



The University of the State of New York

The State Education Department State Review Officer

No. 07-019

Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Hon. Michael A. Cardozo, attorney for respondent, Abigail Goldenberg, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which determined that respondent's decision that her daughter was not eligible for special education services during the 2006-07 school year was appropriate. The appeal must be dismissed.

At the time of the impartial hearing in November 2006, the student was 16 years old and attended the tenth grade at Fashion Industries High School (FIHS) where she studied English 3, global studies, math A, the living environment, fashion design, physical education, and math 2 (Tr. p. 51; Dist. Ex. 9). The student was described as a personable, sensitive and caring young woman (Dist. Ex. 2 at p. 7). The record further described her as a friendly, very social, compassionate, artistic and strong girl who was able to adjust to new environments quickly (Dist. Ex. 13 at p. 3). A May 17, 2006 letter from petitioner to respondent's Committee on Special Education (CSE) indicated that previous testing of the student had identified a language processing disorder and an auditory processing disorder (Parent Ex. E at p. 1). She also demonstrated weaknesses in short-term auditory memory, symbol search skills, and grapho-motor speed for symbol substitutions as well as difficulty with spelling (Dist. Ex. 5 at p. 6). Although she did not have a formal individualized education plan (IEP) in place at the time of the impartial hearing, the student had been provided with accommodations that included extra time for tests, (Tr. p. 47), an additional book to take home (Tr. p. 48), preferential seating, tutoring in school, and provision of class notes (Tr. pp. 73-74). At the time of the impartial hearing, the student was not classified as eligible for special education services and her classification is a matter of dispute.

The student attended a general education class for the first and second grades in Massachusetts (Tr. p. 28). In April 1999, during her second grade year, she underwent a

psychological evaluation per the referral of the Special Education Director of the Lee Public Schools, due to concerns about her decoding and phonics skills (Parent Ex. C at p. 5). Administration of the Wechsler Intelligence Scale for Children -- Third Edition (WISC-III) yielded a verbal IQ score of 121, a performance IQ score of 113, and a full-scale IQ score of 119 (id. at p. 6). Based on results of the WISC-III, the evaluating psychologist reported that the student's cognitive functioning was at the upper end of the high average range and that her verbal skills were within the superior range (id.). Administration of selected subtests from the Wide Range Assessment of Memory and Learning yielded standard scores (and percentile) of 105 (66) for visual short-term memory, equivalent to the upper end of the average range and 91 (27) for auditory short-term memory, equivalent to the low end of the average range (id. at p. 7). The psychologist also reported that the student made only one developmental error on the Bender Visual-Motor Gestalt Test, equivalent to the 90th percentile (id.). Administration of the Boston Naming Test yielded results in the top fifth percentile for children the student's age (id.). The psychologist reported that, overall, the student showed exceptional cognitive strength in expressive vocabulary skills and general higher order language abilities (id. at p. 8). However, he noted that she presented a number of indicators of difficulty with language processing, as well as mild attention difficulties (id.). Despite this finding, the evaluation did not reveal a diagnosis of an attention deficit hyperactivity disorder (ADHD) (id.). The psychologist determined that based on her assessment profile, the student displayed a developmental reading disability, and noted that her reading vocabulary and phonics skills were below her age and grade level, as well as below her measured intellectual ability level (id. at pp. 8-9). Recommendations included an audiological evaluation and close monitoring of her attention functioning (id. at p. 9).

The student was home schooled from third grade through the first part of the fifth grade (Tr. p. 28; Dist. Ex. 13 at p. 2). While home schooling her daughter, petitioner used the Wilson Reading Program and the student also received tutoring through a reading teacher (Dist. Ex. 13 at p. 2). In the middle of fifth grade, the student began attending the Rudolf Steiner School (RSS), an art-based private school located in Great Barrington, Massachusetts (id.). On November 22, 2002, when she was enrolled in the sixth grade at RSS, the same psychologist who had evaluated her in April 1999 conducted a psychological re-evaluation of the student (Parent Ex. C at pp. 10-15). Re-administration of the WISC-III yielded a verbal IQ score of 110, a performance IQ score of 112, and a full scale IQ score of 112 (Parent Ex. C at p. 11), indicating overall cognitive skills in the high average range (id.). The evaluation report indicated that the student demonstrated relative strengths in abstract-level reasoning, social comprehension and expressive vocabulary (id. at p. 14). Administration of selected subtests of the Woodcock Reading Mastery Tests – Revised yielded standard scores (and percentiles) of 86 (18) in word identification, 106 (65) in word attack, 103 (58) in passage comprehension and a total reading cluster standard score of 92 (30), which the evaluator concluded was indicative of the presence of a specific learning disability in reading (id.). Test results indicated that the student's written language skills were within the average to high average range and her mathematics skills were within the high average range (id.). The evaluator recommended continued tutoring in reading (Parent Ex. C at pp. 14-15).

On December 12, 2002, while the student was enrolled in RSS, a student accommodation plan was developed pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[7][1998]) (section 504) (Parent Ex. F at p. 1). The student's accommodation plan provided her with the following accommodations: extra time for reading assignments, rephrasing of directions,

a copy of the teacher's notes, extra time on tests, a limit on time needed to complete homework, more frequent parent-teacher contact and the use of computer (id.).

On February 27, 2003, an IEP team from the Lenox Public Schools (Lenox) in Massachusetts convened for an initial meeting and to develop a program for the student for the period of March 2003 through March 2004 (Parent Ex. F at pp. 2-13). The February 2003 IEP team determined that the student required instruction in a small group setting with specialized materials and recommended placement in a full inclusion program (id. at pp. 7, 13). The student was afforded the following accommodations: tests to be taken in the resource room, the option of extended time on tests and quizzes, test questions read or clarified, access to a word processor, preferential seating, spelling to be considered as separate from content on spontaneous written work, and the use of a graphic organizer (id. at p. 6). Goals and objectives were developed for reading (id. at p. 8). The IEP team also proposed five 45-minute sessions of reading/writing per week in addition to 45-minute sessions of academic reinforcement on alternate days (id. at pp. 4, 9).

The Lenox IEP team reconvened in March 2004 to develop the student's IEP for the period of March 2004 through March 2005 (id. at p. 20). The resultant IEP reflected petitioner's concerns with respect to her daughter's learning, organizational, study and writing skills as well as her central auditory processing disorder (id.). Although the resultant IEP noted that the student had difficulty with reading, it did not specify the student's classification (see id. at pp. 18-27). Goals and objectives were developed with regard to reading (id. at p. 23). Many of the student's program modifications were repeated in the March 2004 IEP and various recommendations were added (id. at p. 21).

On June 2, 2004, and October 14-15, 2004, when the student was 13 years old and attending eighth grade in the Lenox, she underwent an educational assessment as part of the reevaluation process (Parent Ex. C at p. 36). Administration of the Gray Oral Reading Tests (GORT) in spring 2004 (form A) and in fall 2004 (and form B) indicated that the student's overall reading performance was in the average range (id. at p. 38). The student's reading rate on the GORT in fall 2004 yielded a score at the second percentile, but was described as an inaccurate reflection of her actual reading ability, as it was noted that her in-class performance at the time was significantly higher than her fall 2004 test results (id.). Improvement was noted in the student's reading accuracy, based upon comparison of her spring 2004 score at the 25th percentile and her fall 2004 score at the 37th percentile (id.). The student's reading comprehension continued to be an area of strength (id.). The evaluation report also indicated that fall 2004 appeared to be a "distracting" time for the student as a great deal of her attention focused on social events, clothing and "fitting in," as well as changes in family living arrangements that may have affected her school performance (id.).

On August 4, 2004, an auditory processing evaluation of the student was conducted (Parent Ex. C at p. 21). Evaluation results suggested a borderline integrative deficit and a borderline output organization deficit (id. at p. 23). The evaluation report indicated that in the classroom, a student with integration deficit might have poor reading, spelling and writing skills (id.). In addition, the evaluation report noted that, in the classroom, a student with an output organization difficulty often demonstrates difficulty in tasks where success depends on motor/or planning skills, and may experience difficulty in following directions that are long or have several parts, starting

assignments and remembering homework, taking notes or organizing their papers and work (id. at p. 24). Memory-based skills such as word recall or sequential memory may be poor for a student with this kind of difficulty (id.). Recommended accommodations to address the student's auditory processing deficits included a well-structured learning environment, provision of specific how-to information, repeated practice and regular review of learning material, provision of ample time to process information, breaking down instructions into smaller units (id.). The evaluator further recommended that the student be challenged to increase her speed and accuracy, and that her tests, including standardized tests, be given in a quiet room (id.). Additional recommendations included use of a tape recorder and/or peer notetaker and use of books on tape, as well as specific strategies to assist the student in her organization, spelling, and memory skills (id.).

In September 2004, while she was attending eighth grade in Lenox, the IEP team conducted a reevaluation of the student (Parent Ex. F at p. 31). An IEP was developed for the period of September 10, 2004 to March 3, 2005 (id. at p. 33). The September 2004 IEP team proposed placement in a partial inclusion program (id. at p. 42). The resultant IEP recommended that the student participate in a reading/writing tutorial for one period per day in the resource room, in addition to one period per day of academic reinforcement (id. at p. 32). Goals and objectives were developed with respect to reading and organization (id. at p. 37). Despite noting that the student had difficulty with reading, the resultant IEP did not indicate the student's classification thereby rendering her eligible for special education services (see id. at pp. 31-43). Program modifications enumerated in the student's March 2004 IEP were continued and it was also recommended that she be provided with copies of class notes and a set of textbooks at home (id. at pp. 35-36).

On November 6, 2004, a private psychologist conducted an evaluation of the student per the recommendation of her parents and the Director of Special Education Services from the Lenox School District (Parent Ex. C at p. 28). The evaluation report indicated that the student demonstrated superior cognitive ability in verbal comprehension and in perceptual reasoning (id. at p. 33). Relative weaknesses were noted in the student's working memory and processing speed as well as strong visual-motor integration skills (id.). The student also demonstrated relative weakness and minimally average ability in working memory and processing speed, (id.). The psychologist also found that the student demonstrated stronger visual memory as compared to verbal memory (id.). Word retrieval ability was within normal limits (id.). The student's performance on the Wechsler Individual Achievement Test II (WIAT-II) yielded scores in the average range on most subtests, with standard (and percentile) subtest scores of 88 (21) in pseudo word decoding, and 77 (6) in written language (id. at p. 35). The student's composite scores in reading and written language were 93 (32) and 85 (16) respectively (id.). Although the student's math reasoning was described as a relative weakness (standard score 93, 32nd percentile), her math composite of 94 (32) was in the average range (id.). The evaluator reported that, despite weaknesses in language processing and output organization, the student's achievement test scores tended to fall in the average range and suggested that this was likely due to her ability to compensate for her weaknesses with her strong cognitive skills (id.). Written language difficulties were attributed to the student's spelling deficits (id.). Although attention/concentration weaknesses were noted, it was only in the home situation that these were described as "significant," and the evaluator opined that the student did not have an attention deficit hyperactivity disorder (ADHD) (id.). The evaluator reported evidence of mild anxiety and at times sad mood, frustration, and anger with academics, but noted the student's emotional distress centered primarily on learning difficulties and family stresses and conflict (id.). The student's self-esteem relative to both school

and family relationships was described as "well within normal limits," but weaker than her self-esteem relative to peer relationships, personal appearance and her artistic abilities (id.). Additionally, the psychologist noted that the student demonstrated ability for cooperative interpersonal relationships, empathy, and self-responsibility (id.). Further, the November 2004 psychological evaluation report noted that although the student had been told that she was "bright," she did not believe it (id. at p. 34). In order for the student to learn to better organize herself, the evaluator suggested that she needed to know what was expected of her; she needed to have a better understanding of her strengths and weaknesses; and while learning was difficult for the student, she needed to become accurate in her assessment of her achievements (id.).

On November 15, 2004, the Lenox IEP team reconvened to develop the student's program for the period of November 15, 2004 through November 15, 2005 (Parent Ex. F at pp. 44-57). The resultant IEP reflected petitioner's concerns that her daughter was increasingly losing confidence in her skills and abilities, despite her above average to superior functioning in several tested areas (id. at p. 46). The resultant IEP also indicated that the student had difficulty with reading and writing, but did not specify a special education classification (see id. at pp. 46-57). The November 2004 IEP team recommended that the student receive five 45-minute sessions of academic reinforcement per week in addition to five 45-minute sessions of remedial reading and writing per week (id. at p. 53). Goals and objectives were developed with respect to the following program areas: reading, written language/spelling, organization and math reasoning (id. at pp. 51-52). The November 2004 IEP continued the program modifications listed in the September 2004 IEP, and added various other accommodations to the student's program (id. p. 48). On December 23, 2004, per a telephone conversation with petitioner, the Lenox IEP team updated the student's IEP to indicate that she was expected to seek extra help after school in math, science and social studies (id. at p. 71).

After completing the eighth grade, the student relocated with her father and sister to Brooklyn, New York (Dist. Ex. 13 at p. 2). In September 2005, she entered the ninth grade at FIHS for the 2005-06 school year (id.). Some time after the student began attending FIHS, petitioner requested an initial evaluation of her daughter, and in November 2005, respondent's social worker conducted a social history (Dist. Ex. 13). The social worker noted that the student had been doing very well, and that she had been invited to join an honors math class (id. at p. 2). The social worker reported that the student was well liked and that she had made several friends (id. at pp. 2-3). The social worker also stated the student's teachers described her as bright and cooperative and usually prepared for class (id.). According to the social worker, the student achieved a 90 average; however, petitioner reported to the social worker that the student still needed help with reading and copying material from the blackboard, in addition to help with listening and writing at the same time (id. at p. 3).

On December 12, 2005, as part of the evaluation process, respondent's school psychologist conducted a classroom observation of the student in her math class (Dist. Ex. 12). The psychologist observed that although the student was quiet during class, she appeared to be listening (id. at p. 2). The student's math teacher reported to the psychologist that the student frequently volunteered in class, that she was achieving 90's and above on her tests and quizzes, and that she received a 91 on her report card for the second marking period (id.). Her math teacher also told the psychologist that the student would be enrolled in an honors math class next semester (id.).

On December 13, 2005 and January 23, 2006, respondent's school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 11). The psychologist observed that the student answered questions in a straightforward and mature manner (*id.* at p. 5). The psychoeducational evaluation report indicated that respondent's school psychologist concluded that results of the WISC-III in 1999 and 2002 and the WISC-IV in 2004 were consistently stable over time and valid (*id.* at p. 7). Administration of selected subtests of the Kaufman Test of Educational Achievement, Second Edition (K-TEA-II) yielded standard scores of 94 for letter-word recognition and 107 for reading comprehension for a reading composite standard score of 100 and a standard score of 107 for math computation (*id.*). The evaluation report noted that at the time of the evaluation, when the student was in ninth grade at FIHS, she told the examiner that she felt she was adjusting well to high school (*id.* at p. 5). The student also commented that she had recently started to read for pleasure, something that she had not done before, and that she was "hooked" (*id.* at p. 7). The school psychologist indicated that although the student's reading encoding and decoding of new and unfamiliar words could be slow, the student applied the appropriate word analysis principles, sounded out words appropriately, and could self-correct (*id.*). The evaluation report also noted that the student was doing well in her classes (*id.*). Socially and emotionally, the student was described as a personable and sensitive young woman who was straightforward and forthright in answering questions (*id.* at p. 8). The report further described the student as empathetic towards others she encountered; she enjoyed meeting and talking with new people and she participated in class (*id.*). Respondent's school psychologist further reported that the student told her that she found the freshmen study skills seminar that she was taking at FIHS was "beyond belief so helpful" (Tr. p. 63; Dist. Ex. 11 at p. 5), and that pursuant to her parents' request, her teachers provided her with class notes, which she also found helpful (Dist. Ex. 11 at p. 5). The student reported to the psychologist that although she was not a fast reader, she enjoyed reading, as well as writing (*id.* at pp. 5-6). The student also indicated to the school psychologist that sometimes she felt she was being "babied" too much, and that she was looking for more independence in her learning for success in high school (Tr. p. 63; Dist. Ex. 11 at p. 6).

A February 14, 2006 report card indicated that the student earned the following grades during the third marking period of the first term for her ninth grade year: 90, VSCM/INFTC; 85, English 1; 85, Spanish 1; 92, global 1; 75, physical education; 90, science (Dist. Ex. 9).¹ Her overall average was 89.67 percent (*id.*). Her English teacher described the student's class participation as good (*id.*). The student's Spanish teacher indicated that the student needed to work harder, that her work was inconsistent, but that she was developing good skills (*id.*). Her global I teacher described her as inattentive, whereas her math teacher noted that she made excellent progress (*id.*). The student's science teacher characterized her class participation as "good," and further commented that she was highly motivated and cooperative (*id.*).

On February 15, 2006, respondent's Committee on Special Education (CSE) convened to conduct an Educational Planning Conference (EPC) (Dist. Ex. 8). Petitioner and the student's aunt participated in the meeting (*id.* at p. 2). Petitioner requested that the student receive an IEP, and that her daughter be deemed eligible for special education services as a student with a learning disability (Tr. p. 53). During the February 2006 meeting, petitioner advised the CSE that she believed her daughter was disabled and had a language processing disorder (Tr. p. 68). She further

¹ The record does not describe for what the abbreviation VSCM/INFTC stands.

explained that her daughter had difficulty with spelling (Tr. p. 53). After reviewing the student's evaluations, respondent's CSE determined that the student was "non handicapped," and therefore, ineligible for special education services (id. at p. 1).

In May 2006, by due process complaint notice, petitioner commenced an impartial hearing challenging respondent's CSE's determination that the student was not eligible for special education services (Tr. p. 54; Parent Ex. E at pp. 1-2). Petitioner contended that despite her daughter's "well-documented learning disability," she was denied an IEP (Parent Ex. E at p. 1). She further maintained that the evaluation conducted by respondent's school psychologist was inaccurate and incomplete (id.). Eventually, petitioner withdrew her impartial hearing request, because respondent agreed to further evaluate the student and conduct another CSE meeting (Tr. p. 54).

The student's May 16, 2006 report card revealed that she earned the following grades for the second marking period of the second term: 90, fashion art; 85, English 2; 85, Spanish 2; 93, global 2; 90, honors math; 80, physical education; science, 94 (Dist. Ex. 7). She achieved an overall average of 89.50 percent (id.). The student's fashion art instructor noted improvement and her English and math teachers both commented that she was developing good skills (id.). Her Spanish teacher stated that, while the student showed improvement, she was missing homework (id.). Lastly, the student's science teacher observed that she had made "excellent progress" (id.).

On August 22, 2006, a speech-language pathologist conducted an evaluation of the student per petitioner's referral (Dist. Ex. 6). The speech-language evaluation report indicated that the student did not require speech-language services at that time (id. at p. 4) because of her above average performance receptively and expressively on the Clinical Evaluation of Language Fundamentals - Fourth Edition (CELF-4) and on the Oral and Written Language Scales (OWLS) (id.). The report noted that the student experienced some difficulty with decoding and spelling skills and suggested that she might benefit from services from a reading specialist to foster improvement in these areas (id.).

On August 22-23, 2006, a different school psychologist from respondent's staff conducted a psychoeducational evaluation of the student (Dist. Ex. 5). Administration of the WISC-IV yielded a full scale IQ score of 110 (75th percentile, high average range) (id. at p. 3). Relative weaknesses were noted in her short-term auditory memory, symbol search skills and grapho-motor speed for symbol substitutions (id.). Abstract reasoning abilities, social comprehension, and picture concepts skills scores were at the superior level (id.). Administration of the K-TEA II yielded standard (and percentile scores) of 99 (47) for letter and word recognition, 123 (94) for reading comprehension, and 112 (79) for a composite score for reading (id.). Her standard scores of 115 (84) for math concepts and 111 (77) for math computation resulted in a math composite score of 113 (81) (id.). Her subtest score of 87 for spelling was at the 19th percentile (id.). The school psychologist observed that the student required a great deal of time to respond to the questions and tasks presented, and opined that without the additional time or with time constraints imposed, she could not produce results at her potential (id.).

Student progress reports dated September 22, 2006 indicated that the student interacted appropriately with adults and peers; she showed no difficulty adjusting and adapting to her new environment; and that she did well in class (Dist. Ex. 4 at pp. 1-5).

On September 26, 2006, respondent's social worker prepared an addendum (Dist. Ex. 3) to the student's November 2005 social history (Dist. Ex. 13). The social worker commented that the student was enrolled in a math honors class and that she continued to do well (id. at p. 2). Based on her last three report cards, the social worker found that the student had steadily improved in all areas and that she continued to do so (id.). The student reported to the evaluator that with the exception of her fashion class, which she felt was "too easy," she was quite happy with her classes (id. at p. 3). The student also advised the social worker that she no longer received any academic help at home, except for some help with tests (id.). Although worried about her upcoming English Regents examination, the student reported to the social worker that she was pleased that she could complete almost all of her homework by herself (id.).

On October 5, 2006, respondent's CSE convened for a review of the student's program (Dist. Ex. 2). The October 2006 CSE determined that, despite her weakness in spelling, and in light of positive teacher reports and her grades, the student was benefiting from instruction (Tr. p. 120). The CSE concluded that the student was not eligible for special education services (Tr. pp. 119, 143; Dist. Ex 2 at p. 1). Petitioner requested a specific reading program for the student; however, she did not want the support of a special education itinerant teacher (SEIT) (Tr. p. 121). The October 2006 CSE offered petitioner preferential seating, extended time on tests, and that the student's assignments would be e-mailed home (id.). Although petitioner found these accommodations appealing, she did not want the aforementioned accommodations without a formal learning disability classification (id.).

By due process complaint notice dated October 6, 2006, petitioner requested an impartial hearing (Parent Ex. A). Petitioner disagreed with respondent's determination that her daughter did not have a learning disability, and therefore was ineligible for special education services (id.).

The student's tenth grade report card for marking period one during term one of the 2006-07 school year reflected the following grades: 90, English 3; 95, global 3; 85, math A; 95, living environment; 95, fashion design I; 85, physical education; and 85, math 2 resulting in a weighted average of 91.92 percent (Dist. Ex. 1). Except for "lack of class participation" in global 3, and "poor/missing homework" in math 2, teacher comments on the report card were positive and indicated that the student "show[ed] improvement" in English 3 and "a great deal of effort" in global 3 (id.). Her math A teacher described her as "highly motivated and cooperative" (id.). The student's living environment instructor noted that she had made "excellent progress" and achieved the honor roll in that subject (id.). Lastly, her fashion design teacher also stated that she had made "excellent progress" (id.).

An impartial hearing convened on November 30, 2006, after one day of testimony. By decision dated January 9, 2007, the impartial hearing officer concluded that, although the evidence showed that the student had difficulty with reading, she was passing all of her classes and was succeeding in school (IHO Decision at p. 4). She further concluded that respondent correctly determined that the student's learning difficulties did not adversely impact her educational performance to the extent that special education supports and services were required (id. at pp. 4-5).

This appeal ensued. On appeal, petitioner asserts that the original testing completed by respondent's school psychologist was incomplete. Petitioner also argues that the impartial hearing

officer erred in finding that the student's learning difficulties did not adversely impact her education, thereby warranting eligibility for special education services as a student with a learning disability. Respondent submitted an answer and requested that the impartial hearing officer's decision be affirmed in its entirety. As detailed herein, I find that the February 2006 CSE conducted thorough and sufficient evaluations of the student. Moreover, I concur with the impartial hearing officer's determination that the CSEs that convened in February 2006 and October 2006 appropriately determined that the student was ineligible for special education programs and services, based on the information before them, which did not establish that her educational performance was adversely affected by a disability such that she required special education services under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482).²

The central purpose of the IDEA is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (Frank G. v. Bd. of Educ., 459 F.3d 356, 363 [2d Cir. 2006]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; 20 U.S.C. § 1400[d][1][A]).³ A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; see 20 U.S.C. § 1414). 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, 207). "The IEP is the central mechanism by which public schools ensure that their disabled students receive a free appropriate public education" (Polera v. Bd. of Educ., 288 F.3d 478, 482 [2d Cir. 2002]). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114, 300.116[a]⁴; 8 NYCRR 200.6[a][1]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (Schaffer, 126 S. Ct. at 537).

² On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

³ The term "free appropriate public education" means special education and related services that -

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401[8]; see also 34 C.F.R. §300.17; 20 U.S.C. §1414[d].

⁴ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

In order to be classified as a child with a disability under federal or state law, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (20 U.S.C. § 1401[3] [defining a child with a disability as one who, by reason of their disability, "needs special education and related services"]; 34 C.F.R. § 300.8[a][1] [same]; 8 NYCRR 200.1[zz] [defining a student with a disability as one who "requires special services and programs"]; J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 65-66 [2d Cir. 2000] [noting that neither IDEA nor federal regulations define "need special education" or "adverse effect on educational performance"]; Muller v. Committee on Special Education of East Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; Application of a Child Suspected of Having a Disability, Appeal No. 05-047).

Specifically, a learning disability is defined as 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. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage (8 NYCRR 200.1[zz][6]; 34 C.F.R. §§ 300.7[c][10], 300.307, 300.309).

Petitioner contends that respondent's original testing was incomplete and as a result, the February 2006 CSE incorrectly determined that her daughter was not eligible for special education supports and services. I disagree. The record does not establish that respondent did not adequately evaluate the student nor does it show that the student was eligible for special education supports and services as a student with a learning disability. First, I note that despite offering a diagnosis of a language-based learning disability, petitioner's expert witness had never met or personally evaluated the student, or observed her in school (Tr. p. 13). Furthermore, in a May 17, 2006 letter to respondent's CSE, petitioner indicated that when the student entered FIHS, she submitted all of her daughter's prior testing results and her IEP from Massachusetts to the CSE (Parent Ex. E at p. 1).⁵ Petitioner testified that at the time of the impartial hearing, the student's cognitive abilities were consistent with previous assessments (Tr. p. 155). Petitioner also commented that her daughter had "generally high average to superior" cognitive skills, but "rather weak working memory and processing speed" (id.). She attributed the student's writing difficulties to spelling deficits (id.), which she opined put her at risk of avoiding writing assignments (Tr. p. 156). In

⁵ The record does not indicate which of the IEPs from Massachusetts was provided by petitioner to respondent's CSE.

addition, petitioner noted her concern about her daughter's weakness in attention and concentration, but indicated that all of her concerns were significant "only in the home situation" (*id.*). According to petitioner, if the student were in "a more challenging environment," she would not do as well as she was doing at FIHS (*id.*). Petitioner stated that she wanted the student to have a classification of learning disabled "not just for now but [for] the accommodations that would incur for SAT's but also for her applying to college" (Tr. pp. 156-57). She opined that if the student had "a learning disability diagnosis" she would be "considered in a different way" by colleges, and she would have access to financial support that she might not have otherwise (Tr. p. 157).

Although the student demonstrated difficulties learning, the record indicates that her "measured cognitive intellectual ability [was] solidly in the average range," and she demonstrated the ability to compensate for her difficulties in spelling, language processing and memory when she was in eighth grade in Massachusetts, prior to her arrival at FIHS (Parent Ex. C at pp. 28, 30, 33). Once in respondent's educational jurisdiction, as set forth in greater detail below, an independent review of the record reveals that respondent provided the student with thorough evaluations, and identified her strengths and needs.

The record shows that per petitioner's request, respondent's school psychologist initially evaluated the student on December 13, 2005 and January 23, 2006 (Tr. p. 59; Dist. Ex. 11 at p. 1). Part of the psychoeducational evaluation consisted of a review of records from prior evaluations that petitioner submitted to respondent (Tr. p. 59). Evaluation reports reviewed by respondent's school psychologist included psychological evaluation reports dated April 1999 (Dist. Ex. 11 at pp. 1-3; Parent Ex. C at pp. 5-9), November 2002 (Dist. Ex. 11 at pp. 3-4; Parent Ex. C at pp. 10-15), and November 2004 (Dist. Ex. 11 at pp. 4-5; Parent Ex. C at pp. 28-35) all completed when the student lived in Massachusetts.

The February 2006 IEP (Dist. Ex. 8) reported present levels of performance consistent with the December 2005 - January 2006 psychoeducational evaluation conducted by respondent's school psychologist (Dist. Ex. 11), and generally reflected results from previous evaluations conducted in Massachusetts, as well as current educational evaluation results that indicated that the student was performing at grade level or above academically (Dist. Exs. 8 at p. 3; 11 at pp. 1-5). The February 2006 IEP's descriptions of the student's present performance levels in the social-emotional domain were consistent with the November 9, 2005 social history (Dist. Ex. 13 at pp. 1, 3) and the December 2005 - January 2006 psychoeducational report (Dist. Ex. 11 at pp. 5-6). The February 2006 IEP also indicated that the student was personable, sensitive, and caring, and that she had made a very good adjustment to FIHS as an incoming freshman (Dist. Ex. 8 at p. 4). Moreover, the February 2006 IEP noted that the student applied herself to her classes and that she enjoyed the learning process both academically and interpersonally (*id.*). In addition, the February 2006 IEP indicated that the student's self-confidence increased; she became more outgoing, and she shared her ideas in her classes (*id.*). Finally, the February 2006 IEP stated that the student had a positive attitude toward school, and was cooperative and respectful of teachers and peers (*id.*).

Under the circumstances presented herein, I find that respondent's February 2006 CSE conducted thorough and sufficient evaluations of the student and that the reports from these evaluations reflected the student's present performance levels as well as her strengths and needs as identified in earlier evaluations. In consideration of the student's stable evaluation results over time (Dist. Ex. 11 at p. 7), her good performance in all of her courses at FIHS for the 2005-06

school year (Dist. Exs. 7; 9) and the absence of documentation indicating that any of the student's weaknesses resulted in "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," that adversely impacted her educational performance, the record demonstrates that respondent's February 2006 CSE correctly found that the student was not eligible to receive special education services as a student with a disability (Dist. Ex. 8 at p. 1) (see 8 NYCRR 200.1[zz][6]).

I now turn to petitioner's contention that the October 2006 CSE incorrectly concluded that her daughter was ineligible for special education services. As detailed herein, I disagree. The record indicates that the October 2006 IEP, which was developed when the student was in tenth grade, was identical to the February 2006 IEP, with the exception of the addition of the August 2006 speech-language evaluation results reflecting the student's above average receptive and expressive language performance on the CELF-4 and her above average performance on the OWLS (Dist. Exs. 2 at p. 3; 6 at pp. 1-4). A review of the October 2006 IEP reveals that it contained the August 2006 psychoeducational re-evaluation (Dist. Ex. 5) as it included the most current WISC-IV results that yielded a full-scale IQ score in the high-average range (Dist. Ex. 2 at p. 4). The October 2006 IEP consistently reflected information from the August 2006 psychoeducational evaluation report that noted that the clinical data and interview with the student did not suggest any pathology pertaining to her social/emotional development; that she related appropriately, was cooperative, compliant and tried very hard to do well, and that no abnormal behaviors were observed (Dist. Exs. 2 at p. 6; 5 at p. 6). As reported by respondent's school psychologist, who was assigned to the student's case in September 2006 (Tr. p. 108) and attended the October 2006 CSE meeting (Tr. p. 118), all teacher reports and grades indicated that the student was benefiting from instruction in general education (Tr. p. 120). The student's relative weakness in spelling (see Tr. p. 114) did not affect her academic performance in any subject (Tr. pp. 53, 119-20), and did not require a classification of learning disabled by respondent's CSE (Tr. p. 119). Based on the foregoing, and for the same reasons explained regarding the February 2006 IEP, respondent's October 2006 CSE correctly determined that the student was not eligible to receive special education services (Dist. Ex. 2 at p. 1).

On the whole, I also find that the record reveals that respondent considered petitioner's concerns and addressed them. Specifically, the record contains letters from petitioner to respondent's CSE that expressed her desire for the student to be determined eligible for special education supports as a learning disabled student (Parent Ex. E at pp. 2, 4). The requested supports included the accommodations of extended time for tests, an independent note-taking system, preferential seating, e-mailing of assignments, educating her instructors regarding her disability, books on tape, a remedial reading program, and a laptop computer (id.). Respondent's school psychologist reported that several different accommodations were offered to petitioner, including extended time on exams, preferential seating, and assignments e-mailed, but she reportedly did not want those accommodations without a classification (Tr. p. 121). Consistent with her letters to respondent's CSE requesting that the student's learning disability be recorded into her permanent

transcripts as it would "have significance for the rest of her high school career, as well as any higher education she might pursue," (Parent Ex. E at pp. 2, 4).⁶

Respondent's school psychologist who evaluated the student in December 2005 and January 2006 testified that petitioner had requested an IEP with "504" written on it (Tr. p. 76). The school psychologist indicated that she had explained to petitioner that in order to obtain accommodations pursuant to section 504, she must pursue a separate form of redress (id.). Petitioner reportedly did not want to pursue accommodations pursuant to section 504 for the student unless those accommodations were incorporated into an IEP (id.). According to respondent's school psychologist, petitioner did not request any special education services, such as a special education teacher or special education supports (id.). She also did not want resource room services for her daughter (Tr. p. 98). Respondent informally provided the student with accommodations of preferential seating, extended time, tutoring in school, and provision of class notes in all of her classes, consistent with the recommended accommodations noted in the auditory processing evaluation report (Tr. pp. 73-74; Parent Ex. C at pp. 24-25). In addition, the student also reported that the Freshmen Study Skills Seminar that she attended in ninth grade at FIHS was "beyond belief so helpful" (Tr. p. 63; Dist. Ex. 11 at p. 5). In light of the foregoing, the record demonstrates that respondent acted in good faith and in doing so took into consideration parental concerns by offering petitioner access to the 504 process in an effort to formalize accommodations the student received informally (Tr. pp. 73, 76).

Based on the foregoing, petitioner did not sustain her burden of persuasion that her daughter had a disability that adversely impacted her educational performance thereby requiring special education services. On the contrary, although the student received informal accommodations, the record establishes that the student is succeeding in school (Dist. Exs. 1; 4; 9). What the record does not indicate is that any learning difficulties have impeded the student's educational performance to the extent she required special education. Accordingly, the record demonstrates that the student benefited from her education at FIHS in all subject areas for the 2005-06 school year as well as the 2006-07 school year, and that respondent's CSEs correctly found that the student did not qualify for special education services as a student with a disability.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 1, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁶ In her closing statement, petitioner stated, "[t]he reason why I want her to have a learning disability classification is not just for now but the accommodations that would incur for SAT's but also for her applying to college. If she has a learning disability diagnosis she will be considered in a different way. She'll have access to financial support that she might not have otherwise." (Tr. pp. 156-57).