



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-115

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

Appearances:

Law Offices of Wayne J. Schaefer, LLC, attorneys for petitioners, Wayne J. Schaefer, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Christopher Venator, 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 a nonpublic parochial school (nonpublic school) for the 2011-12 and 2012-13 school years. 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 a general education classroom in a district public school from kindergarten through fifth grade (see Dist. Ex. 6 at p. 1). The student began to exhibit some difficulty with motivation and reading during the third grade (2008-09 school year) (see id.; Parent Ex. F). In June 2009, the district identified the student as being "at risk

of meeting the standards in reading" and informed the parents that, although the student would not receive academic intervention services (AIS), the student's progress would be monitored during the 2009-10 school year (Parent Ex. F; see also Parent Ex. M). The parents continued to communicate with the district public school during the 2010-11 school year regarding the student's progress and interest in reading (see Parent Exs. H; I at pp. 1-2; N).

In addition, according to the parents, the student began experiencing harassment and bullying during the 2008-09 school year, which continued through and intensified during the 2010-11 school year (see Tr. pp. 343-364; see also Dist. Exs. 3 at pp. 1-2; 6 at p. 2; Parent Exs. A at pp. 1-2; B). The hearing record shows that the student began seeing a private therapist during the 2008-09 school year (see Tr. p. 344). On April 11, 2011, the student was suspended from school following an incident involving the discovery of the student's drawings in his journal, depicting violence towards a classmate (see Dist. Ex. 1; Parent Ex. P). In lieu of a superintendent's hearing, the parents and the district entered into an agreement providing that the student would receive home instruction at district expense and remain out of school until he was granted psychiatric clearance "by a [d]istrict-provided evaluator" (Parent Ex. Q at pp. 1-3).

On June 1, 2011, the student underwent a psychiatric evaluation (see generally Dist. Ex. 2). The parents subsequently decided to continue the student's home instruction for the remainder of the 2010-11 school year (Dist. Ex. 6 at p. 2; see Tr. pp. 373-74).

By letter to the district, dated July 1, 2011, the parents requested an initial evaluation to determine the student's eligibility for special education services (Dist. Ex. 3 at p. 1). In that letter, the parents also informed the district of their concern that, whatever action resulted from their request, it would not be sufficient to stop the "bullying, teasing and taunting" that the student experienced in the district public school (id. at pp. 1-2). In a separate letter to the district, also dated July 1, 2011, the parents reiterated their concerns and informed the district that, while "not necessarily committed to removing [the student] from any public school placement," they intended to unilaterally place the student at a particular nonpublic school for the 2011-12 school year at public expense (Parent Ex. J at p. 1; see also Dist. Ex. 3 at p. 2).¹

By letter dated July 11, 2011, the district informed the parents that they would process the referral to the CSE (Parent Ex. K). The letter further informed the parents that: the district did not have any records of the student being bullied; that there was no legal basis for the district to pay for the student's tuition at the nonpublic school; and that the parents' request for public funding of the student's tuition at the nonpublic school for the 2011-12 school year was denied (id.). On July 25, 2011, the parents provided the district with consent to evaluate the student (see Dist. Ex. 5).

¹ The Commissioner of Education has not approved the particular nonpublic school as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A psychological evaluation was conducted on July, 25, 2011, and a social history was prepared on August 1, 2011 (see generally Dist. Exs. 6; 7). On August 18, 2011 the CSE convened to conduct the student's initial review (see Dist. Ex. 11; 12).

By prior written notice dated August 26, 2011, the district informed the parents that the August 2011 CSE determined that the student did not meet the criteria for classification as a student with a disability and, therefore, was not eligible to receive special education for the 2011-12 school year (Dist. Ex. 12 at p. 1). Nonetheless, the evidence in the hearing record indicates that "[b]ased on parent concerns and some of the issues raised in . . . the evaluations" before the CSE, the district recommended that the student be further evaluated and a neuropsychological evaluation was completed on September 24, 2011 (see Tr. pp. 45-46; Parent Ex. L at p. 2; see generally Parent Ex. G). The student attended the nonpublic school during the 2011-12 school year (see Dist. Ex. 15 at pp. 1-2).

By letter to the district dated May 31, 2012, the parents indicated their view that the student suffered from an ongoing disability within the meaning of the IDEA, which warranted the provision of special education services (Parent Ex. L at p. 2). The parents also indicated their intent to continue the unilateral placement of the student at the nonpublic school for the 2012-13 school year and requested reimbursement for the cost of the student's tuition and related-services (id.).² The student continued to attend the nonpublic school for the 2012-13 school year (see Dist. Ex. 15 at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated April 11, 2013, the parents alleged that the district failed to identify, evaluate, and classify the student as a student with a disability eligible for special education and, therefore, failed to offer the student a free and appropriate public education (FAPE) for the 2011-12 and 2012-13 school years (Dist. Ex. 13 at pp. 1-12). The parents also set forth a chronological recitation of facts consisting of over 50 paragraphs

Initially, with regard to the 2010-11 school year, the parents alleged that the home instruction and tutoring provided to the student from April to June 2011 was "incomplete"

² According to the evidence in the hearing record, on October 18, 2012, the CSE of the district of location, relative to the student's nonpublic school, convened and, finding the student eligible to receive special education as a student with an other health-impairment, recommended four 40-minute sessions per week of resource room instruction in a small group (5:1), testing accommodations, and on task focusing prompts (Parent Ex. O at pp. 1-2; Dist. Ex. 13 at pp. 8-9; see also Tr. pp. 431-32). However, while not in evidence in the hearing record, the parent alleged in her due process complaint notice that an additional document was generated as a result of the October 2012 CSE meeting of the district of location, which determined that the student was not eligible for special education as a student with a disability (see Dist. Ex. 13 at p. 9). The evidence in the hearing record remains unclear on this point. In any event, notwithstanding the purported October 2012 IESP from the district of location, neither the IDEA nor State law divested the district of its obligations under the IDEA (see generally 20 U.S.C. § 1412[a][10]; Educ. Law. § 3602-c; 34 CFR 300.130-300.147; see also *E.T. v. Bd. of Educ.*, 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [recognizing "that residency, rather than enrollment, triggers a district's FAPE obligations"]; *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 667 [S.D.N.Y. 2011]).

and "inadequate" because the program did not address the student's "struggle to develop more harmonious school relationships and [to] alleviate feelings of anxiety and isolation" (Dist. Ex. 13 at 12).

In particular, the parents asserted that, based on the available evaluative information, the district should have found the student eligible for special education as a student with an emotional disturbance (id. at pp. 5-6, 12). The parents also alleged that the district violated its "child find" obligations (id. at p. 11).

In addition, the parents alleged that the student's unilateral placement at the nonpublic school was appropriate to address his special education needs (Dist. Ex. 13 at pp. 12-13). As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's tuition at the nonpublic school for the 2011-12 and 2012-13 school years (id. at p. 13).

B. Impartial Hearing Officer Decision

On August 26, 2013, an impartial hearing convened in this matter and concluded on April 8, 2014, after four days of proceedings (see Tr. pp. 1-483). By decision dated June 15, 2014, the IHO determined that the district appropriately concluded that the student was not eligible for special education services for either the 2011-12 or 2012-13 school year and dismissed the parents' complaint (see IHO Decision at pp. 1-31).

In concluding that the student was not eligible for special education, the IHO found that being the victim of bullying, by itself, is not a legally recognizable disability, a disabling condition, or a disability under the IDEA (IHO Decision at pp. 3-5). Furthermore, the IHO found that the evidence in the hearing record "stop[ped] well short of demonstrating that the [student] was actually bullied" (id. at p. 6). Having assumed for the sake of argument that the student was bullied, however, the IHO also found that the student did not exhibit characteristics of any of the disability categories enumerated under the IDEA, including emotional disturbance, other health-impairment, or learning disability (id. at pp. 5-6, 22, 27-30).³ In addition, the IHO observed that there was no evidence that the student's "rational reaction to ill treatment at school constituted evidence of an underlying emotional disturbance" or that the student's "attentional issues ha[d] as [of] yet manifested themselves in a way that . . . affected the student's educational performance" (id. at p. 30). Accordingly, the IHO found that the CSE's determination that the student was not eligible for special education and related services was based on the "extensive and excellent clinical evidence available to it at the times that it considered this student's status, [and the CSE's] . . . ineligibility determination[s] were reasonable" and substantively correct (id. at p. 6; see id. at pp. 27-30).

³ The IHO noted, however, that there was some evidence in the hearing record that the student's test performance and behavior were consistent with a diagnosis of ADHD, which, "would support a classification of [other health-impairment] . . . if it supported any classification at all" (see IHO Decision at p. 29).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determinations that the student was not eligible to receive special education and related services as a student with a disability for the 2011-12 and 2012-13 school years and that the parents were not entitled to reimbursement for the cost of the student's tuition at the nonpublic school for either school year.

As an initial matter, with regard to the 2010-11 school year, the parents argue that the home instruction that the student received following the April 11, 2011 incident was inadequate and inappropriate to insure that the student received a FAPE. In addition, the parents allege that the district failed to ease the student's transition back to school following the April 11, 2011 incident and the student's suspension from school or implement recommendations set forth in the evaluative information.

The parents argue that the IHO erred in finding that the bullying purportedly experienced by the student in previous school years could not serve as the basis for a classification of an emotional disturbance. The parents cite testimonial evidence in the hearing record, which they assert reveals a pattern of bullying. Moreover, the parents contend that the evidence in the hearing record establishes that the student suffered from an emotional disturbance, as he presented a "generally pervasive mood of unhappiness or depression" (8 NYCRR 200.1[zz][4][iv]) or, alternatively, demonstrated "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" (8 NYCRR 200.1[zz][4][ii]). The parents also argue that for the purpose of establishing a student's eligibility for special education as a student with an emotional disturbance, it is not required to be shown that the student exhibited clinical or medical depression. The parents also argue that, because the student's test performance and behavior was consistent with a diagnosis of ADHD, the IHO erred in finding that the student was not eligible for special education as a student with an other health-impairment.

The parents also argue that the evidence in the hearing record shows that, as a result of the student's disability, the student's educational performance was adversely affected. Further, the parents argue that the pattern of bullying brought the student's educational performance to a "complete halt" and that this was shown, in part, by the lack of marks on the student's report card for the last quarter of the 2010-11 school year, when the student was receiving home instruction, which, argues the parent, the district failed to explain, and by the district's failure to offer evidence of the student's academic performance at the nonpublic school during the 2011-12 school year. In addition, the parents argue that "educational performance" is not limited to "academic" performance but may include more expansive criteria.

The parents also assert that the nonpublic school was an appropriate unilateral placement because "even with the implementation of limited special education services, [the student] was able to return to a general education setting without being subject to bullying and harassment."

In an answer, the district responds to the parents' petition by admitting and denying the allegations raised and by arguing that the IHO's decision should be affirmed in all respects. In addition, the district asserts that the parents failed to establish that the nonpublic school was an appropriate unilateral placement for the student.

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 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]).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 for Special Education

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]). "Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors" (Educ. Law § 4401[1]). 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[c]; see 8 NYCRR 200.1[zz]; see C.B. v. Dep't of Educ. of City of New York, 322 Fed. App'x 20, 21-22, 2009 WL 928093 [2d Cir. Apr. 7, 2009]; Mr. N.C. v. Bedford Cent. Sch. Dist., 300 Fed. App'x 11, 13, 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; A.M. v. NYC Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, Moody v. NYC Dep't of Educ., 513 Fed. App'x 95, 2013 WL 906110 [2d Cir. 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 296 [S.D.N.Y. 2010]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 306 [E.D.N.Y. 2010]).

In making its determination that the student was not eligible for special education, the August 2011 CSE reviewed and considered the following documentation: a June 2011 psychiatric evaluation; a July 2011 psychological evaluation; an August 2011 social history report; standardized testing completed by the district; the student's report card; and input

from both the parents and the student's fifth-grade teacher (see Tr. pp. 44, 109, 219, 229-30; Dist. Exs. 2; 6; 7; 9; 10; 12 at p. 1).

The evaluative information available to the August 2011 CSE indicated that the student had some concerns related to social interactions, attention, impulsiveness, and anxiety; however, the hearing record does not indicate that, at the time of the August 2011 CSE, these concerns were significant enough for either a clinical diagnosis or to meet the educational criteria for classification as a student with a disability (see Tr. pp. 45-46, 214-15, 219-20, 231; Dist. Exs. 2 at pp. 1-5; 6 at pp. 1-3; 7 at pp. 4-5). Specifically, the June 2011 psychiatric evaluation indicated that the student presented as an "individual who feels as if he is not being treated fairly by his peers" and that he often related this to ethnic or racial differences (Dist. Ex. 2 at p. 4).⁴ Additionally, the evaluation described the student as being somewhat easily irritated by others and opined that the student "perhaps has become somewhat of an easy target to others" (*id.*). The psychiatrist also noted that the student's thought processes were "somewhat tangential" but "not disjointed" and that, while during the evaluation his impulse control and judgment were intact, these may be impaired at times due to "some anger-type concerns" (*id.*). Furthermore, the evaluation indicated that the student's "thought content was negative for suicidal or homicidal ideation, plan or intent" (*id.*). The evaluation reported that student was angry towards the peer depicted in his drawings; however, the evaluation further indicated that student had no history of being violent and admitted he had no intention of being violent or aggressive towards others (*id.* at pp. 4-5). The evaluation also indicated that the student had no intention for anyone to see his drawings and reported that he had been instructed to use his journal by his psychotherapist (*id.* at p. 5). The June 2011 psychiatric evaluation included ADHD and depressive disorder, not otherwise specified, as diagnoses to rule out (*id.* at p. 4).⁵ Recommendations provided by the June 2011 psychiatric evaluation included continued psychotherapy; further evaluation into the nature of the student's situation, including some type of conflict resolution between the student and his peer(s); consideration of in-school counseling to help him address difficulty with the school environment; and further consideration given to the possibility of an ADHD diagnosis (*id.* at p. 5).

The July 2011 psychological evaluation discussed, among other things, the results from the Behavior Assessment System for Children-2 (BASC-2) Parent Rating Scale, which indicated at-risk elevations in externalizing problems, adaptive skills, anger control, developmental social disorders, executive functioning, and resiliency—with clinically significant elevations in internalizing problems and the behavioral symptoms index (Dist. Ex. 7 at p. 4). The psychological evaluation noted that executive functioning "approached the clinically significant level" and was the highest subscale score on the content area scales (*id.*). The psychologist indicated that the overall analysis of the category elevations suggested that the parent identified problems with attention, anxiety, and depression as most

⁴ As noted above, the June 2011 psychiatric evaluation was conducted as a result of the referral from the school district related to an incident that occurred on April 11, 2011 (Dist. Ex. 2 at p. 1).

⁵ The hearing record indicates that a diagnosis to "rule out" is not a formal diagnosis but indicates that there are concerns regarding diagnostic features similar to the particular disorder; however, these are "not to the clinical level" or consistent with expected level of "severity" or do not "meet all the criteria for diagnosis" (Tr. p. 69).

concerning (id.). According to the evaluation, the parents described the student in a manner consistent with characteristics of an ADHD, including that the student often interrupted others, was overly active, was unable to slow down, exhibited a short attention span, and was easily distracted (id.). In addition, the evaluation reported information from the parent that, consistent with symptoms of depression, the student became easily upset, "seem[ed] lonely," cried easily, and said "I don't have friends" and "I hate myself" (id.). The evaluation also described the student's symptoms of anxiety, including nervousness, excessive worry, and fear (id. at p. 5). The psychologist summarized the results of the evaluation and described the student as a "bright and verbal ten year old" who approached tasks logically and persevered when challenged (id.). The psychologist further described that the student had an "occasional lapse in precision" related to inattention or anxiety when listening, reading, or writing and would lose focus when anxious or preoccupied (id.). The evaluation also indicated that the observations were consistent with the identification of a possible diagnosis of ADHD by the psychiatrist who conducted the June 2011 psychiatric evaluation (id. at p. 5; see Dist. Ex. 2 at p. 5). In addition to continuing outside counseling, the July 2011 psychological evaluation recommended that, should the student not qualify for special education services, the district should consider in-school counseling and/or medication to help the student develop better school relationships and to alleviate feelings of anxiety and isolation (Dist. Ex. 7 at p. 6).

According to an August 2011 social history report, completed by a district social worker, the parents made a referral to the CSE based on concerns related to ADHD and to assess the impact of such symptoms on the student's academic performance (Dist. Ex. 6 at p. 1). Based on parental reporting, the social history report indicated that the student disliked reading, had significant deficits in his reading comprehension, and occasionally had difficulty retaining information (id.). The social worker indicated that, in third grade, there were some concerns related to the student's motivation but that he "did extremely well in math and demonstrated improvement in his writing skills" when he transitioned into fourth grade (id. at pp. 1-2). The social worker suggested that, during third grade, the student was "too social," which interfered with his completion of academic tasks, but that, by fifth grade, "more distractions emerged" and the student's then-current teacher assessed that the student was not working to his potential (id. at p. 2). Based on parent report, the August 2011 social history indicated that "bully behavior" intensified during the student's fifth grade, about which the parents had several discussions with school staff; however, the social worker indicated that staff from the student's district public school did not witness the incidents (id.). The social history reported that the student had been receiving outside therapy and that the private therapist encouraged the student to use a journal to express his emotions (id.). The August 2011 social history report described an interview with the student, in which he expressed that he liked school but did not like "being picked on," and that he began to have difficulty with a few peers in third grade, primarily in the form of teasing on the bus (id.). The student also recalled the incident that resulted in his suspension and informed the social worker that "he would never do those things that he drew in his book" (id.). Finally, the August 2011 social history report recommended: that the principal and teaching staff meet to discuss the student's transition into sixth grade; that special seating be considered on the school bus; that the student continue with therapy in order to address anxiety and to "enhance his self-esteem"; that the student be exposed to outside activities to stimulate his interest in

science; and that, during the first three months of the school year, meetings be held to assess the student's transition into sixth grade (id. at p. 3).

Turning to the parents' contention that the CSE should have found the student eligible for special education and related services as a student with an emotional disturbance, according to State and federal regulations, a student with an emotional disturbance must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.; see Mr. N.C., 300 F. App'x at 13; see also Maus, 688 F.Supp.2d at 296-97; A.J., 679 F.Supp.2d at 308). While the term "emotional disturbance" includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; see New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

The parents specifically assert that the student presented with a "generally pervasive mood of unhappiness or depression" (8 NYCRR 200.1[zz][4][iv]) and/or demonstrated an "inability to build or maintain interpersonal relationships with peers and teachers" (8 NYCRR 200.1[zz][4][ii]). However, the evidence does not support the parents' position that the student exhibited either of these characteristics required for a classification of an emotional disturbance.

For example, with regard to a pervasive mood of unhappiness or depression (8 NYCRR 200.1[zz][4][iv]), while the June 2011 psychiatric evaluation recommended ruling out depressive disorder, not otherwise specified, that was the only instance in the evaluation that depression was even mentioned (Dist. Ex. 2). Furthermore, the July 2011 initial psychological evaluation discussion regarding depression is based on parental reporting and was not also professionally diagnosed (see Dist. Ex. 7 at p. 4; see also Mr. N.C., 300 Fed. App'x at 13 [finding the evidence insufficient to establish that student presented a generally pervasive mood of unhappiness or depression where there were diagnoses both for and against finding that the student suffered from depression]). Moreover, with respect to the

incident resulting in the student's suspension, the resulting psychiatric evaluation reported that student was angry towards the peer depicted in his drawings but did not have a history of being violent and admitted he had no intention of being violent or aggressive towards others (Dist. Ex. 2 at pp. 4-5). Thus, even if the single incident were evidence of an underlying social/emotion concern, there is no suggestion that such behavior occurred over a long period of time and to a marked degree (see 34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]).

To the extent that the parents argue that the student qualified for special education as a student with an emotional disturbance because the student exhibited "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" (8 NYCRR 200.1[zz][4][ii]), the parents' position is belied by the evidence in the hearing record that demonstrates, for example: that the student reported that he enjoyed school; that, according to the student's fifth-grade teacher, the student enjoyed interacting and participating in hands-on activities in science; and that the student enjoyed learning and frequently participated in class (Tr. pp. 100, 104, 107; Dist. Ex. 6 at p. 2). The teacher also testified: that the student had some friends in the classroom who shared the same interests as him; that the student got along well with others socially; and that the teacher had a good relationship with the student, who enjoyed talking to the teacher (Tr. pp. 100, 104, 161; see Dist. Ex. 9; see also W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 174 [S.D.N.Y. 2011] [concluding that the student did not exhibit an inability to build or maintain satisfactory interpersonal relationships with peers and teachers where the student maintained friendships, "albeit unsavory ones," and "reacted well to teachers in whose courses he did well"]). The school psychologist, who administered the July 2011 psychological evaluation, also described the student as a "cooperative fifth grader who wanted to do well and was well behaved" (Tr. p. 213). Finally, the July 2011 psychological evaluation reported that the student's teachers, kindergarten through fifth grade, described the student as a "bright and friendly boy who is well liked by his peers"; whose "mood and disposition are always cheerful"; and who was a "pleasure to have in class," and as a "great kid . . . eager to learn" with a "great sense of humor . . . [who made] wonderful contributions to class" (Dist. Ex. 7 at p. 2).

The parents also assert that the student should have been deemed eligible for special education as a student with an other health-impairment. An other health-impairment is defined, as: "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . [i]s due to chronic or acute health problems such as," among others, "attention deficit disorder or attention deficit hyperactivity disorder" (34 CFR 300.8[c][9]; see 8 NYCRR 200.1[zz][10]). Thus, even to the extent that the student exhibited some behaviors consistent with a diagnosis of ADHD, as described above, the evidence in the hearing record does not reveal that the student's reported deficits resulted in limited alertness with respect to the educational environment or were "chronic" or "acute." On the contrary, the June 2011 psychiatric evaluation indicated that, although the ADHD diagnosis could be appropriate based on "some attention and focusing difficulties with some impulsivity and some talkativeness in the classroom," further information was needed (Dist. Ex. 2 at p. 5). The July 2011 psychological evaluation described the student's demeanor during testing as consisting of "an occasional subtle lapse in precision, related to inattention or anxiety," which observations were consistent with the possibility of pursuing a diagnosis of ADHD

(Dist. Ex. 7 at p. 5). The social history reviewed by the CSE did not offer much in the way of elaboration with regard to the student's attentional needs, other than to note that, by fifth grade, the student became increasingly distracted (Dist. Ex. 6 at p. 2). Based on the foregoing, there was insufficient information before the August 2011 CSE to indicate that the student's attentional deficits warranted a determination that he met the criteria for special education.

However, even assuming for the sake of argument that the student met the initial criteria to be deemed eligible as a student with either an emotional disturbance or an other health-impairment, 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[c][4][i], [9][ii]; 8 NYCRR 200.1[zz][4], [10]).

B. Adverse Educational Performance

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 the Second Circuit 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, 688 F. Supp. 2d at 294, 297-98 [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see also C.B., 322 Fed. App'x at 21-22 [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., 679 F. Supp. 2d at 308-11 [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"]; Mr. N.C., 300 Fed. App'x at 13 [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., 307 F. Supp. 2d at 399; 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., 801 F. Supp. 2d at 170-75 [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"]).

While evidence in the hearing record establishes that the student exhibited social/emotional and attentional difficulties, as noted above, the student's reported conditions did not adversely impact his educational performance. Contrary to the parents' contention, the hearing record indicates that the student made adequate progress academically and demonstrated appropriate behaviors over the course of the 2010-11 school year (Tr. pp. 100-01, 104, 106-07, 208-10, 214-16; Dist. Exs. 7; 9; 10). A review of the student's report card for the 2010-11 school year indicated that the achievement grades reflected that the student met grade level standards with appropriate guidance or exceeded grade-level standards independently across all academic areas (Dist. Ex. 9). The June 2011 report card indicated "further development needed" in the area of problem solving; however, the student's overall grade for mathematics was considered to "meet grade level standards with appropriate guidance" (Dist. Ex. 9).

The parent point to the student's suspension and home instruction during the fourth quarter of the 2010-11 school year and the attendant lack of marks on the student's report card that fourth quarter, as evidence of adverse educational impact. Indeed, the 2010-11 report card does not contain all of the academic grades for the fourth quarter due to the student's receipt of home instruction during this time and it is unclear from the hearing record why the student's grades were not so recorded (Tr. pp. 239-51). However, the report card does indicate that, while receiving instruction at home, the student worked "very hard" during the fourth quarter and that the student's grades, which indicated that the student met or consistently exceeded grade-level standards, were a reflection of behavior and academic grades (Dist. Ex. 9; see also Tr. pp. 373-74). Furthermore, as noted above, following the June 1, 2011 psychiatric evaluation the parents elected to keep the student on "homebound instruction" for the rest of the 2010-11 school year (Dist. Ex. 6 at p. 2; see Tr. pp. 373-74).

In addition, the student's fifth-grade teacher described the student as being focused in class and testified that he considered the student to be in the top half of the class (Tr. pp. 100-01). The teacher indicated that, during the course of the 2010-11 school year, he felt the student was not working to his potential, so he moved the student to the front of the class in order to monitor his academic work (Tr. p. 104). Although the teacher stated that he was concerned about the student "falling off track," the teacher explained that he was not worried about the student's academic skills (id.). The teacher testified that the student did well in English language arts (ELA), read well, and frequently participated in class (Tr. p. 107). The teacher also described that, in science, the student enjoyed interacting and participating in hands-on activities (id.).

Further support for the IHO's conclusion that the student's educational performance was not adversely affected by any of the alleged underlying difficulties is the July 2011 psychological evaluation, which reported that a review of the student's academic history indicated that the student's "academic achievement [fell] in the 'advanced' or 'proficient' categories" with the exception of mathematics problem solving where "further development

[wa]s needed" (Dist. Ex. 7 at p. 2). Testing results from the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), reported in the July 2011 psychological evaluation, indicated that the student's full scale IQ was 111 (high average range), with index scores falling in the average to high average ranges (id. at p. 3). Furthermore, the test results from the WISC-IV indicated that the student demonstrated "superior knowledge of general information and high average capacity for verbal and non-verbal abstract reasoning (id.). According to the results of the Kaufman Test of Educational Achievement-Second Edition (K-TEA-II) the student earned average-to-above-average composite test scores in reading, mathematics, and written language, and the results further indicated that reading decoding and spelling were his strongest areas, with mathematics concepts and mathematics computations considered "well developed" (id. at p. 4). Although the student's written expression fell within the low average range, the evaluator explained that this lower score was, in part, due to "understandable fatigue because this was one of the last subtests administered during an extended testing session" (id. at pp. 4, 6).

Moreover, examining the student's educational performance more broadly, the evidence in the hearing record also confirms that there was no adverse effect on the student's educational performance. For example, the student's grades for "social behaviors that promote respect" and "social behaviors that promote learning" indicated that he behaved appropriately "most of the time" or "consistently" throughout the 2010-11 school year (see Dist. Ex. 9).

In summary, the hearing record indicates that, notwithstanding the evidence of the student's social/emotional and attentional needs, the district properly concluded that the student's concerns did not have an adverse impact on his educational performance. Additionally, the evidence in the hearing record reflects that, although the student exhibited some behaviors related to inattention, impulsivity, focusing difficulties, and anxiety, the evidence also demonstrates that he continued to demonstrate progress in academics, liked school, had friends, and had a good relationship with his then-current teacher (Tr. pp. 100, 104, 161; Dist. Exs. 2 at p. 5; 6 at p. 2; 7 at p. 5). 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., 322 Fed. App'x at 21-22; Mr. N.C. v., 300 Fed. App'x at 13; 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).

C. Child Find

In addition, to the extent that the parents argue that the district, as the district of residence, breached its child-find obligations or that the CSE should have recommended special education subsequent to its receipt of the September 24, 2011 neuropsychological evaluation, the parents' argument is also without merit. 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]; E.T. v. Bd. of

Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202, 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 Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). The "child find" requirements apply to "children who are 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]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (see, e.g., 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).

A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, citing Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

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. Further, the district took steps to evaluate the student in response to the disciplinary incident and the parents' initial referral of the student and pursued the neuropsychological evaluation to further review the student's needs. Moreover, while the district, as the district of residence in this case, did not initiate a CSE meeting following receipt of the September 2011 neuropsychological evaluation, the hearing record indicates that director of special education reviewed the evaluation and the district sent a copy of the evaluation to the parents (Tr. p. 48). Furthermore, the director of special education testified that there were "no significant findings [set forth in the neuropsychological evaluation] that would have changed the CSE's determination" and that there was no request made by the

parent for the CSE to reconvene (id.). In addition, an independent review of the September 2011 neuropsychological evaluation does not provide any basis to disturb the findings of the IHO in this matter with regard to the student's eligibility for special education services (see Tr. pp. 47-48; see generally Parent Ex. G). The neuropsychological evaluation noted that the student's test performance and behavior was consistent with a diagnosis of ADHD and that the student's difficulties with attention and organization had been noted by both his parents and teachers (Parent Ex. G at p. 7). The evaluation recommended that the student consult with a physician to determine whether the student would benefit from pharmacological treatment along with a structured behavior modification program to manage his attention issues (id.). These conclusions did not vary greatly from the information previously considered by the August 2011 CSE and there was no additional information available to the district indicating that the student was experiencing adverse educational performance. Moreover, consistent with the other evaluative information reviewed by the August 2011 CSE, there are no findings or conclusions in the student's neuropsychological evaluation that the student's attentional deficits were "chronic" or "acute" so as to support a determination that the student should have been found to be eligible for special education as a student with an other health-impairment (Parent Ex. G at pp. 1-9; see 8 NYCRR 200.1[zz][10]).

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]).

In conclusion, although I sympathize with the parents' concerns that the student's classmates engaged in bullying of the student, for the reasons set forth above, the parent is not entitled to relief under the IDEA. Going forward, I suggest that the parents and district should take note of the New York State's Dignity for All Students Act, which went into effect July 1, 2012 and which intends to prevent and prohibit "harassment" and "bullying," defined as "the creation of a hostile environment by conduct or by threats, intimidation or abuse . . . that," among other things, "has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being" (Educ. Law §§ 10, 11[7]; see generally Educ. Law §§ 10-17). Among other things, the Dignity for All Students Act requires that a district create "[p]olicies and procedures intended to create a school environment that is free from harassment, bullying and discrimination," which included, but are not limited to policies directed to the reporting, investigation, elimination, and prevention of bullying and harassment (id.).

VII. Conclusion

In summary, the determination that the student was not eligible for special education programs and services as a student during the 2011-12 and 2012-13 school years was

supported by the evidence in 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 the nonpublic school 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**
 August 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER