). Based on that review and input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student is a student with a disability, the student's educational needs, the student's present levels of performance, and whether the student needs special education and related services (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional data is needed, the school district shall administer tests and obtain other evaluation materials as may be needed to produce the needed data (34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]).

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

SROs have held that district requests to utilize the consent override procedures to conduct an initial evaluation of a student will be granted when the district has established an "adequate basis" to suspect the existence of a disability requiring the provision of special education services (see, e.g., Application of a Student Suspected of Having a Disability, Appeal No. 13-055; Application of a Child Suspected of Having a Disability, Appeal No. 05-071; Application of a Child with a Disability, Appeal No. 03-033; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). In addition, districts are required to establish what remedial interventions were undertaken to address the student's difficulty prior to the district's referral of the student to the CSE (id.; see Educ. Law § 4401-A[2][b]; 8 NYCRR 200.4[a][2][iii][b]).

In this case, the hearing record established that the parents initially provided consent for the district to conduct a psychiatric evaluation of the student on June 29, 2012 (see Dist. Ex. 34 at pp. 32-35). The hearing record did not clearly establish why the district did not follow

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<sup>24</sup> A school district does not violate its child find or evaluation obligations if it declines to pursue the evaluation (34 CFR 300.300[a][3][ii]; 8 NYCRR 200.5[b][3]).

through with this evaluation prior to the September 2012 CSE meeting, but the hearing record did clearly establish that the September 2012 CSE expressed concern about the student's "psychiatric issues and the need for [an] updated evaluation" in order to "review all aspects of the student's diagnoses, current symptoms, medication and therapeutic treatment so that the student's needs could be identified and addressed in an appropriate manner" (Dist. Ex. 36 at p. 1). At that time, the parents also clearly indicated that they would not provide consent for a psychiatric evaluation, but agreed to provide the district with a report from the student's psychiatrist synthesizing the student's "diagnoses, interventions and psychiatric needs," as well as (*id.*; *see* Tr. pp. 554, 604, 773, 775, 922, 1382).

In an attempt to comply with this arrangement, the parents provided the district with an October 2012 letter, which was reviewed by the May 2013 CSE (Tr. pp. 800-01, 1381-82; Parent Ex. N at p. 2). However, the director testified that the October 2012 letter was not what the September 2012 CSE requested (*see* Tr. pp. 942-43). Additionally, several witnesses testified that the May 2013 CSE did not receive any documentation that approached the content and scope of a psychiatric evaluation or that otherwise qualified as a psychiatric evaluation (*see* Tr. pp. 353, 785, 799, 975). As for the October 2011 and May 2012 privately obtained psychiatric evaluations of the student, the director testified that the district only became aware of the October 2011 psychiatric evaluation of the student because it was noted in the October 2012 neuropsychological evaluation of the student (*see* Tr. pp. 943-44; Dist. Ex. 35 at p. 2). The director also testified that the May 2013 CSE was not directly advised about the May 2012 psychiatric evaluation of the student, but rather, the district became aware of it through a comment the parent made as she left the May 2013 CSE meeting (*see* Tr. pp. 799, 801-02). In addition, the district did not have either the October 2011 or the May 2012 psychiatric evaluations to review (*see* Tr. 353, 937-38, 975; Dist. Ex. 36 at pp. 3-4).

In addition, several witnesses testified that a psychiatric evaluation would provide the district with information about how the student's diagnoses impacted his educational performance (*see* Tr. pp. 555-56, 771-72, 807-13, 974-75, 979-80, 983-84, 1009). The psychiatrist who conducted the October 2011 psychiatric evaluation of the student testified that another psychiatric evaluation of a student would be conducted within six months if his symptoms changed, new symptoms arose, his functioning changed, or medication changed (*see* Tr. pp. 1065-67). In addition, the student's clinical social worker testified that when she began treating the student in November 2011, the student was in crisis and by February 2012, his condition had improved and he was no longer in crisis (*see* Tr. pp. 1091-92, 1099-1101, 1110-13, 1177). She also testified that at that time, the student continued to remain in "remission" from crisis, but noted that his OCD was a "lifelong condition" (Tr. p. 1125-26). The parents testified that between October 2011 and July 2012, the student's medications had been changed (*see* Tr. pp. 1387-88). The parents also testified that in July 2012, the student was placed on a dosage that seemed to be working, and his medication had not been changed since July 2012 (*see* Tr. pp. 1388-89).

Here, since the hearing record established that the district never received the October 2011 or the May 2012 psychiatric evaluations or any other documentation with information equivalent to the scope and content of a psychiatric evaluation, the IHO was correct in finding that the district did not have sufficient evaluative information available to it during the 2012-13

year, and appropriately directed the psychiatric evaluation of the student without parental consent. Moreover, given the lack of updated evaluative information regarding the student and the dispute over the student's eligibility classification, there is no reason to disturb the IHO's order directing the district to conduct a psychiatric evaluation of the student in order to provide more information about the student's needs that may not be identified through the already completed evaluations. In addition, since it appears that the student continues to remain under the care of mental health professionals and may require further psychiatric evaluation if changes occur in his symptoms, functioning or medications occurred, the parents are strongly encouraged to cooperate with the IHO's directives. This is especially necessary in light of the student's continued eligibility to attend district public schools for the 2013-14 and 2014-15 school years, and the potential for the parents to assert a claim in these future school years regarding the student's eligibility for special education and related services as a student with a disability—under these circumstances, the district would need a psychiatric evaluation for such a determination.

## **VII. Conclusion**

In summary, the determination that the student was not eligible for special education programs and services as a student during the 2012-13 school year was supported by the hearing record. Therefore, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' unilateral placement of the student at Fusion or whether equitable considerations should limit or preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 6, 2014**

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