



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-069

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Neal Howard Rosenberg, attorney for petitioners, Neal Howard Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at Xaverian High School (Xaverian) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a tenth grade class as part of the Legacy program at Xaverian (Parent Ex. D at p. 1). The hearing record describes the Legacy program as "a small class (15:1+1) instructional environment for students whose learning needs require a structured, adapted and supportive environment" (Parent Ex. H at p. 1). Xaverian is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

In May 2007, when the student was in seventh grade, respondent (the district) conducted a psychoeducational evaluation of the student as part of his mandated triennial review (Dist. Ex. 4 at p. 1). At the time of the evaluation, the student was classified as having a speech or language impairment and recommended for a 12:1 special class in a community school; however, he was

attending a private school (id.). The evaluating psychologist noted that the student was cooperative and friendly and that his attention to test items was generally good (id. at pp. 1-2). She further noted that the student attempted all tasks, but that his motivation was "fair" when presented with more challenging test items (id. at p. 1). The psychologist administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) as a means of assessing the student's academic functioning (id. at p. 2). The student attained the following subtest standard scores (and percentile ranks): letter-word identification 95 (36th percentile), passage comprehension 83 (13th percentile), calculation 92 (30th percentile), and applied problems 94 (35th percentile) (Dist. Ex. 4 at p. 2). The psychologist noted that the student could not yet successfully execute problems that involved money or fractions (Dist. Ex. 4 at p. 3). With respect to social and emotional functioning, the psychologist reported that the student was forthcoming with information regarding his feelings and experiences (id.). The student indicated that recess was his favorite time, that studying was his least favorite thing to do, and that he liked being pulled for speech-language therapy because it got him out of class (id.). According to the psychologist, the student reported that he had "preferred" friends and that he sometimes got into fights because some of the students were "bad" (id.). The psychologist concluded that the student continued to exhibit academic delays that warranted academic intervention (id.).

In September 2008, the student entered the Legacy program at Xaverian, where he attended a 15:1+1 class for ninth grade (Tr. p. 141; Dist. Ex. 9 at p. 3; Parent Ex. D at p. 1).

On March 9, 2009, the district conducted a 40-minute classroom observation of the student in his art class at Xaverian (Dist. Ex. 5 at p. 1).¹ As part of the observation, the district observer completed a behavior checklist on which she indicated that the student was motivated, participated in class discussion, worked independently, attended to questions, remained on task, interacted socially, and related to teachers/aides (id.). The observer further indicated that the student was hyperactive and distractible and was not organized (id.). As noted in the narrative prepared by the observer, the student was on time for class and participated in the class discussion (id.). According to the observer, the student remained on task but showed signs of distraction and was fidgety in his seat (id.). The observer noted that the student's teacher indicated the student completed both his class assignments and homework projects and that he was putting more effort into his work (id. at p. 2). In addition, the student's teacher reportedly indicated that the student got along with his classmates but that sometimes he became talkative in class and would try to seek attention (id.).

On March 30, 2009, the student's English teacher from the Legacy program completed a teacher report in which he rated the student's performance on school-related tasks (Dist. Ex. 6; see Dist Ex. 7). According to the teacher's responses, the student's reading word attack, reading comprehension, reading speed, writing content, writing speed, attention to lecture, attention to silent reading, attention to verbal reading, attention to writing, respect for adults, respect for peers, social interaction with peers, and homework quality were "good" (Dist. Ex. 6). In addition, as rated by the teacher, the student's writing legibility, writing grammar, study habits, homework

¹ The special education teacher who conducted the observation testified that she mistakenly referred to the name of another student in the first part of her observation (Tr. p. 223).

completion, and test grades ranged between "good" and "poor" and the student's personal organization and organization of assignments were judged to be "poor" (id.). The student's second trimester report card showed that the student's academic grades ranged between a 65 in algebra and life science and an 80 in English (Dist. Ex. 7). Report card comments indicated that the student needed to put more effort into his algebra class and in "Reading & Math 9" the student needed to "cut down" on his talking and focus more on his work (id.). The student's second trimester GPA was 75 (id.).

On March 31, 2009, the district's committee on special education (CSE) convened for the student's annual review and to develop an individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 9 at pp. 2, 10). Present for the meeting were the student's mother, a district representative who observed the student at Xaverian and also served as the special education teacher member of the CSE, and a school psychologist (Tr. p. 226; Dist. Ex. 9 at p. 2). The coordinator of the Legacy program, who was also a certified school psychologist and special education teacher, and a psychology intern from Xaverian participated in the meeting by telephone (Tr. pp. 145-46; Dist. Ex. 9 at p. 2). The resultant March 2009 IEP stated that, according to the student's teachers, math was an area of relative strength for the student, the student's reading skills were satisfactory, and the student's writing skills were delayed and in need of remediation (Dist. Ex. 9 at p. 3). The IEP indicated that the student needed reminders to refocus and to finish the task at hand (id.). As noted in the IEP, the student could work independently if he knew what was expected of him and he was interested in the topic (id.). The student's organizational skills were characterized as "weak" (id.). The March 2009 IEP reflected the following teacher estimates of the student's instructional levels: reading - sixth grade, writing - sixth grade, listening comprehension - sixth to seventh grade, and math - seventh to eighth grade (id.). With respect to social/emotional development, the IEP indicated that the student related well to his teachers and peers, but that sometimes he became too talkative in class and tried to seek attention by being a "jokester" (id. at p. 4).

The March 31, 2009 CSE recommended that the student be classified as having a speech or language impairment and that he be placed in a 15:1 special class (Dist. Ex. 9 at p. 1). The CSE further recommended that the student receive related services of speech-language therapy twice a week for thirty minutes and counseling once a week for thirty minutes (id. at p. 10). The following modifications and resources were recommended by the CSE to address the student's academic management needs: ongoing repetition and review of previously taught concepts, visual and verbal cues, frequent redirection and refocusing to task, and preferential seating to maximize attention and concentration (id. at p. 3). The proposed IEP included annual goals related to increasing attention to task, developing the ability to organize and express ideas through writing, applying a variety of decoding skills to read and spell, reading and comprehending at a seventh grade level, demonstrating problem solving by using the solution process on a ninth grade level, demonstrating understanding of number concepts involving ratio and percent, improving expressive language skills by expanding vocabulary, and improving receptive language skills by following four step multi-contextual directions (id. at pp. 6-7). The IEP afforded the student the following testing accommodations: time extended to time and one-half for all exams more than 40 minutes, a special location with no greater than 15 students, questions read aloud except for reading comprehension,

and directions read and reread aloud (id. at p. 10). The IEP included long term adult outcomes and transition services (id. at p. 11). The student's expected high school completion date, as reflected in the March 31, 2009 IEP, was June 2012 and the student's diploma objective was a Regent's diploma (id.).

On April 30, 2009 the CSE reconvened and amended the student's proposed IEP by adding counseling goals (Dist. Ex. 2 at pp. 8; 10).² The counseling goals stated that the student would improve his school performance through counseling by developing skills to sustain attention in class and by self-regulating behavior to control outbursts (id. at p. 8).

In a final notice of recommendation (FNR) dated June 17, 2009, the district notified the parents of the specific location of the proposed 15:1 special class (Dist. Ex. 3). On July 1, 2009, the student's parents signed a tuition agreement with Xaverian to enroll the student in the Legacy program for the 2009-10 school year (Parent Ex. G).

By letter dated August 17, 2009, the parents informed the district that the student had been accepted for enrollment at Xaverian for the 2009-10 school year, that the student would continue to attend Xaverian for the 2009-10 school year, and that they would seek payment from the district for the costs of the student's tuition and other "ancillary fees" (Parent Ex. C). The August 2009 letter further stated that the student's mother had previously left telephone messages with the school identified in the district's June 17, 2009 FNR in order to arrange an onsite visit, but had not heard from the school (id.). According to the August 2009 letter, the parents would withdraw the student from Xaverian and enroll him at the district's proposed placement on the condition that the district provided the parents with an opportunity to visit the proposed school and they determined at that time that the program would meet the student's needs (id.).

By due process complaint notice dated November 16, 2009, the parents requested an impartial hearing wherein they alleged that the district failed to adequately evaluate the student, develop an appropriate IEP, and offer the student an appropriate placement for the 2009-10 school year (Parent Ex. D). Specifically, the parents asserted that their son required more individual attention than what the district's proposed 15:1 placement could provide and that the student's IEP did not adequately address his transition needs (id. at p. 2). The parents further alleged that the special education classes recommended by the CSE were not reasonably calculated to prepare the student to pass the New York State Regents examinations and to earn a Regents diploma (id. at p. 3). The parents stated that the district's recommended 15:1 special classes included emotionally disturbed students with behavior problems and further asserted that being placed with disruptive students would amount to inappropriate functional grouping because of the student's difficulty sustaining concentration and his distractibility (id.). The parents asserted that the Legacy program at Xaverian was appropriate for the student, that the 15:1+1 student to teacher ratio would provide the student with the level of support and attention that he needed, and that counseling and speech-language services were built into the student's program (id.). According to the parents, students in the Legacy program took the New York State Regents examinations and were expected to meet

² Methods of measurement were also added to the student's annual goals (Parent Ex. A at pp. 6-8).

the requirements for a Regents diploma and attend a four-year college (id.). As relief, the parents requested that an impartial hearing officer find that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year, that Xaverian was an appropriate placement for the student, and that equitable considerations favored an award of tuition payment to the parents and order the district to fund the student's tuition at Xaverian for the 2009-10 school year (id.).

In a response dated November 23, 2009, the district asserted that it offered the student a placement that was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 1 at p. 3).

An impartial hearing convened on April 5, 2010 and concluded on May 6, 2010. In a decision dated July 16, 2010,³ the impartial hearing officer determined that the district offered the student a FAPE and that the parents were not entitled to reimbursement for their son's tuition at Xaverian. The impartial hearing officer determined that the CSE considered input from Xaverian's staff and that the Xaverian coordinator testified that the IEP was not deficient and was used as guide for the student's program at Xaverian (id.). The impartial hearing officer found that updated evaluations of the student were not required, citing to, among other things, the unrefuted testimony of the parents' witness (id.). Additionally, the impartial hearing officer noted that the parents neither requested an updated evaluation from the district nor obtained one on their own (id.).

With regard to the parents' contention that the absence of a speech-language evaluation deprived the student of a FAPE, the impartial hearing officer found that the parents did not challenge the student's classification or the sufficiency of speech language services at the CSE meeting or in their due process complaint notice (IHO Decision at pp. 7-8). In addressing the parents' assertions that the district's proposed 15:1 placement was inappropriate, the impartial hearing officer determined, among other things, that the evidence showed that disruptive behaviors are not permitted in class, steps are taken to minimize disruptions, and that the recommended placement was based on a Regents curriculum with individualized modifications for the students (id. at pp. 8-9). The impartial hearing officer also determined that the student's transition goals were not inadequate because although he was invited, the student did not attend the CSE meeting and, furthermore, the recommended program offered each student an opportunity to discuss his or her transition plans (id. at p. 8).

The parents appeal, contending that the impartial hearing officer improperly placed a burden on the parents to establish that the district failed to offer the student a FAPE. The parents assert that the district failed to establish that it offered the student a FAPE for the 2009-10 school year because the student's April 2009 IEP was based on inadequate evaluations and the placement recommended for the student was inappropriate. The parents allege that the district failed to present evidence that the student had been evaluated by a speech pathologist. As a result, the

³ The impartial hearing officer initially issued her decision on June 22, 2010 (IHO Decision at p. 9). The impartial hearing officer corrected her decision on July 16, 2010 by appending the list of exhibits considered (id. at pp. 9, 11).

parents assert that it was not possible for the CSE to draft speech-language goals that were appropriate for the student. The parents argue that the impartial hearing officer improperly placed a burden on the parents to ask for evaluations or to provide their own. The parents also contend that the impartial hearing officer misinterpreted their argument of inadequate evaluation as a dispute over the student's classification.

According to the parents, the IEP made reference to the student's concentration and organizational difficulties, but the CSE failed to have the student evaluated for an attention deficit disorder. Without a proper evaluation, the parents argue that the CSE was unaware of the appropriate type of placement that the student required for learning.

The parents assert that the recommended 15:1 placement would not provide the student with the appropriate individualized attention he required due to his distractibility and disorganization. The parents contend that the recommended class included students with "disruptive behavior problems" and that grouping the student with them would be inappropriate. According to the parents, the impartial hearing officer improperly concluded that the other students would not distract the student based on the inability of the student's mother to identify any students displaying disruptive behavior during her visit. The parents argue that the impartial hearing officer erred in determining that the proposed 15:1 placement was appropriate in view of the low Regents passing rate and that "it was not reasonably calculated to prepare [the student] to earn a Regents diploma."

With regard to the student's transition goals, the parents allege that the impartial hearing officer improperly relied upon evidence showing that the student did not attend the CSE meeting. According to the parents, there is no evidence in the hearing record that the student was asked about his future plans and that the CSE did not conduct a vocational assessment of the student which is an integral part of the formulation of transition goals. The parents conclude that without an understanding of the student's aptitudes and interests, the CSE was unable to create appropriate transition goals for the student's IEP.

The parents allege that the impartial hearing officer should have reached the issues of whether Xaverian is appropriate for the student and whether equitable considerations support their claim. The parents assert that Xaverian is an appropriate placement for their son and that equitable considerations favor an award of tuition reimbursement. For relief, the parents seek a determination that the district failed to offer their son a FAPE for the 2009-10 school year and that Xaverian is an appropriate placement. The parents request an order directing the district to directly fund a placement for the student at Xaverian.

In its answer, the district asserts that the impartial hearing officer's determination that the district offered the student a FAPE should be affirmed. Alternatively, the district argues that Xaverian is an inappropriate placement for the student because Xaverian lacks the related service of speech-language therapy, which the student needs in order to receive educational benefit. Furthermore, the district contends that, equitable considerations preclude the parents' requested relief because the parents' notice of unilateral placement was insufficient insofar as it failed to include "a single substantive or procedural objection to the student's IEP" or identify any other

problem except the district's purported failure to return the parents' phone calls. In addition, the district contends that evidence in the hearing record shows that the parents did not intend to enroll the student in any program other than Xaverian. Finally, the district asserts that it is precluded from providing relief to the parents in the form of direct tuition payment to a non-approved private school such as Xaverian.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]).

Turning first to the parties' dispute over the adequacy of the evaluative data available to the CSE for purposes of addressing the student's speech-language, attention and organizational deficits, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation

(34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

With regard to the district's evaluation of the student, the impartial hearing officer concluded that the parent did not challenge the adequacy of district's evaluation of student with respect to his speech-language deficits (IHO Decision at pp. 7-8). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]), or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). The parents' due process complaint notice did not identify any issues regarding the student's speech-language deficits, the adequacy of the student's speech-language goals in his IEP or the speech-language services recommended by the district (see Dist. Ex. 2). I also note that hearing record does not contain evidence showing any attempt by the parents to amend their original complaint with permission given by the impartial hearing officer to add this issue (Parent Ex. 1 at p. 4). I find no reason to disturb the impartial hearing officer's

conclusion that the issue of the student's speech-language deficits or services was not properly before her (IHO Decision at pp. 7-8).⁴

With regard to the information before the CSE concerning the student's organizational and attention deficits, the district representative reported that, prior to the CSE meeting, the CSE was provided with updated information including her observation report of the student, the student's report card, and a teacher report (Tr. p. 228; see Dist. Exs. 5; 6; 7). The district representative testified that the CSE also reviewed the student's psychological evaluation report conducted in May 2007, and relied on additional documentation from Xaverian (Tr. p. 247; see Dist. Exs. 4; 5; 6; 7). The participants who considered this information at the March 2009 and April 2009 CSE meetings included the student's mother; a district representative, who also served as the special education teacher; a school psychologist; the coordinator of the Legacy program, who was also a school psychologist; and a psychology intern from Xaverian (Tr. pp. 145-46, 226; Dist. Exs. 2 at p. 2; 9 at p. 2).⁵ The district representative testified that she observed the student in his art class at Xaverian in March 2009 and that she had the opportunity to discuss the student with his art teacher and the coordinator of the Legacy program (Tr. pp. 219-20). Furthermore, the district representative noted that the coordinator appeared well acquainted with the student's needs (Tr. p. 227). The Legacy coordinator testified that he was familiar with the student's academic needs, the services he received, and his progress (Tr. p. 115). The Legacy coordinator explained that he spoke to the Xaverian teachers and psychology interns about the student (*id.*). According to the Legacy coordinator, the psychology intern who participated in the CSE meetings also provided the student with counseling services (Tr. p. 145-46). Furthermore, the student's mother testified that she had the opportunity to fully participate in the student's CSE meeting (Tr. pp. 178-79).

According to the district representative, the CSE specifically considered input from the Legacy coordinator and psychology intern when drafting the present levels of performance on the student's IEP (Tr. p. 233). In addition, the district representative reported that the instructional levels listed on the student's March 31, 2009 IEP were provided to the CSE by the Legacy coordinator, who had consulted with the student's teachers, and by the psychology intern (Tr. pp.

⁴ Furthermore, even if the issue had been raised, the impartial hearing officer also noted that the evidence in the hearing record weighed against the need for further evaluation of the student's speech-language needs (IHO Decision at pp. 7-8). Rather than improperly shifting the burden to the parents during the impartial hearing, the impartial hearing officer's decision accurately describes the hearing record, such as the absence of a parental request for reevaluation of the student's speech-language needs (Tr. pp. 235, 258; see 34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]). Furthermore, the parent testified that she did not have any objection to the speech-language therapy services that the student had received previously, and that these services were provided to address his deficits in reading and comprehension (Tr. pp. 258-59). According to the hearing record the student's proposed IEP contained goals related to reading comprehension and vocabulary development (Dist. Ex. 2 at pp. 6-7). Moreover, I note that the district representative testified that at the time of the review, the CSE did not feel that it was necessary for the student to be evaluated by a speech-language pathologist (Tr. pp. 140, 249).

⁵ For the March 31, 2009 CSE meeting the district representative signed in as the special education teacher (Dist. Ex. 9 at p. 2). For the April 30, 2009 CSE meeting the coordinator of the Legacy program was designated as the special education teacher (Dist. Ex. 2 at p. 2).

228, 233-35).⁶ According to the district representative, the CSE chose to rely on teacher estimates because the teacher was the person who worked with the student every day, who knew the student best, and who knew how he performed on a daily basis (Tr. p. 235). The coordinator of the Legacy program testified that the present levels of performance on the student's IEP accurately described the student and that instructional levels contained in the IEP were accurate (Tr. pp. 135-36). Upon reviewing the observation report, teacher report, report card, and psychoeducational evaluation report and considering the input of the CSE members described above, the hearing record shows that the CSE identified modifications and resources on the student's IEP, such as frequent redirection and refocusing to task and preferential seating, necessary to assist the student with attention and concentration (Dist. Ex. 2 at p. 3; see Connor v. New York City Dept. of Educ., 2009 WL 3335760, at *5 [S.D.N.Y. 2009] [holding that an additional evaluation was not necessary to comply with the IDEA where adequate information was available from other sources during the process of developing an IEP such as an observation report and communications with a student's teacher and service provider]). In addition upon the recommendation of Xaverian staff the CSE added counseling services to the student's IEP to address, among other things, the student's attending weaknesses (Tr. pp. 227-28, 238, 240-41).

As noted above, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]). According to evidence presented in the hearing record, neither the coordinator nor the parent requested any updated evaluations of the student (Tr. p. 235). Furthermore, the student's mother reported that she never asked for updated evaluations and the Legacy coordinator testified that he did not believe that the student was in need of updated testing at the time of the review (Tr. pp. 140, 258). Even if an additional formal assessment of the student's attention or organization skills were required, there is no evidence in the hearing record that the lack of a formal assessment impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process, or 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]; see E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d 415, 419).

I now turn to the parents' assertion that the district's proposed 15:1 placement is inappropriate for the student. The parents contend that the student requires more individual attention than what the district's recommended 15:1 placement could provide, that the special education classes at the proposed school were "not reasonably calculated to prepare" the student to attain a Regents diploma, and that the student would not be appropriately grouped in the recommended class because it included emotionally disturbed students with behavior problems (Parent Ex. D at pp. 2-3). For the reasons set forth below, I am not persuaded by the parents' arguments and find that the hearing record demonstrates that the special education services recommended by the CSE were reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

⁶ The same instructional levels are listed on the student's April 30, 2009 IEP (Dist Ex. 2 at p. 3).

The hearing record indicates that the students' writing skills were delayed, that he had weak organizational skills, and that he required reminders to refocus and prompting to complete assignments (Tr. p. 229; Dist. Ex. 2 at p. 3). To address the student's special education needs, the CSE recommended that the student be placed in a 15:1 special class and receive speech-language therapy twice weekly and counseling once weekly as related services (Dist. Ex. 2 at pp. 1, 12). In addition, the CSE recommended that the student be provided with ongoing repetition and review of previously taught concepts, visual and verbal cues, frequent redirection and refocusing to task, and preferential seating to maximize attention and concentration in order to address the student's academic management needs, including his attending skills (*id.* at p. 3). Annual goals contained in the recommended IEP targeted the student's attending deficits and academic weaknesses (*id.* at pp. 6-8). As recommended by the CSE, the student's IEP afforded him the following testing accommodations: extended time, special location, questions read aloud (except reading for comprehension), and directions read and reread aloud (*id.* at p. 11). The dean of the district's recommended school testified that these testing accommodations were available at the recommended school (Tr. pp. 41-42). Further, the teachers of the district's 15:1 special classes both testified that they could provide the student with the strategies and resources listed on his IEP to address his academic management needs (Tr. pp. 75, 91-92). The teachers testified that they had experience working with students who were distractible and attention seeking and about the strategies they would use to address these needs (Tr. pp. 76, 92). According to the district representative, the Legacy coordinator and psychology intern from Xaverian did not object to the IEP and "felt" that the student would do well in a 15:1 class (Tr. p. 253). In light of the forgoing evidence, I find that the hearing record supports the conclusion that the special education services recommended by the CSE were appropriate for the student and I concur with the impartial hearing officer's determination that the hearing record demonstrates that the 15:1 placement was appropriate for the student.

Regarding the grouping of the district's recommended 15:1 class, the dean of the recommended school testified that students were grouped together based on "a functional level three-year grouping" (Tr. pp. 35, 48-49). He explained that the functional grouping was based primarily on academic needs, including reading and math scores, but that students' social needs were also taken into consideration (Tr. p. 35). According to the dean, student classifications were mixed in the 15:1 class and included students who were learning disabled and mildly autistic, as well as possibly some students classified with an emotional disturbance (Tr. pp. 35, 48). The dean opined that the different classifications in the 15:1 classes did not affect the learning process because behavior intervention plans were used and the school had certain steps that it followed if a student was disruptive (Tr. pp. 48-50). The dean further testified that after reviewing the student's IEP, he felt that the student "fit right into the program" as far as his strengths and present levels of performance (Tr. p. 44). With respect to the student's reading and math scores, the dean noted that the recommended program had many students functioning at the same level (*id.*). The dean indicated that the student's writing skills were delayed, but noted that the program addressed those needs (Tr. p. 45). Based on a review of the student's IEP, the dean characterized the student as a "model student for our program" and opined that the school was able to address the student's needs (*id.*).

In addition, the dean testified that the district school was a college preparatory school where students "are geared toward the Regents requirements" (Tr. p. 28). The dean reported that every class followed the New York State curriculum (Tr. pp. 36-37). The dean explained that the special education program paralleled the mainstream curricula, which was modified to suit the needs of the students (Tr. pp. 28, 37). According to the dean, every student was required to take Regents exams, regardless of their functional level (Tr. p. 51). He noted that there were "safety nets" if students failed, specifically the Regents Competency Test(s) (RCT) (Tr. pp. 51, 83-84). While the dean did not know how many students in the 15:1 classroom received a Regents diploma the previous year, he testified that the school had met its goals for adequate yearly progress (AYP) (Tr. pp. 53, 54-55). With regard to the student's goal of achieving a Regents diploma, the dean testified that the recommended school had tutoring programs, including teacher and peer tutoring (Tr. pp. 35-36; see Tr. pp. 29, 55-56). Thus, I find that the hearing record demonstrates that the 15:1 special class at the school proposed by the district was reasonably calculated to enable the student to receive educational benefits, including the opportunity to access the Regents curriculum and pursue the goal identified in his IEP of obtaining a Regents diploma.

Next, I turn to the parents' contention that the district failed to develop an appropriate transition plan for the student. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]). It must also include the transition services needed to assist the student in reaching those goals (id.). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]; see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F. 3d 18 [1st Cir. 2008]; Virginia S. v. Dept. of Educ., 2007 WL 80814 at * 10 [D. Hawaii, Jan. 8 2007]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the

school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]; Application of the Dep't. of Educ., Appeal No. 08-080).

Here, the hearing record shows that the March 2009 IEP included long-term adult outcomes that targeted the student's independent integration into the community, attendance at a post secondary institution for a Bachelor of Arts degree, independent living, and competitive employment (Dist. Ex. 9 at p. 11). The IEP also listed transition services, although it did not indicate who the responsible party would be for each service (Dist. Ex. 2 at pp. 11-12).

The district representative indicated that the transition plan, contained in the student's IEP, was discussed at the March 2009 CSE meeting (Tr. p. 239). The district representative testified that when drafting the transition plan the CSE considered the progress the student was making in school, as well as the requirements that the student needed to fulfill to obtain a high school diploma and eventually go on to college (*id.*). According to the district representative, information regarding the student's ability to obtain a high school diploma was provided by the student's parent and Xaverian school staff (Tr. pp. 254-55). The district representative reported that the student did not attend the CSE meeting and that the CSE did not interview the student to determine his aptitude or interests; nor was she aware of the student or his parents filling out a questionnaire (Tr. pp. 227, 250-51). The district representative could not recall if the student's parent or the Legacy coordinator provided any information regarding the student's individual interests (Tr. p. 241). However, during her testimony the student's mother indicated that she participated in a discussion at the CSE meeting about the student's interests and aptitudes following high school and that she commonly discussed such scenarios with her son (Tr. p. 257). According to the district representative, the Legacy coordinator and psychology intern from Xaverian did not object to the transition plan (Tr. p. 253).

The district's first witness, who was both a resource room teacher and dean at the recommended school, testified as to the services available at the school to address students' transition needs. The dean indicated that there was a transition linkage coordinator on staff at the recommended school who could assist students with implementing the goals and or outcomes listed in the student's transition plan (Tr. p. 39). According to the dean, the transitional linkage coordinator was responsible for making sure that the transition from school to post-secondary activities was planned for each student and that they had transition goals (Tr. p. 40). The transition linkage coordinator interviewed students and parents to discuss "future opportunities" (*id.*). According to the dean, the transition linkage coordinator assisted students with achieving their goals and becoming informed about the different opportunities at the high school (*id.*). The transition linkage coordinator also worked with VESID and other agencies that have transition programs after high school and tried to help students "get acquainted with this agency [VESID] if they need it later on" (Tr. pp. 40-41). In addition to the transition linkage coordinator, the dean testified that during a student's sophomore year, district staff member filled out applications for students to have time extensions on their SATs (Tr. p. 38). He stated that students' individual guidance counselors would discuss the student's future and that transition goals related to college or a vocational program would be discussed with the parents, the student, and guidance counselor (*id.*). The dean noted that the district's recommended school had a college office that included a

library of "all the colleges and careers that are possible," as well as vocational programs (*id.*). The dean testified that the school held college and career fairs twice per year, including one held in the evening so that parents could attend (Tr. p. 39).

The hearing record shows that while the CSE developed transition goals for the student without having either a formal evaluation or the student present at the CSE meeting, the parent provided the CSE with information that allowed the development of the transition plan. The hearing record further demonstrates that the student's counselor at Xaverian had a discussion with the student about his future plans and that the student indicated that he wanted to attend college (Tr. p. 130). Accordingly, I find that any procedural inadequacies regarding the development of the student's transition plan did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause 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]; *see E.H.*, 2008 WL 3930028, at *7; *Matrejek*, 471 F. Supp. 2d 415, 419).

Lastly, with regard to the parent's bare assertion that the impartial hearing officer improperly placed the burden of persuasion on the parents to establish that the district failed to offer the student a FAPE, I note the impartial hearing officer properly articulated the burden of persuasion in her decision, holding that "the [district] has been found to have meet its burden that it provided the student with a FAPE" (IHO Decision at p. 9).

Based on the above, I find that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2009-10 school year. Having found that the district offered the student a FAPE, I need not reach the issue of whether the private educational services obtained by the parents was appropriate for the student and the necessary inquiry is at an end (*Mrs. C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134; *Application of a Child with a Disability*, Appeal No. 05-038; *Application of a Child with a Disability*, Appeal No. 03-058).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 22, 2010**

**ROBERT G. BENTLEY
STATE REVIEW OFFICER**