The University of the State of New York

The State Education Department
State Review Officer
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No. 09-037

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Mahopac Central School District

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioners, Andrew K. Cuddy, Esq., and Jason H. Sterne, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Ralph C. DeMarco, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational programs and services respondent's (the district's) Committee on Special Education (CSE) recommended for their daughter for the 2007-08 school year were appropriate. The appeal must be dismissed.

At the time of the impartial hearing, the student received homebound instruction through an agency retained by the district (Dist. Exs. 13-14; see Dist. Ex. 17). As measured by standardized testing, the student's general cognitive ability falls within the low range of intellectual functioning, and she exhibits deficits in processing and memory (Dist. Exs. 3B at pp. 1-2; 3D). In addition, the student has a history of vision problems and demonstrates difficulty with organization and attending; her ability to attend and focus may be affected by emotional concerns (Dist. Exs. 3A at p. 2; 3B at p. 2; see Dist. Ex. 7 at pp. 1-3). Academically, the student demonstrates delays in mathematics and written expression, as well as weaknesses in reading comprehension (Dist. Exs. 4; 7 at p. 3). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

During the 2006-07 school year for ninth grade, the student attended a general education program ("program 1") located within the district's high school (Dist. Exs. 2 at p. 1; 3A at p. 1; 4; see Tr. pp. 23-24, 33; Dist. Ex. 4). The CSE chairperson who testified at the impartial hearing described program 1 as a general education setting that included a special education teacher and

special education students (Tr. pp. 14, 21, 23-25, 34; see Dist. Ex. 1 at p. 5). A regular education teacher "with a specialty in the content area"—such as mathematics, science, social studies, and English—co-taught the class with a special education teacher (Tr. pp. 24-25). Program 1 included a support period where the special education students worked on individualized education program (IEP) annual goals with a special education teacher (Tr. p. 24). Classes in program 1 ranged in size from 22 to 28 students, and when the student attended program 1 in ninth grade, classes contained up to a maximum of 15 special education students (Tr. pp. 24-25, 861-62). In late 2006, the parents expressed concern that the student continued to struggle academically, and they requested a change of program to better meet the student's needs (Dist. Ex. 2; see Tr. pp. 38-42).

To address the parents' concerns, the district convened an Instructional Support Team (IST) meeting on December 7, 2006 to discuss the student's difficulties and her program (Dist. Ex. 2 at pp. 1-2; see Tr. pp. 38-42). As a result, the team decided—with the parents' agreement—to move the student into a smaller, slower-paced mathematics class and a non-laboratory science class (Dist. Ex. 2 at p. 1; see Tr. pp. 21, 39-41; Dist. Ex. 4). The team explained to the parents that although the new mathematics and sciences classes did not have a special education teacher in the classroom, the student could receive needed assistance from the special education teacher assigned to her support period (Dist. Ex. 2 at p. 1; see Tr. pp. 40-41; Dist. Ex. 4). The IST also recommended conducting an updated psychoeducational evaluation of the student, including an evaluation for attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 2 at p. 2).

In multiple sessions between December 2006 and March 2007, the district assessed the student's cognitive functioning and academic achievement (Dist. Exs. 3A-3E). An administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 80, which the evaluating psychologist reported as in the "[l]ow [a]verage range" of intellectual functioning (Dist. Ex. 3B at p. 1). According to the evaluator, both the student's verbal and non-verbal reasoning abilities fell within the "[a]verage range" (id.). However, the student performed in the "[e]xtremely [l]ow range" on tasks measuring her ability to "sustain attention, concentrate and exert mental control," which the evaluator described as a "weakness" when compared to her verbal and non-verbal reasoning abilities (id. at p. 2). The evaluator noted that compared to her peers, the student's ability to process "simple or routine visual material without making errors" fell within the "[b]orderline range" (id.). With respect to academic achievement, the district administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II), which yielded subtest scores that fell within the "[h]igh [a]verage range" for pseudoword decoding and within the "[a]verage range" for reading comprehension and word reading (id. at p. 3). On measures of overall written language skills, the student's scores fell within the "[a]verage range;" on measures of overall mathematics skills, the student's scores fell within the "[l]ow [a]verage range" (id.). Using an ability-achievement discrepancy analysis, the evaluator reported that the student achieved "better than anticipated in reading" and in spelling (id. at pp. 3-4).

In addition to assessing the student's cognitive functioning and academic achievement, the student's special education teacher completed the Conners' Teacher Rating Scales-Revised: Long Version (CTRS-R:L) to provide information about the student's behaviors in the classroom (Dist. Ex. 3E; see Tr. pp. 253-58). According to the CTRS-R:L, the student exhibited "markedly atypical" behavior in the areas of "cognitive problems/inattention," the "Conners' ADHD index," the "DSM-IV: Inattentive," and the "DSM-IV: Total" (id.). On the Children's Memory Scale used

to further assess the student's memory issues, the student's scores all fell "significantly below age and grade level expectations" (Dist. Exs. 3A at p. 2; 3D; see Tr. pp. 59-60).

In preparation for the student's annual review for the 2007-08 school year, the student's special education teacher prepared a progress report based upon the 2006-07 school year (Dist. Ex. 4; see Tr. pp. 60-63; Dist. Ex. 1 at p. 5). According to the progress report, the student improved academically, "especially in English and her new [s]cience class" (Dist. Ex. 4). However, the student continued to "struggle with her study skills, math and reading comprehension" (id.). The teacher noted that the student exhibited difficulty "grasping [mathematics] concepts" due to a "deficit in the necessary basic math skills," and further, that although the student "made some progress" in global studies, she was "in danger of failing the class" (id.). In the progress report, the teacher opined that moving the student into the "modified" program 1 for tenth grade might be "beneficial" to her and that she needed to "improve her math skills, reading comprehension and writing," as well as her "study skills" (id.). The teacher also noted that the student required a "multi-sensory approach" to instruction (id.).

On March 2, 2007 a subcommittee of the CSE convened to conduct the student's annual review for the 2007-08 school year (Dist. Ex. 1 at p. 5; see Tr. p. 43). According to meeting minutes, the student continued to struggle academically in program 1 despite moving into the slower-paced mathematics class and non-laboratory science class (Dist. Ex. 1 at p. 5; see Tr. pp. 43-44). Consistent with the recommendation in the special education teacher's progress report, the CSE subcommittee suggested—with the parents' agreement—that the student would be more successful in the "modified" program 1 for next year and thus, the CSE subcommittee decided to table the meeting in order to reschedule the annual review as a "district-level meeting" (Dist. Ex. 1 at p. 5; see Tr. p. 44).

On June 7, 2007, the CSE convened to continue the student's annual review for the 2007-08 school year (Dist. Ex. 1 at pp. 1, 5; see Tr. p. 44). Attendees included the following: the CSE chairperson, a guidance counselor, the student's 2006-07 special education teacher, a school psychologist, a regular education teacher, the student, and the parents (Dist. Ex. 1 at p. 5; see Tr. pp. 45-46).[1] According to the CSE chairperson's testimony at the impartial hearing, the student's special education teacher summarized the events of the March 2007 CSE subcommittee meeting and then the CSE discussed both the district's "modified" program 1 and another program ("program 2") available at the district (Tr. pp. 34-36, 44-45, 65-68). The CSE chairperson also testified that the CSE relied upon the student's recently performed psychoeducational evaluations, as well as the progress report written by the student's special education teacher, to prepare the student's 2007-08 IEP, and in her testimony, she identified and explained the information gathered from those documents (Tr. pp. 49-75; see Dist. Exs. 1 at p. 5; 2; 3A-3E; see also Dist. Exs. 4-6). After a discussion of both programs, the CSE chairperson testified that the CSE requested that the parents attend "an intake with [program 2] and get more information so that . . . they would feel comfortable" making a decision about the program (Tr. p. 67; see Dist. Ex. 1 at p. 5). At that time, the CSE did not make a final determination to recommend placement in program 2 because the

[1] The parents waived the participation of an additional parent member for the June 7, 2007 CSE meeting (Dist. Ex. 19; see Tr. pp. 149-52, 294-96). The school psychologist in attendance at the CSE meeting performed the student's updated psychoeducational evaluations and had also attended the December 2006 IST meeting (compare Dist. Ex. 1 at p. 5, with Dist. Exs. 2 at p. 1; 3A at p. 2; 3B at p. 1; 3C at p. 1; see Tr. p. 51).

student needed to attend an intake meeting prior to the CSE making a recommendation to place the student in that program (Tr. pp. 44-45). The CSE chairperson further indicated that after visiting program 2, the CSE could reconvene to make a final decision regarding the student's placement for the 2007-08 school year (Tr. pp. 44-45, 67; see Dist. Ex. 1 at p. 5).

After the June 2007 CSE meeting, the CSE chairperson forwarded the student's information to the school psychologist who worked exclusively in program 2; the parents attended an intake meeting with the student at program 2 on June 21, 2007, which was also attended by the program 2 psychologist and some of the program's teachers (Tr. pp. 75-76, 350, 363-66, 696-97, 870). According to the program 2 psychologist who testified at the impartial hearing, the student detailed "her difficulties with concentration and memory and retaining information," that she struggled with taking tests, and that she "wasn't doing very well in her classes" (Tr. p. 366; see Tr. pp. 369-70). The parents expressed concerns about the population of students in program 2, which the psychologist described to her "in detail" (Tr. pp. 365-70, 371). Specifically, the parents questioned whether the students in program 2 had "outbursts and emotional and behavioral concerns," as well as issues with drugs or alcohol (Tr. p. 367). The psychologist explained to the parents that during her three years with the program, she had "never had any issues with students with those concerns," and that the program had "never had a fight" (Tr. pp. 367-68). She also indicted in her testimony that she tried "not to paint a rosy picture of the program" and that she explained that there were more male students than female students in the program (Tr. p. 368). The program 2 psychologist testified that she explained the "rules of the program and the expectations," and further notified the parents about a parent orientation session that would be held before the start of the school year (Tr. pp. 366-67). As reported by the psychologist, the program 2 staff concluded that the student was appropriate for the program and the parents indicated "that they were going to give it a try" (Tr. pp. 370-71). Subsequent to the intake meeting, the parents contacted the program 2 psychologist via telephone with additional questions about the student population (Tr. p. 371). The student attended the orientation session at program 2, but the parents did not (Tr. pp. 371-72).

At the impartial hearing, the program 2 psychologist described the program as a self-contained, alternative instructional support program, which was separately housed in the district's high school and could be accessed through its own separate entrance (Tr. pp. 353, 378, 488; see Tr. pp. 33, 261-63). She testified that the program was "designed specifically for credit-deficient students" who were not totally successful in the mainstream population (id.). Program 2 provided "individualize[d] classes for students to optimize the amount of credits they can earn in one year" (Tr. pp. 353-54). In the program, the students received a "tremendous amount of small classroom instruction, individualized attention, and any kind of counseling support" the students may need throughout their academic day (Tr. p. 354). She further explained that program 2 was a "mainstream regular education program" with a "very strong special education support component" (id.).

At the beginning of the 2007-08 school year in September, program 2 contained 38 students, 21 of whom were special education students (Tr. p. 354). The program 2 psychologist described the "typical" special education student as "learning disabled" and who had not been "successful" in the larger, program 1 setting due to issues with anxiety, behavioral or impulsivity needs that could be better managed in a smaller classroom, or just because the students needed a smaller classroom setting (Tr. pp. 354-56; see Tr. p. 32). In her testimony, she indicated that the smaller classroom sizes in program 2 allowed these special education students to receive a more

individualized program with the additional assistance of consultant teacher services (Tr. p. 355; see Tr. pp. 28-29). With respect to the regular education students at program 2, she testified that typically they were an "average to above-average student who either had some family issues or some personal issues that distracted them from functioning in the mainstream high school" and who had "attendance issues" (Tr. p. 356; see Tr. p. 32).

The staff at program 2 during the 2007-08 school year included five regular education teachers, two special education teachers, a school psychologist, and a teaching assistant (Tr. pp. 27, 357). According to the hearing record, the special education teachers pushed into content area classes and in addition, worked individually with students to meet their needs (Tr. pp. 27-30, 355, 361-62). Classes ranged in size from between 4 to 12 students (Tr. p. 360). On a typical day, the students attended academic classes from the fourth through seventh periods of the school day; during eighth period, students attended electives, such as gym or career development, and during ninth period, students attended an advisory period (Tr. pp. 358-60, 506-07).

After the intake meeting, the program 2 psychologist contacted the CSE chairperson and reported that the student "would be a good match in the program" (Tr. pp. 75-76). The CSE chairperson then contacted the parents via telephone, who indicated that they "did want to give the program a shot in September," and she scheduled a CSE subcommittee meeting for August 15, 2007, to finalize the student's IEP and to recommend a placement on the IEP (Tr. pp. 76-79, 698-99; see Dist. Ex. 7 at pp. 1, 5).

As noted above, the CSE subcommittee reconvened on August 15, 2007 (Dist. Ex. 7 at p. 1; see Tr. pp. 77-78). Attendees included the following: a CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, a school counselor, and a special education administrator (Dist. Ex. 7 at p. 5).[2] The CSE subcommittee discussed and recommended that the student be placed in the program 2 for tenth grade during the 2007-08 school year, where she would receive two hours per week of consultant teacher services in an integrated group setting (id. at p. 1; see Tr. pp. 77-79). The IEP also included program modifications of refocusing and redirection, reteaching of materials, preferential seating, the provision of a copy of class notes, and use of a calculator (Dist. Ex. 7 at p. 2). In addition, the IEP provided the following testing accommodations: extended time, special location, directions and questions read and explained, and the use of a calculator (id.). The IEP included annual goals related to study skills, reading, writing, and mathematics, as well as a transition plan and related transition activities (id. at pp. 4-7). At the impartial hearing, the CSE chairperson testified that the only difference between the June 2007 IEP and the August 2007 IEP was the addition of the consultant teacher services in connection with the student's recommended placement in program 2 and that the attendees at the two meetings differed (Tr. pp. 80-84; compare Dist. Ex. 1, with Dist. Ex. 7). She also testified that although short-term objectives used to be required in IEPs for "all special education students," the student

[2] The hearing record indicates that the parents consented to allow the CSE subcommittee meeting to go forward on August 15, 2007, in their absence because they were away on vacation (Tr. pp. 76, 698-99; see Dist. Ex. 7 at p. 5). For purposes of clarity, the special education administrator in attendance at the August meeting was the same individual identified as the CSE chairperson who attended the student's June 2007 CSE meeting and who is otherwise referred to in this decision as the CSE chairperson who testified at the impartial hearing (compare Dist. Ex. 7 at p. 5, with Tr. pp. 14, 21-23, 45-46, and Dist. Ex. 1 at p. 5).

in question did not need short-term objectives due to a change in that requirement (see Tr. pp. 83-84).

In September 2007, the student attended program 2 (Tr. pp. 372-80). Approximately three weeks into the school year, the student was assaulted by another student (Tr. pp. 84-86, 372, 544-47). The district's administrative and counseling team immediately met with the parents, and at that meeting, the parents advised that the student would not return to the district's high school (see Tr. pp. 86, 177-79, 269-70, 593, 633-35, 720; Dist. Ex. 8; see also Tr. pp. 548-49, 557-59). Rather than wait for a CSE meeting, the CSE chairperson offered to send referral packets "right away" to potential out-of-district programs for placement (Tr. pp. 86-87, 156, 177, 300-01). The parents signed a consent form allowing the district to send the referral packets, which the district then sent to 17 potential out-of-district placements—including public schools, Board of Cooperative Educational Services' (BOCES') programs, and private schools—during October 2007 (Dist. Exs. 9-10; see Tr. pp. 90-110, 177, 550-55). In addition, the district offered to immediately place the student in an Intensive Day Treatment (IDT) program operated in a local BOCES program, which the parents rejected because they did not want the student to attend the IDT program and then need to transfer to yet another program upon its completion (Tr. pp. 177-79, 312-13, 594-96).[3] With the parents' agreement, the district placed the student on homebound instruction services for ten hours per week (Dist. Ex. 8; see Tr. pp. 87, 548-49, 595-95). At the meeting, the parents also indicated that they obtained private counseling for the student from a therapist with whom the student already had a working relationship and it was not necessary for someone in the district to "talk" to the student (Tr. pp. 178-79, 593-97, 704, 790-91, 808-09, 975-76; see Dist. 13 at p. 5).

On October 8, 2007, the student began receiving homebound instruction from a tutoring service provided by the district (Dist. Ex. 17 at p. 2; see Tr. pp. 94, 268, 548). The district continued to follow-up on the potential out-of-district placements throughout October and November 2007 (Dist. Ex. 10 at pp. 1-4; see Tr. pp. 91-110, 550-55). Three out-of-district programs accepted the student—Southern/Westchester BOCES (a therapeutic support program located in Scarsdale High School), Putnam/Northern Westchester BOCES (a Learning Center program), and the Karafin School (a State-approved private school) (Dist. Exs. 10 at pp. 1-4; 13 at p. 5; 20 at pp. 1-2; see Tr. pp. 91, 97-98, 102-08). Although the student and the parents participated in the intake process for each program, the parents ultimately rejected the out-of-district placements that had accepted the student (Dist. Exs. 10 at pp. 1-2; 13 at p. 5; see Tr. pp. 97, 114-16, 165-75, 271-73, 550-55, 599-607).

By letter dated October 29, 2007, the district invited the parents to attend a CSE meeting scheduled on November 14, 2007, which the parents cancelled due to a conflict with their schedule (Dist. Exs. 11A-11B; see Tr. pp. 110-12, 699-700). By letter dated November 28, 2007, the district invited the parents to a rescheduled CSE meeting on December 12, 2007 (Dist. Exs. 12A-12B). Prior to the December CSE meeting, the parents communicated to the CSE chairperson that, at that time, they would prefer to continue the student in the homebound instruction until the district found a program "that was more to their liking" because they were "not comfortable with those programs" that had accepted the student (Tr. pp. 114-15).

[3] The IDT program was described as a "four-week program" that allowed students to continue their education with the assistance of a tutor and "a lot of counseling support" (Tr. pp. 177-78).

The CSE convened on December 12, 2007, with the following in attendance: the CSE chairperson, a school psychologist, an additional parent member, a special education teacher, a regular education teacher, a guidance counselor, and the parents (Dist. Ex. 13 at pp. 1, 5). The CSE reviewed and discussed the placements that had accepted the student, and the parents expressed their concerns with these options (id. at p. 5; see Tr. pp. 116-17, 170-75, 273-76, 600-07). Consistent with their prior conversation with the CSE chairperson, the parents continued to reject the out-of-district placement options and reiterated their preference for continuing the student on homebound instruction (Dist. Ex. 13 at p. 5; see Tr. pp. 114-15, 273-76, 600-07; see also Tr. pp. 117, 165-67, 705-06). As a result, the CSE recommended that the student continue to receive ten hours per week of homebound instruction (Dist. Ex. 13 at p. 1). According to the IEP meeting minutes, although the student received "private treatment," the CSE "discussed and recommended that a monthly counseling consult by the psychologist could be beneficial in helping [the student] progress toward re-entry to an educational program at [the district] or another setting" (id. at p. 5; see Tr. pp. 116-17, 276-78, 796). Thus, the CSE added a 15 minute per month counseling consult recommendation to the student's 2007-08 IEP (Dist. Ex. 15 at pp. 1, 5).

By due process complaint notice dated January 23, 2008, the parents identified the program recommended in the student's August 15, 2007 IEP and asserted that they did not agree with the student's "2007-08 IEP and program as recommended by the CSE" (Dist. Ex. 14 at p. 1). The parents noted that since the assault in September 2007, the district had not identified an appropriate alternative setting for the student (id.). As a basis upon which to request an impartial hearing, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) and asserted both procedural and substantive violations (id. at pp. 2-4). In particular, the parents alleged the following: the district failed to provide a placement that met the student's needs; the district failed to address the student's social/emotional needs that arose from the assault; the provision of homebound instruction isolated the student and was not appropriate; the district failed to implement appropriate goals and objectives and failed to develop appropriate transition goals; the district failed to implement meaningful, measurable goals and objectives; the district failed to discuss methodologies to address the student's needs; the district failed to provide adequate information about program 2 regarding the homework policy and the student population; the district failed to provide the appropriate amount of homebound instruction; the homebound instruction was delivered inconsistently; the district had failed the student since middle school with poor placement choices and allowing the student's promotion from grade to grade despite failing courses; the homebound instruction teachers were repeatedly late or absent and thus, the students missed a significant amount of instruction; the homebound instruction teachers failed to adequately communicate with the student's teachers at the district; the homebound instruction services were difficult to consistently schedule; and the student needed a placement where she felt safe and secure (id.). As relief, the parents sought to annul the current IEP; to develop an appropriate IEP with transition services and appropriate goals and objectives; to place the student in an appropriate out-of-district setting with her non-disabled peers; payment of attorney's fees; additional services to make up for the deprivation of services during the 2007-08 school year; and any other further relief deemed just and proper (id. at p. 4).

After receiving the due process complaint notice, the parties conducted a resolution session at which the district agreed to re-explore potential out-of-district placements by re-sending referral packets to the placements originally investigated in October and November 2007, and to also send packets to additional schools (Dist. Ex. 16 at p. 1; see Tr. pp. 136-40, 279, 292-93, 333, 715-16).

The CSE chairperson testified at the impartial hearing that at the resolution session, the parents indicated that the student was "doing well with her tutors" and asked that the district include current progress reports from the student's homebound instruction tutors in the referral packets currently being sent to potential out-of-district placements (Dist. Ex. 16 at pp. 2-4; see Tr. pp. 136-40).

The parties proceeded to an impartial hearing on April 4, 2008, which concluded after five days on August 26, 2008 (Tr. pp. 1, 843). On the first day of testimony, the CSE chairperson testified that as a result of the referral packets sent pursuant to the resolution session, two local high school programs had accepted the student (Tr. pp. 1, 141-44; see Dist. Ex. 21).

Between the first and second days of testimony at the impartial hearing, the CSE convened on April 15, 2008, to review the student's homebound instruction program, the out-of-district placements that had recently accepted the student, and to recommend a placement for the student for the remainder of the 2007-08 school year (Dist. Ex. 23 at p. 5). Attendees included the following: the CSE chairperson, a regular education teacher, the program 2 psychologist, a special education teacher, an additional parent member, a guidance counselor, the parents, the parents' representative via telephone, the district's legal counsel, the owner of the tutoring agency providing homebound instruction services via telephone, the CSE chairperson from the recommended out-of-district placement via telephone, the school psychologist from the recommended out-of-district placement via telephone, and another individual from the recommended out-of-district placement (id.). According to meeting minutes, the student and her mother preferred the recommended high school program because they felt it would provide the student with a "more typical high school experience" (id.). The CSE reviewed the program options and recommended placement in a 12:1 integrated co-teaching class at a local high school for the remainder of the school year (id. at pp. 1, 5). According to meeting minutes, the CSE also recommended to continue ten hours per week of homebound instruction services through the conclusion of the 2007-08 school year because the class options at the recommended placement did not "line up completely" with the student's homebound instruction courses (id.; see Tr. pp. 950-51). In addition, the CSE noted that the student's schedule and services would be "modified for her transition to [the recommended placement]" (Dist. Ex. 23 at p. 5). The CSE added one session per week of individual counseling to the student's IEP and annual goals to address the student's identified social/emotional needs (id. at pp. 1, 5, 7-8). The meeting minutes further indicated that the parents "agreed that the levels/needs, program/testing modifications, transition plan and goals were appropriate and should not be changed at this time, with the exception that counseling needs and social/emotional goals should be added to the IEP" (id. at p. 5).

The student attended the recommended placement for approximately two weeks before her parents removed her from the program reportedly due to harassment by other students (Tr. pp. 577-78, 610-23, 950-53). After leaving this placement, the student continued to receive ten hours per week of homebound instruction services through the district (Tr. pp. 611, 761-63, 777, 950-53). On the final day of testimony at the impartial hearing, the CSE chairperson indicated that she had authorized additional homebound instruction services at the beginning of the summer in order

to allow the tutors to assess the student's progress relative to her IEP goals and to allow the student to complete her tenth grade courses (Tr. pp. 956-59, 976-78, 983-88, 990-91).[4]

In her decision dated February 11, 2009, the impartial hearing officer concluded that the district sustained its burden to establish that the special education programs and services recommended in the student's 2007-08 IEPs offered the student a FAPE (IHO Decision at pp. 10-23). The impartial hearing officer separately analyzed each of the parents' allegations to determine whether the district denied the student a FAPE during the 2007-08 school year (id.). Turning first to the parents' claim that the district's failure to adequately and accurately communicate information about program 2 denied them a meaningful opportunity to participate in the development of the student's IEP, the impartial hearing officer weighed the evidence and found the district witnesses' testimony persuasive on this issue (id. at pp. 11-13). In her decision, the impartial hearing officer noted that according to the parents, the district misrepresented the nature of program 2 by failing to provide "'crucial information'" about the program—such as failing to explain that the teachers did not assign homework, that the students were predominantly male, and that the students were "'beset with behavioral problems, including disruptive behaviors, defiance of teachers, and regular outbursts'" (id. at p. 11). The parents argued that as a result of this alleged misrepresentation, they agreed to place the student at program 2, where the student was assaulted (id. at pp. 11-12).

Based upon the evidence presented, the impartial hearing officer concluded that the district did not "materially misrepresent, by omission or affirmatively, the nature" of either program 2 or the population of students in program 2 (IHO Decision at pp. 12-13). The impartial hearing officer specifically noted the testimony provided by the program 2 school psychologist who participated in the intake meeting with the parents and who testified about the program and student population at program 2 at the impartial hearing (id. at p. 12).[5] The impartial hearing officer noted that in testimony, the school psychologist explained that program 2 was a "mainstream regular education program with a 'very strong special education support component'" (id.). According to her testimony, program 2 contained 38 students in September 2007, which included 21 special education students and 8 female students (id.). The program 2 school psychologist described the range of the student population, noting that some students had "issues like anxiety that made it difficult for them to function in a large class, some with behavior issues that could be managed better in a small setting, some with impulsivity needs and some who just needed a small setting" (id.). The impartial hearing officer noted that when the parents attended the intake meeting—which lasted 30-45 minutes—the school psychologist described the program "'in detail'" and in her own words, "tried 'not to paint a rosy picture of the program'" to the parents (id.). During the intake meeting, the school psychologist acknowledged that the parents expressed concern about

[4] The hearing record indicates that the CSE convened to develop the student's IEP for the 2008-09 school year, which recommended an out-of-district placement in a local high school program (see Dist. Exs. 25; 27; see also Tr. pp. 961-63, 970-75). The parents, by letter dated August 14, 2008, requested a CSE meeting to discuss returning the student to the district's high school (Dist. Ex. 25 at pp. 1-2). The district responded by letter dated August 15, 2008, indicating that the Board of Education had approved the student's placement in the out-of-district program identified in her 2008-09 IEP, but that the CSE would review the parents' request to return the student to the district and would respond at a later date (Dist. Ex. 27).

[5] The impartial hearing officer also noted that the CSE chairperson's testimony about program 2 and student population "substantially confirmed" the testimony provided by the school psychologist (IHO Decision at p. 13).

the student population and inquired about student outbursts, as well as behavioral and emotional concerns, and drugs and alcohol (id.). In her testimony, the school psychologist noted that she explained to the parents that she had not experienced issues with any of the parents' concerns in her three years at program 2, nor had she encountered any "'safety issues whatsoever with any of our students'" (id.). After the intake meeting, the parents contacted the school psychologist to express further concerns and to ask additional questions about the student population at program 2 (id. at pp. 12-13). The impartial hearing officer noted that after the intake meeting, the parents also had the opportunity to participate in an orientation session at program 2—which offered the added opportunity to speak with other parents of students at program 2—but that the parents did not attend (id.). After the intake meeting, the parents agreed to place the student at program 2 for the 2007-08 school year (id. at p. 13).

In addition to noting the reliability and persuasiveness of the testimonial evidence presented by the district witnesses, the impartial hearing officer determined that the parents' testimony—as the "only evidence proffered to rebut the district's claims"—was insufficient to rebut the evidence presented by the district that it provided the parents with information regarding program 2 and student population (IHO Decision at p. 13). With respect to the issue of program 2's homework policy, the impartial hearing officer concluded that the "failure to explicitly discuss the homework policy in the circumstances of this case [did] not constitute a procedural violation" (id.). The impartial hearing officer briefly noted that when the parents requested homework for the student during the intake meeting, the social studies teacher in attendance agreed to the parents' request (id.). Furthermore, the impartial hearing officer noted that the evidence presented did not warrant a finding that the district "knowingly concealed" the homework policy at program 2 or that it was "material" (id.). Thus, the impartial hearing officer determined that the parents were not denied a meaningful opportunity to participate in the development of the student's August 2007 IEP (id. at pp. 13-14).

Next, the impartial hearing officer addressed the parents' allegation regarding the district's failure to provide appropriate transition services, as well as appropriate transition goals and objectives (IHO Decision at pp. 14-17). Here, the impartial hearing officer noted that consistent with State regulations, the district properly included transition services in the student's IEPs developed when the student turned 15 years of age, and specifically identified that the student's June 2007, August 2007, December 2007, and April 2008 IEPs all contained transition services (id. at p. 14, citing 8 NYCRR 200.1[fff], 200.4[d][2][ix]). The impartial hearing officer explained that according to the evidence, the district developed the student's transition plan based upon "the transition assessment" performed by the guidance counselor "after consultation with the student" (IHO Decision at p. 15). Both the student and the guidance counselor attended the June 2007 CSE meeting, which resulted in the transition plan that the parents "now challenged" (id.). The impartial hearing officer found that the evidence did not support the parents' contention that the transition plan contained inconsistent or contradictory post-secondary goals, noting that due to the changing nature of a student's interests the "development of the transition plan [was] an 'ongoing process'" and thus, students could have what appeared to be "inconsistent goals" (id.). In addition, the impartial hearing officer also determined that the transition activities were "sufficiently linked to the transition goals," and that the parents had not asserted "any specific substantive harm to the student" that constituted a denial of a FAPE based upon "the alleged inadequate transition plan" (id. at pp. 15-16). The impartial hearing officer further noted that the student's April 2008 IEP contained the same transition plan first developed and included in the June 2007 IEP and that the

"Comments" section of the April IEP reflected the parents' agreement that the transition plan was appropriate and should not be changed at that time (id. at p. 16). Thus, the impartial hearing officer concluded that the student's IEP included an appropriate transition plan with the requisite level of specificity to allow the student to move toward the stated outcomes (id.). She also noted that even if the transition plan "did not comport with statutory or regulatory requirements, defects here did not rise to the level of causing substantive deprivation such that the student was not offered a FAPE" (id. at pp. 16-17).

The impartial hearing officer then moved on to address the parents' allegation that the district failed to appropriately address the student's social/emotional needs that arose as a result of the assault (IHO Decision at pp. 17-20). In particular, she noted that the parents argued that the district failed to evaluate the student to determine whether special education services would address the student's "needs for safety and support, including from her peers, and did not consider those needs and develop an IEP that would appropriately address them" (id. at p. 17). In opposition, the district asserted that the parents "refused to permit access to the student by district personnel, the parents failed to provide any information concerning the student's circumstances and needs other than their own oral reports, and that the CSE nevertheless accommodated the parents and complied with their request to the extent possible" (id.).

As to the issue of whether the district failed to evaluate the student's social/emotional needs, the impartial hearing officer found that the hearing record contained the following undisputed facts: after the assault, the parents informed the district that the student would not return to the high school and that she was receiving counseling through a private therapist; the district offered to place the student in an IDT program, which the parents rejected; the parents did not allow any district staff or personnel to contact or talk to the student and the parents repeatedly advised the district that they did not "need any other counseling;" the parents "made it clear to the district that the family did not want the district involved in the student's counseling;" at the December 2007 CSE meeting, the parents rejected the CSE's offer to provide a district counselor to the student; although the CSE included a counseling consultation service in the December 2007 IEP, the student did not use the service; the parents did not request a psychological evaluation by the district; the parents did not provide any information—other than oral reports—about the student's social/emotional needs to the district; and the student's private therapist did not participate in any of the CSE meetings subsequent to the assault and did not provide any written information to the district regarding the student's needs (IHO Decision at pp. 17-18).

Examining the record and weighing the undisputed evidence, the impartial hearing officer concluded that the district exerted a "substantial" effort attempting to "address the parents' concerns and the student's placement needs" (IHO Decision at pp. 18-20). In her decision she noted that after learning of the assault, the district immediately offered a four-week IDT placement and weekly homebound instruction services, and further, that the district immediately initiated exploration into potential out-of-district placements for the student (id. at p. 19). At the December 2007 CSE meeting, the impartial hearing officer found that the CSE added the counseling consultation service and after the CSE meeting, the district continued to pursue an alternative placement for the student (id.). The impartial hearing officer noted that the "district had compelling reasons to believe the parent[s] were strongly resistant to and would not permit an evaluation," and therefore, the "failure to formally request one in these circumstances does not compel a conclusion that a FAPE was not provided" (id.). In addition, the impartial hearing officer

found that the parents obtained private counseling for the student and that the district cooperated with them to find "an appropriate placement acceptable to the parents" (id. at pp. 19-20). The impartial hearing officer also noted that the parents did not identify any "specific actions with regard to the student's special education program that the district should have taken that it was not already taking," and further, that the district directed its efforts toward the parents' "principal concern regarding the student's social and emotional needs" by attempting to locate a "supportive and academically appropriate placement" (id. at p. 20). The impartial hearing officer concluded that the district did not deny the student a FAPE "resulting from any failure or inadequacy in addressing the student's social and emotional needs" (id.).

Finally, the impartial hearing officer analyzed the parents' allegation that the district's failure to provide appropriate homebound instruction services to the student during the 2007-08 school year denied the student a FAPE (IHO Decision at pp. 20-22). As noted by the impartial hearing officer, the parents argued that the district failed to provide homebound instruction services by a special education teacher from mid-January through April 2008; that the homebound instruction agency failed to distribute the student's IEP to the individual tutors; the homebound instructors failed to work toward the student's IEP goals and failed to collect data or report on the student's progress on her IEP goals (id. at p. 20). The district contended that it implemented the homebound instruction services based upon the parents' assertion that the student could not return to the district and were intended as a "temporary measure until" the district located an appropriate placement (id.). Based upon the evidence presented, the impartial hearing officer determined that the student did not require the services of a special education teacher for the homebound instruction services as "long as [the student] had one-to-one instruction where material could be re-taught and directions and questions explained" (id. at p. 21). Moreover, the evidence adduced at the impartial hearing supported a finding that the student "was keeping up and was motivated to complete her work and receive a diploma," and further, that the student had been completing her coursework (id.). The tutors described the student "as 'hard working, cooperative, productive during her tutoring sessions and earning very good grades'" (id.). The hearing record also indicated that all of the student's homebound instruction tutors were certified teachers (id.).

Here, the impartial hearing officer found that based upon the evidence, the homebound instruction services provided the student with a program "at the level of her needs, that instruction was provided at her pace, that the one-to-one tutoring format enabled her to receive instruction in the manner that would be effective and in accordance with her IEP and that the student progressed" (IHO Decision at pp. 21-22). As to the allegation that the homebound instruction failed to address the student's IEP goals, the impartial hearing officer found that such had been remedied by the district's directive to the tutoring agency to provide "additional tutoring hours" and mandated the generation of progress reports regarding the student's goals (id. at p. 22). She concluded that the homebound instruction services met the student's educational needs and enabled her to "receive meaningful educational benefits" (id.). In addition, she determined that any "deprivation of education services claimed [did] not constitute a gross violation of the [Individuals with Disabilities Education Act (IDEA)] resulting in a denial of the services for a substantial period of time," and thus, she denied the parents' request for compensatory educational services (id.). Based upon the foregoing, the impartial hearing officer concluded that the district sustained its burden to establish that it offered the student a FAPE for the 2007-08 school year and she dismissed the parents' case (id. at pp. 22-23).

On appeal, the parents allege that the impartial hearing officer erred when she made the following determinations: that the parents were not denied a meaningful opportunity to participate in the IEP process; that the transition plan was appropriate despite the fact that the IEP did not contain any transition goals; that the district did not deny the student a FAPE by failing to address the student's social/emotional needs because the parents resisted and would not permit an evaluation of the student; that the district's failure to timely update the student's IEP regarding her social/emotional needs did not constitute a denial of a FAPE; that the homebound instruction services provided the student with a FAPE; and that the impartial hearing officer improperly required a gross violation of the IDEA to justify an award of compensatory relief. The parents seek to annul the impartial hearing officer's decision in its entirety based upon a finding that the district failed to offer the student a FAPE for the 2007-08 school year, and further, request an order awarding 360 hours of special education tutoring and the development of an appropriate IEP with a transition plan.

In its answer, the district asserts that the impartial hearing officer properly concluded that the district offered the student a FAPE for the 2007-08 school year. In addition, the district further asserts that the impartial hearing officer properly concluded that the parents' request for an out-of-district placement for the 2007-08 school year was moot and that the parents were not entitled to compensatory services as relief. The district seeks to uphold the impartial hearing officer's decision in its entirety.

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 Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"

(Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [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]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parents seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Upon careful review of the entire hearing record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 28-page decision, correctly held that the district sustained its burden to establish that the special education programs and services recommended by the CSE for the 2007-08 school year offered the student a FAPE (IHO Decision at pp. 10-23). The impartial hearing officer accurately recounted the facts of the case, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2007-08 school year, and she fully addressed each alleged defect asserted by the parents in support of their allegation that the district denied the student a FAPE (id. at pp. 3-22). The decision shows that the impartial

hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she carefully marshaled and weighed the evidence in support of her conclusions and properly supported her conclusions with citations to the hearing record (id.). The hearing record amply supports the impartial hearing officer's conclusion that, given the circumstances of the case, the district's special education programs and services—including the homebound instruction services—offered the student a program that was appropriate to her special education needs and enabled her to receive meaningful educational benefits. I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096). In conclusion, based upon an independent review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the hearing officer (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 22, 2009

PAUL F. KELLY
STATE REVIEW OFFICER