



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-078

**Application of the BOARD OF EDUCATION OF THE [REDACTED] for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability**

### **Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, Joseph E. Madsen, 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. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the respondents' (the parents') son was eligible for special education and related services as a student with a learning disability for the 2013-14 and 2014-15 school years. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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**

The student attended a general education classroom in a district public school since kindergarten (Dist. Ex. 5 at p. 1; IHO Ex. I at p. 3). Beginning on April 23, 2013, during the student's second grade year, the district provided the student with two 30-minute sessions per week of academic intervention services (AIS) in the form of remedial math services in a group of 11 students (Dist. Ex. 1 at p. 30; IHO Ex. I at p. 3; see Dist. Ex. 27 at p. 1).<sup>1, 2</sup> The hearing

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<sup>1</sup> State regulations define AIS as "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance" (8 NYCRR 100.1[g]).

record reflects that the student received these AIS in the same duration and amount during the 2013-14 school year (see Tr. pp. 93-94, 132, 167-69, 200-01, 223-25, 290, 450-51; Dist. Ex. 1 at pp. 30, 33). Additionally, upon the parents' request, the student began receiving additional AIS in math from the student's third grade teacher consisting of two sessions of extra help per week in a small group before the start of the school day (see Tr. pp. 135, 167, 200-01, 224, 227, 290, 450, 452-53; Dist. Ex. 6 at p. 4).

According to the district's director of student services, the parents requested referral of the student to the CSE in an email dated February 7, 2014 (see Tr. pp. 32, 36-37). By prior written notice dated February 10, 2014, the district acknowledged the parents' referral of the student to the CSE and requested consent to conduct a classroom observation, educational evaluation, physical examination, psychological evaluation, social history, and speech-language evaluation to determine the student's initial eligibility for special education services (Dist. Ex. 1 at p. 10). This prior written notice reflected the parents' concerns that the student experienced difficulty with his handwriting and performed below grade level in reading and math (*id.*). In a separate prior written notice dated March 6, 2014, the district requested the parents' consent to conduct an occupational therapy (OT) evaluation of the student (*id.* at p. 9).<sup>3</sup> During February and March 2014, the district conducted an initial evaluation of the student that included the evaluations identified in the February and March 2014 prior written notices (see generally Dist. Exs. 1 at pp. 10-18, 21-29, 33-37; 5 at pp. 1-2; see also Dist. Ex. 8 at p. 1).

On March 25, 2014, the CSE convened to consider the student's eligibility for special education (Dist. Exs. 1 at p. 6; 8). The March 2014 CSE determined that, based upon the evaluative information considered at the CSE meeting, the student was not eligible for special education as a student with an educational disability (see *id.*). At the conclusion of the March 2014 CSE meeting, the chairperson recommended referral to a committee which would determine whether the student was eligible for accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504) (Tr. pp. 67, 111-12; see also Tr. p. 465). In a prior written notice dated March 25, 2014, the district identified the evaluative materials and school reports considered by the March 2014 CSE and stated that the student did not meet the criteria to be classified as a student with a disability and, accordingly, was not eligible for special education services (Dist. Ex. 8 at p. 1).

On May 13, 2014, a committee convened to determine the student's eligibility to receive Section 504 accommodations (Dist. Ex. 10 at p. 1). The May 2014 Section 504 committee determined that the student was eligible for a Section 504 accommodation plan and recommended that the student receive one 30-minute session per week of OT in a group setting (*id.* at pp. 1-2; see Dist. Exs. 11; 12).

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<sup>2</sup> According to the parents, the student received remedial reading in the first grade but no longer required such services in second grade because he was reading on grade level (see Tr. p. 460; IHO Ex. I at p. 3).

<sup>3</sup> The testimony adduced at the impartial hearing reveals that the parents consented to each of the evaluations identified above (see Tr. pp. 104-05, 477-78).

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

In a due process complaint notice dated November 24, 2014, the parents alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (Dist. Ex. 1 at pp. 1-3). Specifically, the parents alleged that the district violated the child find provision of the IDEA; failed to convene a CSE meeting in a timely manner; and failed to determine that the student was eligible for special education services (*id.* at p. 1). The parents further contended that the CSE failed to properly evaluate the student in all areas of suspected disability (*id.*).

The parents also raised several allegations based on the supposition that the student should have been found eligible for special education services during the 2013-14 and 2014-15 school years (*see* Dist. Ex. 1 at pp. 1-3). First, the parents alleged that the district failed to address the student's OT, assistive technology (AT), reading, writing, and social/emotional needs (*id.* at pp. 1-3). The parents also asserted that the student's annual goals were "either inappropriate or deficient" (*id.* at p. 3). The parents further alleged that the district failed to provide parent counseling and training services (*id.*). The parents additionally stated that the student's "program" was inappropriate due to an insufficient level of "services" as well as an insufficient number of appropriate annual goals (*id.*)<sup>4</sup>

For relief, the parents sought a determination that the student was eligible for: special education services; an IEP; independent evaluations in math, written expression, reading functioning, and OT; daily one-to-one reading, math, and writing instruction; three 45-minute sessions per week of individual OT; one session per week of counseling; provision of a 1:1 teacher's assistant; resource room or integrated co-teaching (ICT) services; "proper" annual goals; an AT evaluation; certain AT services; extended day services; daily extra help or resource room services; and digital notes and books for the student (Dist. Ex. 1 at pp. 1-4). The parents also sought compensatory services in the areas of OT (120 sessions, in 45-minute durations); math (90 hours); reading and writing instruction (320 hours); parent counseling and training (35 hours), and counseling (50 hours) (*id.*).

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

On January 20, 2015, the parties proceeded to an impartial hearing, which concluded on May 28, 2015 after three days of proceedings (Tr. pp. 1-980). At the conclusion of proceedings on January 21, 2015, the IHO ordered "an independent neuropsychological evaluation and an independent reading/writing evaluation" of the student to be completed by evaluators of the IHO's choosing and directed to the CSE to reconvene after completion of such evaluations (Tr. p. 556). In March 2015, the student participated in a neuropsychological and educational

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<sup>4</sup> These allegations notwithstanding, there is no evidence in the hearing record that the district developed an IEP for the student.

assessment ("March 2015 neuropsychological evaluation report") (IHO Ex. 1 at pp. 1-25; see Tr. p. 556).<sup>5</sup>

In a decision dated July 6, 2015, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (see IHO Decision at pp. 10-11).<sup>6</sup>

First, with the respect to the conduct exhibited during the impartial hearing, the IHO noted that a "serious confrontational situation" existed between the parties and that the animosity exhibited during the impartial hearing "was of deep concern" (IHO Decision at p. 9).

Turning to the dispute between the parties, the IHO found that the district followed "established procedures under the IDEA" for the 2013-14 and 2014-15 school years (IHO Decision at p. 10). Nevertheless, with regard to the threshold issue of the student's eligibility, the IHO found that the district erred by failing to find the student eligible for special education as a student with a learning disability (id. at p. 9-11). Specifically, the IHO found that the student "met the criteria for [s]pecial [e]ducation" based on findings contained in the March 2015 neuropsychological evaluation report, which concluded that the student met the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) criteria for diagnoses of developmental coordination disorder and specific learning disorder with impairment in written expression (id. at p. 10). The IHO further found that the student lacked the ability to effectively communicate his ideas in writing, and to answer questions that assessed his knowledge of mechanics, word usage, and other details (id. at pp. 10-11). The IHO additionally found that the student's graphomotor needs "significantly impact[ed]" his functioning in school and that these challenges were "compound[ed]" by his illegible handwriting (id. at pp. 10, 11). According to the IHO, the district did not "offer an appropriate program and placement" that addressed the student's writing needs for the 2013-14 and 2014-15 school years (id. at p. 11).

Having found the student eligible for special education services as a student with a learning disability, the IHO remanded the matter to the CSE to develop an IEP for the student (IHO Decision at p. 11). The IHO further stated that the evidence in the hearing record "warranted" placement of the student in a "full time special education setting" because, according to the IHO, the student's lack of ability to function in a mainstream setting "was well established" prior to the 2013-14 school year (id.). The IHO denied the parents' request for

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<sup>5</sup> The hearing record reflects that a CSE convened on April 29, 2015 to consider the resultant March 2015 neuropsychological evaluation report (see Dist. Ex. 23 at pp. 1-2, 5, 9). The hearing record further reflects that the April 2015 CSE determined that the student was not eligible for special education as a student with a disability under the IDEA (see id.).

<sup>6</sup> State regulations provide that "[t]he decision of the impartial hearing officer shall . . . set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to the hearing record are a standard legal practice and should be included in any IHO decision. Here, the IHO failed to cite to specific transcript and exhibit pages in the findings of fact and conclusions of law section of his decision (see IHO Decision at pp. 9-12). The IHO is reminded to, in the future, cite specific transcript or documentary exhibit pages to support his findings of fact. Otherwise, as is the case here, it is difficult to ascertain how the IHO reached his conclusions, which precludes a meaningful review of the decision.

compensatory relief, observing that no evidence in the hearing record supported an award of the specific services sought by the parents (id.).<sup>7</sup>

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

The district appeals, asserting that the IHO erred by finding the student eligible for special education as a student with a learning disability. Consequently, the district argues that the IHO erred by finding that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. As a preliminary matter, the district argues that the IHO demonstrated bias against the district by allowing the advocate for the parents to engage in inappropriate, intimidating, and disrespectful conduct during the impartial hearing. As for the March 2014 CSE's eligibility determination, the district asserts that the CSE assessed the student's needs by conducting multiple evaluations prior to the CSE meeting. The district further argues that the March 2014 CSE considered appropriate evaluative and classroom reports and, after doing so, properly concluded that the student was not eligible for special education as a student with a learning disability. Additionally, the district contends that, subsequent to the March 2014 CSE meeting, it offered the student OT services to meet his handwriting needs pursuant to a Section 504 plan. Moreover, the district argues that the March 2015 neuropsychological evaluation report contains inaccurate information and is inconsistent with the student's performance in school. The district further submits that the CSE reconvened in April 2015 to consider the March 2015 neuropsychological evaluation report and properly concluded that the student was not eligible for special education services. Finally, the district asserts that the IHO erred in finding that a full-time special education setting was "warranted" as this would be too restrictive for the student (see IHO Decision at p. 10). The district requests reversal of the IHO's determinations that the student was eligible for special education and that the district denied the student a FAPE for the 2013-14 and 2014-15 school years.<sup>8</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.

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<sup>7</sup> The statement of appeal rights attached to the IHO's decision incorrectly identified the deadlines by which a party must appeal an IHO's decision and by which a parent must serve a notice of intent to seek review upon the district (IHO Decision at p. 12; see 8 NYCRR 200.5[j][5][v]). Notwithstanding this error, there was no harm in this instance because the district initiated this appeal in a timely manner under State regulations. Additionally, the IHO's decision does not contain, as required by State regulations, "a list identifying each exhibit admitted into evidence" (8 NYCRR 200.5[j][5][v]). The IHO is reminded to comply with these portions of State regulations (8 NYCRR 200.5[j][5][v]; 279.2-279.4).

<sup>8</sup> The parents did not file an answer to the petition. Notwithstanding that the parents have not responded to the petition, the entire hearing record has been examined, and an independent decision based on the entire hearing record has been rendered (20 U.S.C. § 1415[g]; 34 CFR 300.510[b][2][i]).

Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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]). 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).

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).

## **VI. Discussion**

### **A. Preliminary Matters – IHO Bias**

First, the district argues that the IHO demonstrated bias against the district by allowing the parents' advocate to engage in inappropriate, intimidating, and disrespectful conduct towards the witnesses called by the district and counsel for the district. The evidence in the hearing record demonstrates that the district's arguments are without merit.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by

words or conduct, manifest bias or prejudice, according each party the right to be heard (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

The hearing record reveals that the IHO appropriately attempted to maintain control over the hearing in response to the zealous advocacy of both counsel for the district and the advocate for the parent. On more than one occasion, the IHO urged the parents' advocate and counsel for the district to keep in mind that they were there for the student (see Tr. pp. 122, 125-26, 416). Additionally, the IHO made numerous efforts to maintain the decorum of the proceedings and move the impartial hearing forward by instructing the parties to refrain from inappropriate conduct and by directing the parties to continue their examination of the witnesses (see Tr. pp. 122-24, 254-55, 391, 416-17, 532-34, 552-53, 688, 772, 807-08, 846-47, 865-66). With respect to the conduct of the advocate for the parent, the hearing record further reveals that the IHO responded to the district's specific objections (see Tr. pp. 122-24, 254-55, 417, 429-30, 772, 807). Indeed, at one point during the impartial hearing, the IHO threatened to sanction the advocate if he continued to make inappropriate comments (Tr. p. 552).

As for the IHO's statement that counsel for the district reacted in an "overly sensitive" manner by seeking to indicate on the record that the advocate for the parents laughed in response to a witness's testimony (Tr. pp. 806-07), despite the IHO's admonition, the district was afforded a full and fair opportunity to present evidence and testimony in support of its position. Therefore, contrary to the district's contention, the hearing record demonstrates that the IHO made numerous efforts to retain control of the hearing and to curtail inappropriate conduct and remarks. Accordingly, the district's argument that the IHO possessed or displayed bias toward the district is without merit.

## **B. Eligibility for Special Education**

Next, the district appeals the IHO's finding that the March 2014 CSE improperly determined that the student was not eligible for special education as a student with a learning disability. The district argues that the evaluative and other materials considered by the CSE supported its determination. A review of the hearing record supports a conclusion that the March 2014 CSE permissibly determined that the student did not meet the criteria for eligibility for special education services as a student with a learning disability.

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]). A learning disability, according to State and federal regulations, means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]). A learning disability "includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]). A learning disability does not "include learning problems that are primarily the result of visual, hearing or

motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see also 34 CFR 300.8[c][10]).

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i], [3], [4][i], [5]-[6], [8], [9][ii], [11]-[13]; 8 NYCRR 200.1[zz][1]-[2], [4]-[5], [7], [9]-[13]), the learning disability classification does not contain a requirement expressed in such terms (34 CFR 300.8[10]; 8 NYCRR 200.1[zz][6]). Instead, consideration of whether a student has a specific learning disability must take into account whether the student achieves adequately for the student's age or meets State-approved grade-level standards when provided with learning experiences and instruction appropriate for the student's age (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), and either the student does not make sufficient progress or meet age or State-approved grade-level standards when provided with a response to intervention process, or assessments identify a pattern of strengths and weaknesses determined by the CSE to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]).<sup>9</sup> Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in certain areas (8 NYCRR 200.4[j][4]).

Federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307–300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i], [2]; see 34 CFR 300.308[a], 300.310).<sup>10</sup>

Although the sufficiency of the evaluative and other materials considered by the March 2014 CSE is not directly in dispute, a review thereof is necessary to assess the CSE's ultimate determination. The evidence in the hearing record reveals that the following individuals attended

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<sup>9</sup> When determining whether a student should be classified as a student with a learning disability, a CSE must also create a written report documenting the student's achievement according to the above, along with other information, including: the basis for the CSE's determination, any relevant student behaviors, any relevant medical findings, the effects of other factors on the student's achievement, and whether the student has participated in a response to intervention program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]). State Education Department guidance provides a form for CSEs to use in ensuring that a proper written record is maintained (see "Response to Intervention: Guidance for New York State School Districts," Office of P-12 Educ., Appendix B [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/RTI/guidance-oct10.pdf>).

<sup>10</sup> In addition, as part of its initial evaluation of the student, to ensure that underachievement exhibited by a student suspected of having a learning disability is not due to a lack of appropriate instruction in reading or mathematics, the CSE must consider data that demonstrates that, prior to the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel, and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction, which was provided to the student's parents (8 NYCRR 200.4[j][1][ii]).

the March 2014 CSE meeting: the district's director of student services (who also served as the chairperson), a school psychologist, a special education teacher, the student's third grade teacher, a speech-language pathologist, and the parents (see Dist. Ex. 1 at pp. 6, 28; see also Tr. pp. 32-33, 36, 159, 446-47).<sup>11</sup> The hearing record further reflects that the March 2014 CSE considered the following evaluative information: a December 2012 health appraisal form, a February 2014 psychological evaluation report, a February 2014 speech-language evaluation report, a March 2014 classroom observation, a March 2014 remedial math report, a March 2014 social history, a March 2014 OT evaluation report, and a March 2014 educational evaluation report (Tr. pp. 33-34; 45-53, 55, 65-66, 72, 447, 485; Dist. Ex. 8; see Dist. Exs. 1 at pp. 11-18, 21-23, 27-29, 30, 33-37; 3; 5).<sup>12</sup>

The February 2014 psychological evaluation report stated that, according to an administration of the Wechsler Intelligence Scale for Children-Fourth Edition, the student's full scale IQ was 96, in the average range (Dist. Ex. 1 at p. 36). Specifically, the student scored in the average range in the areas of verbal comprehension, perceptual reasoning, and working memory, and in the low average range in the area of processing speed (id. at p. 34). The student achieved a score in the 18th percentile on the Developmental Test of Visual Motor Integration (id.). On the Behavior Assessment System for Children-2nd Edition Teacher Rating Scale, he scored within normal limits in all areas of behavior, except he was found to be "at risk" for learning problems (id. at p. 35). The evaluator noted that the student "displayed an awkward pencil grip" when completing written tasks (id. at p. 33).

The February 2014 speech-language evaluation assessed the student in the areas of hearing, auditory comprehension and reasoning, semantics/word retrieval, syntax and morphology, speech production, and fluency (Dist. Ex. 1 at pp. 27-28). The February 2014 speech-language evaluation report indicated that the student exhibited average to above average speech and language skills and that his hearing acuity was within normal limits (id. at p. 27).

The March 2014 classroom observation took place in the student's third grade general education classroom while students engaged in independent work completing a reading comprehension and vocabulary packet (Dist. Ex. 1 at p. 21). The student was observed engaging in appropriate classroom behavior such as positively interacting with peers and teachers, attending to his task, and following verbal directions (id.). Further, the school psychologist

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<sup>11</sup> Several of these individuals generated reports that were considered at the March 2014 CSE meeting. Specifically, the school psychologist conducted the March 2014 classroom observation; the special education teacher conducted the March 2014 educational evaluation; and the speech-language pathologist conducted the February 2014 speech-language evaluation (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 1 at pp. 21-23, 28).

<sup>12</sup> The December 2012 health appraisal form indicated that the student did not display any medical problems or restrictions (Dist. Ex. 3 at p. 1). Given the brevity of this form and the lack of any dispute as to the student's health needs, this form is not discussed at length below.

noted that she observed the student completing "written assignments" in a satisfactory manner (id.).<sup>13</sup>

The March 2014 remedial math report stated that the student was making slow progress, but was still exhibiting below grade level skills in most areas of math (Dist. Ex. 1 at p. 30). The report noted that, while the student sometimes displayed an understanding of a concept, he did not retain the information in order to achieve mastery (id.). The report described the student as "highly distractible," needing "constant prompting" to remain on-task, and working at a slow pace (id.).

The March 2014 social history report provided information obtained through an interview with the student's parents (Dist. Ex. 5 at p. 1-2). The parents stated that the student took a long time to complete his homework, that he struggled with reading comprehension and decoding, and that he had difficulty with fine motor tasks such as writing, fastening buttons, and other daily life skills (id. at p. 2). The parents also indicated that the student could be "hard on himself" but had friends at school and enjoyed healthy social relationships (id.).

The March 2014 OT evaluation report indicated that the student's third grade teacher expressed concerns regarding the student's fine motor skills, bilateral skills, posture, and the effect of his attention on his ability to print legibly (Dist. Ex. 1 at p. 11). The student achieved a score in the 75th percentile on the Motor-Free Visual Perception Test-Third Edition, which assessed the skills used during classroom tasks such as the ability to copy from text, recognize words and letters, understand ditto and blackboard information, and organize written material onto paper using appropriate sizing (id. at p. 15). On the Beery-Buktenica Test of Visual Motor Integration-Sixth Edition, the student exhibited skills in the 10th percentile on the motor coordination subtest, 45th percentile on the visual perceptual subtest, and at the 18th percentile overall (id.). The report further stated that the student slouched and leaned on the table during fine motor tasks; demonstrated some hand weakness during writing tasks; and used an "immature fist grasp" when writing (id. at p. 16). Also, the report stated that the student was performing below grade level with respect to his handwriting and ability to organize material on the page (id.). Specifically, the student displayed poor letter formation, spacing, sizing, line targeting, and alignment, and demonstrated decreased speed and errors when copying words (id.). The occupational therapist indicated that the student's handwriting was often illegible (id.).<sup>14</sup> The

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<sup>13</sup> The March 2014 classroom observation indicates that, if an observed student "is suspected of a learning disability, [an] observation must be completed in the subject area(s) of concern" (Dist. Ex. 1 at p. 21 [emphasis in original]; see also 34 CFR 300.310[a]; 8 NYCRR 200.4[b][1][iv]). Here, the March 2014 classroom observation included an observation of the student's handwriting (Dist. Ex. 1 at p. 21). While the observer did not observe the student receiving math instruction, the parents did not raise a concern regarding this omission in their due process complaint notice and, in any event, the March 2014 remedial math report provided current information as to the student's math needs such that the lack of an observation did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]; see also Mr. N.C. v. Bedford Cent. Sch. Dist., 300 Fed. App'x 11, 14 [2d Cir. Nov. 12, 2008]; J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68-70 [2d Cir. 2000]).

<sup>14</sup> The student's third grade teacher disagreed with this statement, indicating that the student's handwriting proved illegible to her and the student only "at times" (Tr. pp. 177-78).

therapist recommended that the student receive OT one time per week in a group, and recommended goals and strategies for appropriate pencil grasping, improving his copying skills, and increasing his hand strength, posture, and endurance (id. at pp. 12, 17).

The March 2014 educational evaluation report indicated that, according to the Wechsler Individual Achievement Test-Third Edition, the student achieved scores in the superior range in early reading, reading comprehension, alphabet writing fluency, word reading, pseudoword decoding, oral expression, and oral reading fluency (Dist. Ex. 1 at pp. 22-23). The student scored in the average range for listening comprehension, math problem solving, sentence composition, essay composition, numerical operations, spelling, and multiplication math fluency (id.). The examiner noted that, although the student achieved 100 percent accuracy in addition and subtraction fluency, his slow rate, attributable to counting on his fingers, placed him in the low average range for those subtests (id.).

The student's third grade report card for the 2013-14 school year revealed that the student was not meeting grade level expectations in overall writing conventions and usage by the end of the second trimester (i.e., at the time of the March 2014 CSE meeting), which included the use of grammatically correct sentence structure, correct capitalization and punctuation, spelling patterns and generalizations, use of resources to correct spelling, and legibility (Dist. Ex. 6 at p. 1).<sup>15</sup> In addition, the student obtained an "F" grade in math for the first and second trimesters (id. at p. 2). The student's third grade teacher commented at the end of the first trimester that he was a "capable student" but needed to work on his handwriting (id. at p. 4). Additionally, both the student's remedial math teacher and third grade teacher commented at the end of the first trimester that the student needed to practice his multiplication facts (id.).

The March 2014 CSE chairperson testified that the CSE did not recommend classification of the student because he generally exhibited "average to above-average . . . [skills] in all areas assessed," and the CSE found no evidence which supported a classification of speech or language impairment or learning disability (Tr. pp. 40-41; see also Tr. pp. 71, 75-76, 84-85, 111). According to the CSE chairperson, the parents expressed concerns at the March 2014 CSE meeting about the student's "fine motor skills and his poor penmanship and the impact that it had for legibility" (Tr. p. 67). The CSE chairperson acknowledged that the student had "some fine motor weaknesses" and explained that the March 2014 CSE recommended referral to a Section 504 committee to address these needs (Tr. p. 41). In addition, she stated that, while the student's penmanship required "some support," the student's teacher and the testing results indicated that his writing ability was average overall (Tr. p. 41; see also Tr. pp. 88-89, 111). Specifically, the chairperson opined that the student "did not present with weaknesses in the area of written expression" (Tr. pp. 88-89; see also Tr. p. 92).

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<sup>15</sup> While the extent to which the March 2014 CSE considered the student's third grade report card for the first and second trimesters is unclear from the hearing record, the parents testified that the March 2014 CSE discussed the student's most pertinent grade—i.e., a failing grade in math—at the meeting (Tr. p. 451). Moreover, the student's third grade teacher possessed first-hand knowledge as to the student's grades and attended the March 2014 CSE meeting. But even assuming that the CSE did not review or discuss the student's grades in other academic subjects, a review of these report cards does not reveal any information that would have altered the CSE's conclusions.

The student's third grade teacher attended the March 2014 CSE meeting and discussed the student's current functioning, including his strengths in science and science vocabulary as well as his challenges in penmanship and math (Tr. pp. 136-37, 142-43, 169, 183-84). The teacher testified that she expressed her concerns about the student's handwriting and reported that she was working on handwriting in the classroom and had sought support from an occupational therapy specialist (Tr. pp. 136-37, 183-84).<sup>16</sup> The teacher attributed the student's difficulties with penmanship to rushing; she frequently reminded the student to "slow down" and to rewrite anything she could not read (Tr. pp. 175-76; see also Tr. pp. 141-42). The teacher noted that, although the student possessed the ability to complete math calculations, he often struggled due to a lack of interest and because he often rushed (Tr. pp. 135, 139-40, 168-69, 228-29, 231). As a result, the teacher referred the student for remedial math services in September 2013 (Tr. p. 135, 168). In addition, the teacher testified that she provided the student with one-on-one instruction for math AIS and "practiced math facts" with the student (Tr. pp. 135-36). The teacher also stated that the student was occasionally "a little unfocused" during class, especially during math (Tr. p. 146). The teacher further opined that this was not atypical for third grade students and that she redirected the student when he became unfocused (Tr. pp. 146, 176). The teacher stated at the impartial hearing that the student did not require special education services because "[h]e performed like a typical third-grade student" in her classroom (Tr. p. 138).

The parents testified that, at the March 2014 CSE meeting, they discussed the student's "very difficult time" with math and that their main areas of concerns were math and writing (Tr. pp. 450, 460-61). According to the parents, the March 2014 CSE discussed the student's failing grade in math and the CSE chairperson responded that the student would continue to receive AIS devoted to math (Tr. p. 451). The parents testified that they told the March 2014 CSE that the student exhibited frustration and engaged in task avoidance with respect to writing (Tr. pp. 490-91). The parents further informed the March 2014 CSE that they could not read the student's writing (Tr. p. 461). According to the parents, the student's third grade teacher stated at the March 2014 CSE that she could not read the student's writing at times (Tr. p. 506; see Tr. pp. 177-78). The parents testified that the March 2014 CSE discussed classification generally but did not "review . . . various classifications" that may have been appropriate for the student (Tr. pp. 541-42).<sup>17</sup> The parents testified that they told the CSE chairperson that they did not agree with the CSE's determination and that, in response, the chairperson informed them that they could "file" for a Section 504 plan (Tr. p. 465).

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<sup>16</sup> While it is unclear from the hearing record whether these events occurred before or after the March 2014 CSE meeting, the occupational therapy specialist provided the teacher with strategies to help the student within the classroom, such as use of a pencil grip and "specialized" lined paper (Tr. pp. 136-37, 147; see also Tr. pp. 141-42, 197). The teacher testified that these strategies did, in fact, help the student with his penmanship (Tr. pp. 136-37).

<sup>17</sup> By contrast, the March 2014 CSE chairperson testified that the CSE considered whether the student was eligible as a student with a speech or language impairment or as a student with a learning disability (Tr. pp. 40-41). I note that a speech or language impairment is defined as "a communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a student's educational performance," (8 NYCRR 200.1[zz][11]; see also 34 CFR 300.8[c][11]) and that the February 2014 speech-language evaluation found that the student exhibited average to above average speech and language skills (see Dist. Ex. 1 at p. 28).

After considering the evaluative material and school reports discussed above and engaging in a discussion, the March 2014 CSE concluded that the student was not eligible for special education services as a student with a learning disability.<sup>18</sup> In finding that the CSE should have reached a contrary conclusion, the IHO relied exclusively on the findings contained in the March 2015 neuropsychological evaluation report (see IHO Decision at pp. 9-12). This evaluation report post-dated the March 2014 CSE meeting and, thus, could not have been considered by the March 2014 CSE (Tr. pp. 33-34; 45-53; Dist. Ex. 8). While it was within the IHO's authority to order this evaluation as part of the hearing (see 34 CFR 300.502[d]; 8 NYCRR 200.5[g][2], [j][3][viii]), it was inappropriate for the IHO to reverse the determination of the March 2014 CSE based solely on the results of an evaluation that the March 2014 CSE did not consider (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]).<sup>19</sup> The remainder of the IHO's analysis did not discuss any of the documents considered by the March 2014 CSE(see IHO Decision at pp. 9-12).

Moreover, the IHO's consideration of the March 2015 neuropsychological evaluation report was inconsistent with the parents' expressed intent to file a separate due process complaint notice regarding the April 2015 CSE's consideration of this evaluation report. During the impartial hearing, the advocate for the parents objected on multiple occasions to any discussion of the April 2015 CSE meeting, stating that it was outside the scope of the impartial hearing (Tr. pp. 616-18, 663, 668). The advocate further expressed his intention to file a separate due process complaint notice regarding the April 2015 CSE's determination (Tr. pp. 616-18, 668; see also Dist. Ex. 23 at pp. 1, 4, 8). The advocate for the parents correctly argued that it was impermissible for the IHO to expand the scope of the issues raised without the express consent of the parties and then base his determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).<sup>20</sup> For these reasons, I decline to speculate as to whether or not the March 2015

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<sup>18</sup> The hearing record does not contain a written report as required by State and federal regulations documenting whether the student had a learning disability, the basis for the CSE's determination, any relevant student behaviors, any relevant medical findings, the effects of other factors on the student's achievement, and whether the student participated in a response to intervention program (34 CFR 300.311[a]; 8 NYCRR 200.4[j][5][i]). However, given the evidence in the hearing record as well as the March 2014 prior written notice explaining the CSE's determination, the lack of this written report in evidence does not affect the above analysis of the March 2014 CSE's determination (see Dist. Ex. 8; see also Mr. N.C., 300 Fed. App'x at 14; J.D., 224 F.3d at 68-70).

<sup>19</sup> The district also correctly points out that, while DSM-V diagnoses may be useful in understanding a student's needs, they are not dispositive as to whether a student is eligible for services under the IDEA or the Education law (see W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 168, 170-75 [S.D.N.Y. 2011] [finding that, despite multiple DSM-IV diagnoses, the student was properly found ineligible for special education as a student with an emotional disturbance and that the relevant inquiry is whether student is a "child with a disability within the meaning of the IDEA"]).

<sup>20</sup> Nothing in this decision shall prevent the parents from filing a due process complaint notice concerning the April 2015 CSE meeting.

neuropsychological evaluation set forth information about the student which would warrant a finding that the student should be deemed eligible for special education.

Removing this retrospective evidence from the analysis, the hearing record supports a conclusion that the March 2014 CSE's eligibility determination was consistent with federal and State regulations pertaining to identifying students with learning disabilities, as well as with the evaluative information available to the March 2014 CSE (see 34 CFR 300.309; 8 NYCRR 200.4[j][3], [4]). Although the March 2014 CSE had before it information that the student did not demonstrate adequate achievement or meet grade-level standards in the area of math calculation (see Dist. Ex. 1 at p. 30)—one of the areas specified in the relevant regulations see 34 CFR 300.309[a][1][vii]; 8 NYCRR 200.4[j][3])—this fact alone would be insufficient to warrant a determination of eligibility for special education (see Letter to Prifitera, 48 IDELR 163 [OSEP 2007]).<sup>21</sup> As for the other considerations, the student did not participate in a response to intervention program and the hearing record does not indicate that the CSE inappropriately concluded that the student did not exhibit a pattern of strengths and weaknesses in performance, achievement, or both, relevant to the identification of a learning disability, or, that the student exhibited a severe discrepancy between achievement and intellectual ability (see 34 CFR 300.309[a][2][i], [ii]; 8 NYCRR 200.4[j][3][i][b], [4]).<sup>22</sup> Accordingly, as there is sufficient evidence supporting the March 2014 CSE's determination that the student was not eligible for special education services, the IHO's decision must be reversed.

As a final matter, even if the evidence in the hearing record supported a finding that the student should have been deemed eligible for special education, the IHO's determination that the student's needs warranted a "full time special education setting" is not supported by the law or the facts of this case (see IHO Decision at p 11). The IHO made this determination without reference to, or an analysis of, the IDEA's requirement that a student's recommended program be provided in the least restrictive environment (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; see 8 NYCRR 200.1[cc], 200.6[a][1]; see also P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Moreover, the CSE is empowered to recommend appropriate services for a student and, as such, the CSE should be the first to determine the extent to which a student can be educated with nondisabled peers in a public school setting before considering a more restrictive option, such as the special class setting endorsed by the IHO.<sup>23</sup> Accordingly, the IHO also erred in this determination.

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<sup>21</sup> The information before the CSE did not indicate that the student's difficulties with handwriting necessarily equated with a lack of achievement in the area of written expression, as they appeared, at least in part, to relate more primarily to the student's visual motor skills and hand strength (Dist. Ex. 1 at pp. 18, 22-23, 37; see 34 CFR 300.309[a][1][iii]; 8 NYCRR 200.4[j][3]; see also 8 NYCRR 200.4[j][3][ii]).

<sup>22</sup> State regulations do not identify circumstances under which a CSE must identify a student as eligible for special education services as a student with a learning disability but, rather, identify factors that "may" be considered by a CSE in reaching its determination (see 8 NYCRR 200.4[j][3], [4]).

<sup>23</sup> A "full time special education setting" (IHO Decision at p. 11) would, indeed, be more restrictive than the resource room or ICT services sought by the parents in their due process complaint notice, which services could be delivered in a general education classroom setting (see Dist. Ex. 1 at pp. 2, 4; see also 8 NYCRR 200.6[f], [g]).

## **VII. Conclusion**

The evidence in the hearing record does not support the IHO's determinations that the student was eligible for special education and that the district failed offer the student a FAPE for the 2013-14 and 2014-15 school years.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated July 6, 2015, is modified by reversing those portions which found that the student was eligible for special education and that the district denied the student a FAPE for the 2013-14 and 2014-15 school years; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 6, 2015, is modified by reversing those portions which ordered the district to convene a CSE and develop an IEP for the student.

**Dated:**            **Albany, New York**  
                         **August 21, 2015**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**