



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-042

**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:**

Brown & Gropper, LLP, attorneys for petitioners, James A. Brown, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Lisa R. Khandhar, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed by respondent (the district) for their son's tuition costs at the York Preparatory School (York Prep) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was a seventh grade student attending York Prep and enrolled in its Jump Start Program (Tr. pp. 388, 421, 440).<sup>1</sup> The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). According to the hearing record, the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and a generalized anxiety disorder and exhibits difficulty with executive functions, organizational skills, attention, distractibility, impulsivity, and anxiety (see Tr. pp. 109-10, 325-26, 441; Dist. Exs. 1 at p. 5; 7 at pp. 1-7; 8 at pp. 1-2, 15; 9 at pp. 1-9; 11 at p. 4; 12 at p. 2; Parent Exs. F at pp.

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<sup>1</sup> The hearing record describes Jump Start as a program targeting those students with "problems in one or more of the following academic areas: language processing, reading, writing, math, time management skills, and organizational skills" (Dist. Ex. 20 at p. 5).

1-2; I; J).<sup>2</sup> The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

## **Background**

According to the hearing record, the parents initially observed their son's academic delays while he attended a private nursery school (Tr. p. 440; Dist. Exs. 8 at p. 2; 9 at p. 1). At that time, subsequent to an evaluation, he received Early Intervention Program (EIP) services consisting of speech-language therapy and occupational therapy (OT) (Tr. pp. 440-41; Dist. Ex. 9 at p. 2). The student's anxiety and attention concerns were also addressed pharmacologically under the supervision of a child psychiatrist, and after responding well to such intervention, the student entered a public kindergarten, participating in the school's dual language program for gifted and talented students (Tr. pp. 323-24; Dist. Exs. 8 at p. 2; 9 at p. 2; 12 at p. 1).

At six years old, the student received a diagnosis of an ADHD (Tr. pp. 323-24; Dist. Ex. 9 at pp. 4, 7). For first grade, the student transferred to a small coeducational nonpublic school, where he remained through fifth grade (Tr. pp. 441-42; Dist. Exs. 8 at p. 2; 9 at p. 2). The hearing record establishes that the parents obtained a neuropsychological evaluation of the student in December 2004, which resulted in diagnoses of a developmental reading disorder and an expressive language disorder (see Dist. Ex. 8 at p. 4). According to the hearing record, the student participated in a "reading recovery program" at the nonpublic school and reportedly started to read, demonstrating good reading comprehension skills; was "very well adjusted socially, and had many friends" (see Dist. Ex. 9 at p. 2).

The student continued "to do well" during second grade, although the hearing record indicates that a June 2005 speech-language evaluation identified articulation delays as well as expressive and receptive language delays, prompting the evaluator to recommend speech-language therapy services (see Dist. Exs. 8 at p 4; 9 at p. 2).

In third grade, the student began to experience academic difficulties with math and homework completion, which were addressed by daily instruction from a private learning specialist (Dist. Exs. 8 at p. 2; 9 at p. 2). In February 2007, the student's private psychiatrist conducted a neuropsychological evaluation of the student, the results of which suggested that the student's overall cognitive abilities fell within the average range, that his academic abilities were commensurate with his cognitive abilities, and that he demonstrated significant difficulties in the areas of executive functions and attention (Dist. Ex. 8 at pp. 13-14).

The student reportedly continued to experience academic and social difficulties during fourth grade, and on June 16, 2008 he underwent a private diagnostic psychiatric evaluation (Dist. Ex. 9 at p. 1). In the evaluation report, the evaluators noted that in addition to continuing to work

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<sup>2</sup> I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I further note that the impartial hearing officer has been reminded of his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious pursuant to 8 NYCRR 200.5(j)(3)(xii)(c) in previous appeals (see Application of the Bd. of Educ., Appeal No. 09-057; Application of the Dep't of Educ., Appeal No. 08-062), and I again caution the impartial hearing officer to comply with State regulations.

with the learning specialist, the student began receiving private math tutoring outside of school, "struggled to complete multi-step homework assignments, and worked regularly with his mother on organizational skills and time management" (id. at p. 2). The parents believed that the student required "significant academic support" to complete assignments, and the student himself related "feeling depressed over the past year" due to his academic difficulties (id. at pp. 2-3). The psychiatric evaluation report noted that the student exhibited signs of depression including feelings of worthlessness and a "sad mood triggered by his academic difficulties," and that he also experienced "social difficulties" with his peers, teasing his classmates and becoming "very angry when he was teased back" (id. at p. 3).

Although the report advised that the student's "mood improved" after he received medication for his depression, "he continued to express feelings of failure academically" and exhibited difficulty interpreting social cues due to inattention rather than a lack of emotional reciprocity (Dist. Ex. 9 at pp. 3-4). The student acknowledged that he experienced several symptoms of anxiety, including restlessness, fatigue, difficulty concentrating, and muscle tension, and the report observed that the student experienced performance anxiety, including lack of engagement in schoolwork, when he feared failure (id. at p. 6). The evaluators opined that the student's worrying about his perceived poor performance in school compromised his motivation to complete his schoolwork, but noted that the student responded well to organizational skills training and was a "capable student when he fe[lt] secure and able to manage the tasks he must complete" (id.). The report advised that the student experienced social difficulties due to impulsive behavior, such as speaking without thinking and making inappropriate comments; that he continued to experience difficulties with attention and distractibility; and that he was prone to make careless mistakes (id. at p. 7). The evaluators posited that the student's "anxiety coupled with his language and attention difficulties ha[d] led him to retreat from schoolwork, and to feel demoralized about his academic capabilities" (id.).

The evaluators offered diagnoses of an ADHD, inattentive type, and an anxiety disorder, not otherwise specified (NOS), and recommended ongoing medication management to address these conditions; cognitive-behavioral therapy to address the student's anxiety and self-esteem and to allow him to feel in control of his learning environment; an alternative school placement offering the student academic support addressing the student's ADHD and anxiety; a structured learning environment offering the student tools to master organizational skills and work habits; and encouraging the student to engage in athletic extra-curricular activities, including instruction in organizational skills to prevent his inattention from interfering with athletic achievement (Dist. Ex. 9 at pp. 8-9).

On March 9, 2009, a district social worker updated the student's social history in preparation for his triennial reevaluation (Dist. Ex. 12). The parent reported to the social worker that she had been funding private speech-language therapy and tutoring for the student since first grade because he had not received the speech-language therapy services that were purportedly mandated in a prior individualized education program (IEP) (id. at p. 1). According to the parent, the student exhibited "unpredictable anxiety, tremendous[ly] poor self-esteem, and academic delays in math and writing skills," and experienced difficulties with organizational skills, articulation, work retrieval, self-expression, and receptive language (id.). She commented that her son attempted to compensate for his academic difficulties by "acting clownish in the classroom" which negatively affected his social life (id. at p. 2). The social history update confirmed that the

student received medication to address his anxiety and attention difficulties, and added that he had "many friends" and related well with peers (id.). The social worker reported that the parent sought additional academic support, speech-language therapy, and a psychoeducational evaluation of the student (id. at pp. 2-3). The updated social history also confirmed that the parent was provided with a procedural safeguards notice at the time of the update (id. at p. 3).

A psychoeducational evaluation of the student was conducted on March 26, 2009 (Dist. Ex. 11). According to the psychoeducational evaluation report, the parent related that her son was receiving outside counseling and that a psychiatrist managed his medications (id. at p. 1). The student's mother reported to the psychologist that the student exhibited sadness and anxiety in school, and that his attention difficulties led to behavioral concerns (id.). The student remarked that he liked school, especially his friends and teachers (id.). The evaluating psychologist confirmed that the student had received diagnoses of an attention deficit disorder (ADD), a generalized anxiety disorder, and a learning disorder, NOS (id.).

Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a full scale IQ of 97 (average), a verbal comprehension index of 93 (average), and a perceptual reasoning index of 100 (average) (Dist. Ex. 11 at p. 2; see Dist. Exs. 1 at p. 3; 4 at p. 1). The student's working memory index of 113 and processing speed index of 85 fell within the high average and low average ranges, respectively (Dist. Ex. 11 at p. 2; see Dist. Ex. 4 at p. 1). Administration of the Bender Motor Gestalt Test suggested that the student did not exhibit a severe deficit in graphomotor functioning (Dist. Ex. 11 at p. 3). The evaluating psychologist administered the Rorschach Inkblot Test and projective drawings to the student; the projective data suggested that the student demonstrated "considerable anxiety and emotional insecurity," prompting the evaluating psychologist to caution that the student would "need external support and guidance to be able to more adequately deal with perceived environmental stress" (id. at p. 4). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded standard scores of 111 in letter-word identification (7.5 grade level equivalent [GLE]), 98 in passage comprehension (5.1 GLE), 101 in reading fluency (6.0 GLE), 103 in spelling (6.2 GLE), 91 in calculation (4.5 GLE), 89 in math fluency (4.2 GLE), and 91 in applied problems (4.1 GLE) (id.). The student received his highest score in letter-word identification and computed single digit addition, subtraction and multiplication math problems (id.).<sup>3</sup>

On April 21, 2009, the district obtained a speech-language evaluation of the student (Dist. Ex. 10). The evaluating speech-language pathologist characterized the student as "well-related and cooperative," observing that he remained engaged and actively participated during the entire evaluation, maintained eye contact, took turns, and demonstrated "good seat behavior" throughout the testing (id. at pp. 1-2). The student's pragmatic language skills were assessed as average, insofar as he did not require prompts, cues or redirection by the evaluating speech-language

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<sup>3</sup> The hearing record contains an undated summary of WISC-IV test scores resulting from three different test administrations dated December 2004, February 2007, and the March 2009 administration discussed above (Dist. Ex. 18). In December 2004, administration of the WISC-IV yielded a full scale IQ of 99 (average), verbal comprehension index of 98 (average), perceptual reasoning index of 94 (average), and working memory index of 112 (high average) (id.). In February 2007, the student earned a full scale IQ of 92 (average), verbal comprehension index of 95 (average), perceptual reasoning index of 102 (average), working memory index of 80 (low average), and a processing speed index of 100 (average) (id.).

pathologist in order to elicit language (id. at p. 2). The student's hearing skills, oral motor skills, voice quality, and voice fluency were all determined to be within normal limits, as were his articulation skills, based upon the student's results on the Goldman Fristoe Test of Articulation-Second Edition (GFTA-2) (id.). The student's performance on the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) demonstrated that his overall abilities in the areas of language concepts, language content, and language usage fell within the average range relative to same age peers (id. at pp. 3-4). The evaluating speech-language pathologist opined that the student demonstrated "good" semantic and syntax skills and "average" receptive and expressive language skills relative to same age peers (id. at pp. 3-5). The speech-language pathologist declined to recommend speech-language therapy for the student at that time (id. at p. 6).

After completion of fifth grade, the student was not invited to return to the private school; according to the hearing record, his parents enrolled him in York Prep and its Jump Start program for sixth grade (2009-10) (Tr. pp. 239, 263, 442; see Parent Ex. F at p. 2). On March 22, 2010, the Committee on Special Education (CSE) requested that the parents obtain the student's educational information from York Prep and forward it to the CSE by April 23, 2010, in advance of the student's annual review (Dist. Ex. 13). On April 14, 2010, the parents executed a student enrollment contract reenrolling the student in York Prep and Jump Start for the 2010-11 school year (Parent Ex. G; see Tr. pp. 450-51, 468-70; see also Parent Ex. H at p. 1).

The CSE sent a second request letter to the parents on May 13, 2010 seeking the student's educational records from York Prep (Dist. Ex. 14). The hearing record contains an undated letter from the student's mother to the CSE acknowledging receipt of the district's March 22, 2010 request letter and stating that she would provide all relevant documents in her possession and that she would do her best to obtain any additional documents; the student's mother provided the district with her consent to contact York Prep "to obtain any further documentation that [the district] might need to conduct the annual review" (Dist. Ex. 15).<sup>4</sup>

On May 19, 2010, the district conducted a vocational assessment of the student (Dist. Ex. 6). The student advised the examiner that he worked best in the afternoon, learned best by listening, preferred to work alone, enjoyed soccer, and was interested in pursuing a career in soccer, science, or banking (id. at p. 1). He acknowledged that he "sometimes" asked for assistance with school work and "sometimes" organized his time to allow him to finish his work; advised that he enjoyed several classes including physical education, science, and drama; and considered homework "difficult" (id. at p. 2).

On June 1, 2010, a district social worker conducted a classroom observation of the student at York Prep during an English class comprised of 10 students (Dist. Ex. 5). The observer noted that the student sat at his desk in the front of the classroom as the class reviewed material for an upcoming final exam and continually turned around and played with small objects in his hands, prompting the teacher to repeatedly remind him to turn around and focus his attention (id.). The observation report indicated that the student called out frequently, played with a classmate seated next to him, and verbally maintained that he knew assigned vocabulary words as the teacher reviewed them (id.). The observer witnessed the teacher direct the student to take a walk to the

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<sup>4</sup> Although the parents' response is undated, it contains a handwritten notation stating "Sent to York Prep 5/13/10" (Dist. Ex. 15).

water fountain, and described him as "calmer" when he returned from this walk and able to complete the remainder of the class (*id.*). The observer noted that the teacher provided with the student with an additional copy of the classroom materials because the student lacked his own copy of the materials that had been provided to him several days earlier (*id.*). According to the observer, the classroom teacher informed her that the student was "extremely anxious" that day and typically did not require such frequent redirection, adding that he demonstrated a "great deal of progress academically" and responded well to positive reinforcement (*id.*).

On June 2, 2010, the student's Jump Start teacher at York Prep issued a teacher report summarizing the student's performance during the 2009-10 school year (Dist. Ex. 7). Academically, relative to reading, the Jump Start teacher acknowledged that the student demonstrated strength in sight word vocabulary and decoding, possessed average skills in reading fluency, and demonstrated a weakness in spelling (*id.* at p. 4; *see* Tr. p. 388). She identified his reading goals as increasing his spelling ability, annotating while reading, reviewing chapters, and writing extra notes/summaries of chapters (Dist. Ex. 7 at p. 4). Relative to writing, the Jump Start teacher identified the student's weaknesses in his use of commas, sentence completion, punctuation, and vocabulary (*id.*; *see* Tr. p. 388). His writing goals included developing grammar/syntax skills, strengthening self-editing skills, and increasing and varying vocabulary (Dist. Ex. 7 at p. 4). With regard to organization, she identified following directions, providing written detail, structure, and general organization as student deficits; corresponding goals included expanding details of written work, creating outlines to assist with focusing on select details, strengthening written language, and utilizing a pre-writing process (*id.* at p. 5; *see* Tr. p. 388). In math, although acknowledging that the student had "learning issues," she identified the student's strengths in solving word problems, estimating answers, and calculation skills including addition, subtraction and simple multiplication; noting also that the student was able to apply basic math concepts to solve novel problems (Tr. p. 388; Dist. Ex. 7 at p. 5).

Relative to communication, the Jump Start teacher opined that the student demonstrated weaknesses in the areas of distractibility, attention, anxiety, and communication with the teacher; and recommended goals for increasing attention and strengthening self-advocacy and social skills (Dist. Ex. 7 at p. 5). With regard to self-regulation and organization, she commented that the student was "incredibly disorganized and clearly ha[d] difficulty maintaining any order within his school materials" and needed constant reminders to organize his school materials (*id.* at p. 6; *see* Tr. p. 388). Goals in these areas included monitoring his organization and using his locker efficiently (Dist. Ex. 7 at p. 6). Teaching strategies implemented to address the student's needs included the use of graphic organizers, "webs," and outlines; various study skills/strategies; a writing process; reading for meaning and highlighting important ideas/details, as well as annotating text; rewording, rephrasing, and paraphrasing; and repetition (*id.*; *see* Tr. pp. 389-96, 402-12). The student's Jump Start teacher concluded that the program addressed the student's needs (Dist. Ex. 7 at p. 7; *see* Tr. pp. 413-14).

On June 9, 2010, the district sent a letter to the parents noting that an appointment letter for the student's upcoming CSE annual review meeting on June 16, 2010 was enclosed, and informing them that it was "imperative" for the student's teacher to participate at the review meeting and requesting them to arrange for the teacher to participate either in person or telephonically (Dist. Ex. 16).

On June 23, 2010, the CSE convened for the student's annual review meeting to develop his educational program for the 2010-11 school year (Dist. Exs. 1 at pp. 1-2; 4 at p. 1). In attendance were a district regular education teacher, special education teacher, and school psychologist; a parent advocate, and the student's mother (Dist. Exs. 1 at p. 2; 4 at p. 1). According to the hearing record, the June 2010 CSE discussed the student's needs, in light of the February 2007 neuropsychological evaluation, the May 2010 vocational assessment, the June 2010 district classroom observation, the June 2010 York Prep teacher report, the June 2008 diagnostic psychiatric evaluation, the April 2009 speech-language evaluation, the March 2009 psycho-educational evaluation, and the March 2009 social history update (Tr. p. 105; Dist. Exs. 5; 6; 7; 8; 9; 10; 11; 12). The June 2010 IEP reflected that academically, the student's "general level of intellectual-cognitive functioning was in the average range," with a full scale IQ score of 97, average verbal skills and perceptual reasoning abilities, average short-term auditory memory skills, and high average processing speed (Dist. Ex. 1 at p. 3). Relative to the student's social/emotional functioning, the IEP noted that the student "had periods of anxiety and [got] overwhelmed" (*id.* at p. 4). With respect to health and physical development, the June 2010 IEP acknowledged the student's ADHD diagnosis and anxiety (*id.* at p. 5). The resultant IEP included annual goals to address the student's needs in executive functions, reading comprehension, and math, as well as testing accommodations (*id.* at pp. 6-7, 10).

According to the June 2010 IEP, the CSE recommended continuing the student's classification as a student with an OHI and further recommended that the student be placed in a ten-month general education program with special education teacher support services (SETSS) (8:1) five times per week (Dist. Ex. 1 at p. 1). The IEP noted that the related service of "[c]ounseling was considered – however, more documentation would be needed to indicate that this service [was] needed in school" (Dist. Ex. 1 at p. 9 [emphasis in original]; see Dist. Ex. 4 at p. 2).<sup>5</sup> The June 2010 CSE also considered placing the student in a general education class without services and an integrated co-teaching (ICT) class (Dist. Ex. 1 at p. 9; see Tr. p. 121; Dist. Ex. 4 at p. 2).<sup>6</sup> The June 2010 IEP reflected that the parent was furnished with a copy of the IEP at the time of the review meeting (Dist. Ex. 1 at p. 2).

On August 18, 2010, the student's mother sent a letter to the CSE informing it that because she had not yet received a placement letter assigning her son to a school, she would be reenrolling him at York Prep for the 2010-11 school year (Parent Ex. D). She added that she did not believe that the district had offered her son an appropriate "program/placement" for the 2010-11 school year, and advised the district that she intended to seek tuition reimbursement (*id.*).

In a letter to the parents dated August 20, 2010, the district summarized the recommendations reflected in the June 2010 IEP and assigned the student to a specified district school (Dist. Ex. 2).

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<sup>5</sup> According to the hearing record, the student was already under "outside clinical care" for his anxiety at the time of the June 2010 CSE meeting (see Dist. Ex. 4).

<sup>6</sup> According to State regulations, "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

## **Due Process Complaint Notice**

On September 4, 2010, the parents filed a due process complaint notice alleging, among other things, that the June 2010 IEP was inappropriate because: (1) the annual goals did not reflect the student's educational, social, and emotional needs; (2) the annual goals were not developed at the June 2010 CSE meeting, thereby denying the parents input into the development of the student's IEP; (3) the annual goals contained no evaluative criteria, procedures, or schedules by which to measure progress; (4) the parent was not given a copy of the June 2010 IEP at the CSE meeting; (5) the June 2010 CSE predetermined the program recommendation; (6) the level of services recommended in the June 2010 IEP was inappropriate for the student; (7) the June 2010 CSE was improperly constituted; (8) the June 2010 CSE failed to recommend an appropriate program for the student in a timely fashion; (9) the parent's concerns about the recommended program were ignored by the June 2010 CSE, thereby depriving the parent of meaningful participation in the review; and (10) the June 2010 CSE failed to offer an appropriate placement to the student (Parent Ex. F at pp. 1-3). The parents further asserted that the student required a small school, a small class of students with needs similar to his, and staff specifically trained to work with students having his needs (*id.* at p. 4). They sought an order from an impartial hearing officer determining, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year; their unilateral placement of the student at York Prep together with the Jump Start program was appropriate; equitable considerations favored their claim for tuition reimbursement; and they were entitled to tuition reimbursement and transportation for the student's 2010-11 school year at York Prep (*id.* at pp. 4-5).

The district responded to the parents' due process complaint notice on September 14, 2010, countering that, among other things: (1) on August 20, 2010, the district issued an FNR to the parents recommending an assigned school that was "reasonably calculated to enable the student to obtain meaningful educational benefits;" (2) during the June 2010 CSE review meeting, the CSE discussed the student's needs, afforded the parents an opportunity to participate in the review, and discussed the IEP goals and program recommendation; (3) the June 2010 IEP contained annual academic goals; (4) and the June 2010 CSE consisted of the parent, a special education teacher, a regular education teacher, a school psychologist, and an educational advocate (Dist. Ex. 3).<sup>7</sup>

## **Impartial Hearing Officer Decision**

An impartial hearing convened on November 17, 2010 and concluded on February 14, 2011 after four days of proceedings. On March 17, 2011, the impartial hearing officer issued a decision in which he determined that the program recommended by the district in the June 2010 IEP was appropriate for the student for the 2010-11 school year, and consequently denied the parents' claim for tuition reimbursement (IHO Decision at p. 6). Specifically, the impartial hearing officer determined that the program recommended by the district was "in many ways, quite similar to that provided by the private school," but that the "pivotal difference between the two programs" was the size of the district's recommended general education class (*id.* at p. 3). With regard to that issue, he found that the size of the district's general education class did not deprive the student of a FAPE as the student was learning on grade level and "in a manner that [did] not manifest a

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<sup>7</sup> In its response, the district erroneously ascribed a date of "September 7, 2010" to the parents' due process complaint notice (compare, Dist. Ex. 3 at p. 1, with Parent Ex. F at p. 1).



critically severe level of either the attention deficit disorder or the anxiety" (*id.* at p. 5). The impartial hearing officer further determined that the district's "hypothesis" that the supports offered by the recommended SETSS teacher would be sufficient to allow the student to benefit from instruction, was "reasonable" (*id.* at p. 6). Therefore, he determined that the student's IEP and placement offered by the district was appropriate for the student.

Although he found that the district offered the student a FAPE, the impartial hearing officer also determined that the parents' unilateral placement was appropriate (IHO Decision at p. 5).<sup>8</sup>

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

The parents appeal the impartial hearing officer's decision, alleging that he erred in determining that the district offered the student a FAPE for the 2010-11 school year, because, among other things, the level of SETSS offered by district's recommended placement did not conform to the level recommended in the June 2010 IEP. More specifically, they contend that the IEP recommended that the student receive 5 periods of SETSS per week; however, according to the hearing record, the recommended district placement would have provided him with 10 periods of SETSS per week, which would have violated the mandate that the student be placed in the least restrictive environment (LRE). The parents also contend that the SETSS offered at the recommended district placement would have failed to conform with the 8:1 student-to-teacher ratio as recommended in the June 2010 IEP. Additionally, the parents allege numerous procedural and substantive defects in both the June 2010 CSE review meeting and resultant IEP, including, among other things: (1) that the June 2010 CSE lacked an additional parent member and a current teacher of the student from York Prep; (2) that the June 2010 CSE and resultant IEP failed to advise the parents whether the recommended SETSS would be push-in or pull-out, thereby impeding their opportunity to meaningfully participate in the development of the student's IEP; (3) that the June 2010 CSE failed use the student's then-current academic reports in determining the student's present levels of academic performance reflected on the IEP; (4) that the IEP failed to set forth appropriate annual goals; and (5) that the CSE failed to recommend appropriate related services to address the student's anxiety disorder. The parents also argue that the impartial hearing officer did not address any of the legal arguments raised in their posthearing brief and that he did not cite to the hearing record or any legal authority in his decision. The parents note that the impartial hearing officer "observed" that York Prep was appropriate for the student. The parents further contend that equitable considerations support their claim for tuition reimbursement. The parents seek an order from annulling the impartial hearing officer's decision insofar as he determined that the district offered the student a FAPE during the 2010-11 school year. They seek a further finding that equitable considerations support their request for tuition reimbursement for York Prep and Jump Start.

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<sup>8</sup> The impartial hearing officer based his decision that York Prep was appropriate in part on a prior impartial hearing officer decision addressing a prior school year which had found York Prep to be appropriate and which the district had chosen not to appeal (IHO Decision at p. 5). I remind the impartial hearing officer that each school year is to be analyzed separately when determining whether a FAPE was provided to the student (see 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see e.g., Application of the Bd. of Educ., Appeal No. 11-005) and that he has been cautioned regarding this same issue in at least one prior case (see Application of the Dep't of Educ., Appeal No. 11-037).

The district answers, countering that, among other things: (1) it offered the student a FAPE for the 2010-11 school year, insofar as the hearing record does not establish that the student would have definitively received 10 weekly sessions of SETSS, only that there was the "potential" for him to receive that many; (2) the parents' allegation that the June 2010 CSE was improperly composed is without merit; (3) the parents' allegation that the June 2010 CSE failed to consider the student's then-current academic reports in determining the student's present levels of performance is not adequately supported by the hearing record; (4) the goals contained in the June 2010 IEP addressed the student's ADHD and anxiety disorder; (5) State regulations do not require the district to describe the specific nature of the recommended SETSS that a placement may provide, and even if the district was so required, the parents failed to raise this argument below; and (6) the parents' ultimately rejected the district's offer and their arguments regarding the implementation of SETSS at the assigned school and the appropriateness of sizes of the assigned school/classroom are speculative and without merit. The district further argues that the parents failed to demonstrate that York Prep was an appropriate placement for the student for the 2010-11 school year and the equities do not support an award of tuition reimbursement. The district seeks an order upholding the impartial hearing officer's decision insofar as it found that the district offered the student a FAPE for the 2010-11 school year.

### **Applicable Standards**

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; 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 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]).

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).

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]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **Discussion**

### **Procedural Matters**

#### **Impartial Hearing Officer's Decision**

Initially, it should be noted that although it appears that the impartial hearing officer derived his factual findings from the exhibits and testimony in the hearing record, the impartial hearing officer failed to provide any references to the evidence in the hearing record to support the factual determinations in his decision as required by State Regulations, despite being reminded of his obligation to do so on multiple prior occasions (see IHO Decision at pp. 1-6; see also Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 08-064; Application of the Dep't of Educ., Appeal No. 08-062; Application of a Student with a Disability, Appeal No. 08-043). State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). It also appears that the impartial hearing officer simply ignored many of the issues raised by the parents in their due process complaint notice. I find that the impartial hearing officer failed to "render and write [a decision] in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). The impartial hearing officer is strongly cautioned to comply with State regulations by addressing the issues set forth in a party's due process complaint notice and citing to relevant facts in the hearing record (see Application of a Student with a Disability, Appeal No. 08-028).

#### **Impartial Hearing – Scope**

Before addressing the merits of this case, I must address a procedural matter. The parents allege for the first time in the petition on appeal that the June 2010 CSE failed to advise them as to the nature of the recommended SETSS (whether they were push-in or pull-out), and that the CSE used the student's prior year (fifth grade) academic reports in determining the student's present levels of performance on the June 2010 IEP. State regulations provide that 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]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the 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]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Here, I find that the hearing record demonstrates that the parents failed to assert in the due process complaint notice any claim relating to the district's failures to specify the

nature of the recommended SETSS or to consider the student's sixth grade academic reports in determining his present levels of performance on the June 2010 IEP (see Parent Ex. F).<sup>9, 10</sup> Moreover, the hearing record does not indicate that the parents amended their due process complaint notice or that the district agreed to expand the scope of the impartial hearing to include these issues. Accordingly, these issues raised for the first time in the parents' petition must be dismissed.

### **Composition of the June 2010 CSE**

Turning to the first prong of the Burlington/Carter test, I must determine whether the district complied with the procedural protections of the IDEA (see Cerra, 427 F.3d at 192).<sup>11</sup> The parents argue that the June 2010 CSE was not properly composed because it did not include the participation of an additional parent member or a representative from York Prep. The district argues that since the CSE meeting did not involve the student's initial placement in a special class but was an annual review, an additional parent member was therefore not required. Further, the district asserts that the lack of an additional parent member at the June 2010 CSE meeting did not impede the parents' opportunity to participate in the decision-making process. Regarding the lack of a teacher from York Prep, the district contends that it made "significant efforts" to secure the attendance of such a teacher, and that the absence of a representative from York Prep did not

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<sup>9</sup> Even if the parents had raised this issue below, I do not find support in the hearing record for the parents' argument that the district's failure to specify whether the recommended SETSS were push-in or pull-out would have deprived the student of educational benefits or rose to the level of a deprivation of FAPE. The parents do not cite to any authority to support their contention that the district was required to specify the nature of the recommended SETSS on the June 2010 IEP, nor does it explain how the lack of this information compromised the parents' opportunity to meaningfully participate in the formulation of their son's IEP. However, I note that a January 2010 guidance document from the State Education Department entitled "New York State Model Forms: Student Information Summary Form and Individualized Education Program (IEP)" provides a model IEP form, which requires a school district to specify the particular type of related service, service delivery recommendations, frequency, duration, location, and projected beginning service date(s). This model form is required to be used by all local and State educational agencies for all IEPs developed for implementation during the 2011-12 school year and thereafter, pursuant to 8 NYCRR 200.4(d)(2). A copy of this document and the relevant form are available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/home.html>.

<sup>10</sup> Even if the parents had raised this issue below, I do not find support in the hearing record for their argument that the district failed to consider the student's present levels of performance in the development of the June 2010 IEP. The evidence contained in the hearing record demonstrates that the June 2010 CSE considered the February 2007 neuropsychological evaluation, June 16, 2008 diagnostic psychiatric evaluation, April 21, 2009 speech-language evaluation, March 26, 2009 psychoeducational evaluation, March 9, 2009 social history update, May 19, 2010 vocational assessment, June 1, 2010 classroom observation, and June 2, 2010 York Prep teacher report in developing the recommended program (Tr. pp. 105, 159-60; Dist. Ex. 4 at p. 2; see Dist. Exs. 5; 6; 7; 8; 9; 10; 11; 12). The June 2010 CSE did not have the student's academic report cards for his sixth grade year (2009-10) (Tr. pp. 162-65). However, based upon a review of the documents the CSE considered, I conclude that the June 2010 IEP accurately reflected the student's present levels of performance as described in the aforementioned evaluative data (see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 07-120; Application of the Bd. of Educ., Appeal No. 04-031).

<sup>11</sup> I note that the impartial hearing officer's decision did not address any of the procedural allegations regarding the June 2010 CSE meeting or the resultant IEP that were set forth in parents' the due process complaint notice (compare, Parent Ex. F at p. 3, with IHO Decision at pp. 3-6).

significantly impede the parents' ability to meaningfully participate in the development of the student's IEP or deprive the student of a FAPE.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.321), New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In the case at bar, it is uncontroverted by the parties that the parents did not waive the participation of an additional parent member at the June 2010 CSE review meeting (Tr. pp. 231-32). Although the hearing record characterized the meeting as a "CSE Review" meeting (Dist. Exs. 1 at pp. 1-2; 4 at p. 1), the evidence contained in the hearing record establishes that the student was not being considered for initial placement in special class, a school primarily serving students with disabilities, or a school outside of the student's district. Therefore, under State regulations, the June 2010 CSE could have permissibly proceeded as a CSE subcommittee, and an additional parent member would not have been a required participant (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]; see Dist. Exs. 1 at pp. 1-2, 8-9; 4).<sup>12</sup>

With regard to the absence of a representative from York Prep at the June 2010 CSE meeting, the district contacted the parents on June 9, 2010, two weeks prior to the June 23, 2010 CSE meeting, informed them that it was "imperative" for the student's teacher to participate in the review meeting, and requested that they arrange for the teacher to participate either in person or telephonically (Dist. Ex. 16). According to the hearing record, York Prep was closed on the date of the CSE meeting, and no representative of the school participated (Tr. pp. 157-58; Dist. Ex. 4

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<sup>12</sup> As discussed further below, the absence of an additional parent member did not (a) impede the student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) 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]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek., 471 F. Supp. 2d 415).

at p. 2). However, neither the student's mother nor the educational advocate requested at the CSE meeting that the meeting be adjourned in order to secure the appearance of a representative from York Prep. (Tr. pp. 157-58). Furthermore, as previously discussed, a review of the evidence contained in the hearing record demonstrates that the totality of evaluative data considered by the June 2010 CSE, including the February 2007 neuropsychological evaluation, June 16, 2008 diagnostic psychiatric evaluation, April 21, 2009 speech-language evaluation, March 26, 2009 psychoeducational evaluation, March 9, 2009 social history update, May 19, 2010 vocational assessment, June 1, 2010 classroom observation, and June 2, 2010 York Prep teacher report, afforded it sufficient evaluative information to proceed with the student's review meeting, notwithstanding the absence of a representative from York Prep (Tr. pp. 105, 121, 124, 174; Dist. Exs. 1 at pp. 3-5; 4 at p. 2; 5; 6; 7; 8; 9; 10; 11; 12; see L.K. and A.K. v. Dep't of Educ., 2011 WL 127063, at \*7 [E.D.N.Y. Jan. 13, 2011]; Connor v. Dep't of Educ., 2009 WL 3335760, at \*5 [S.D.N.Y. Oct. 13, 2009]).

Moreover, the hearing record does not support the parents' argument that the absence of an additional parent member and a representative from York Prep deprived the student of a FAPE for the 2010-11 school year. The evidence contained in the hearing record demonstrates that the student's mother actively participated in the review meeting, discussing the student's strengths and weaknesses with the other CSE members, stressing her son's difficulties with anxiety and attention, and assisting the CSE in the development of the June 2010 IEP's goals (Tr. pp. 104, 110, 118; Dist. Exs. 1 at pp. 4-5; 4 at p. 2). In view of the foregoing, even if an additional parent member had been a required participant under the State regulations, I do not find that the evidence contained in the hearing record supports the parents' contention that the absence of such a participant impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; see also E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419). Likewise, the absence of a representative from York Prep at the June 2010 CSE meeting did not deprive the student of a FAPE for the reasons discussed above, most notably, that the CSE reviewed a June 2, 2010 York Prep teacher report at the meeting and that a district special education and regular education teacher participated at the CSE meeting (A.H., 2010 WL 3242234, at \*2).

Upon review, and as more fully described below, I find that the hearing record reflects that the June 2010 IEP accurately reflected the student's needs, included appropriate annual goals to address the student's deficits, and that the June 2010 CSE developed an appropriate placement for the student with appropriate related services in the LRE for the 2010-11 school year.

## **June 2010 IEP**

### **Annual Goals**

In the petition, the parents contend that the annual goals contained in the June 2010 IEP were inappropriate in that they failed to address the student's needs relative to his diagnoses of an ADHD and a generalized anxiety disorder. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability and to enable the student to be involved in and make progress in the

general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The June 2010 IEP contained five annual goals, two addressing executive functions, one addressing reading comprehension, and two addressing math (Dist. Ex. 1 at pp. 6-7). Notes from the CSE review contained in the hearing record established that the student's mother actively participated in the development of the annual goals, and that the school psychologist explained during the impartial hearing that the parent and the educational advocate assisted in the development of the student's annual goals, one of which - a goal relating to math calculation - was specifically developed to accommodate the parent's concerns (Tr. pp. 104, 118-19; Dist Exs. 1 at p. 7; 4 at p. 2). The school psychologist acknowledged that the June 2010 CSE recognized the student's ADHD diagnosis and incorporated methods into the annual goals to address the student's ADHD-related needs, such as use of graphic organizers, outlines, editing checklists, and "webs" (Tr. pp. 109, 116-18; Dist. Ex. 1 at pp. 6-7). The school psychologist further testified that the student's "main deficit" in the area of organizational skills was addressed by the annuals goals related to written expression and reading comprehension that integrated organizational techniques contained in the June 2010 IEP (Tr. p. 109, 116-18; Dist. Ex. 1 at pp. 3, 6-7).

With regard to the student's generalized anxiety disorder, the school psychologist testified that the evaluative reports reviewed by the June 2010 CSE did not demonstrate the need for an annual goal related to anxiety (Tr. pp. 169-72). The June 2, 2010 York Prep teacher report did not reflect anxiety as an emotional or health factor negatively affecting the student's educational performance (Dist. Ex. 7 at p. 6). However, the York Prep teacher report did suggest that the student's anxiety negatively affected his ability to maintain his attention, and consequently, listed a goal of increasing the student's focus during the school day (id. at p. 5). Although as indicated above, the June 2010 IEP lacked a goal specifically addressing the student's attention deficit caused by his anxiety (see Dist. Ex. 1 at pp. 6-7), the school psychiatrist clarified that the June 2010 CSE addressed this need through program modifications and accommodations set forth on the IEP; including redirection and refocusing, preferential seating, reading and rereading of directions, and a separate location for tests (Tr. pp. 109-10, 112-13, 146, 173-74; Dist. Ex. 1 at pp. 3-4, 10). The school psychologist also explained the lack of any social/emotional goals on the June 2010 IEP by citing the lack of references to any social/emotional functioning deficits, behavioral or emotional problems in either the June 2, 2010 York Prep teacher report or in the other evaluative reports reviewed by the June 2010 CSE (Tr. pp. 171-72; see Dist. Exs. 5; 6; 7; 8; 9; 10; 11; 12).

In consideration of the foregoing, I find that: with the exception of a lack of a goal specifically addressing the student's attention deficit, which was at least in part addressed through the aforementioned program modifications and accommodations contained in the IEP, the annual goals contained in the June 2010 IEP were consistent with the student's identified needs in the areas of organization and related academic needs as reflected in the February 2007 neuropsychological evaluation, June 16, 2008 diagnostic psychiatric evaluation, April 21, 2009 speech-language evaluation, March 26, 2009 psychoeducational evaluation, March 9, 2009 social history update, May 19, 2010 vocational assessment, June 1, 2010 classroom observation, and June 2, 2010 York Prep teacher report (see Dist. Exs. 5; 6; 7; 8; 9; 10; 11; 12). I further find that the



goals were designed to meet the student's needs resulting from his disability and to enable him to be involved and make progress in the general education curriculum (O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]).

### **General Education with SETSS**

The June 2010 CSE continued the student's classification as a student with an OHI and recommended a 10-month general education program with SETSS (8:1) five times per week; program modifications consisting of use of graphic organizers, "webs," and outlines, use of a highlighter to mark details, monitoring of homework daily, repetition of directions as needed, preferential seating, and redirection and refocusing; and testing accommodations consisting of extended time (1.5), separate location, use of a calculator, and directions read and reread (Dist. Exs. 1 at pp. 1, 3-4, 8-10; 4).

The school psychologist who participated in the June 2010 CSE meeting advised that the CSE developed the student's IEP based on a review of the student's March 2009 testing results that indicated average overall cognitive and academic abilities (Tr. pp. 108-09). She further opined that a general education class with SETSS would address the student's organizational and attentional needs (Tr. pp. 111-12). She explained that the CSE considered two alternatives to general education with SETSS, namely a general education placement without special education services for the student and an ICT class (Tr. pp. 120-21, 126-27; Dist. Exs. 1 at p. 9; 4 at p. 2). She further noted that the June 2010 CSE concurred that the student required SETSS to address his deficits in the areas of organization and planning (Tr. pp. 148-49).

Testimony elicited from both the English language arts (ELA) and math special education teachers, both of whom provided SETSS at the assigned school, supports the district's recommended placement in general education with SETSS. The SETSS ELA teacher testified that within the assigned school, seventh grade students received instruction in ELA, math, science, social studies, and art (Tr. p. 204). Two special education teachers provided SETSS at the assigned school, in ELA and math, both of whom collaborated to discuss the individual needs of each student (Tr. pp. 185-86, 202-03). She further testified that the general education placement assessed students through the use of portfolios, class participation, tests, quizzes, and administration of a formal reading assessment at the beginning of the school year (Tr. pp. 192, 194). The SETSS ELA teacher testified that she and the SETSS math teacher provided students with opportunities for independent reading, conferencing, and direct questions (Tr. pp. 194-95), and that both provided additional support to students during lunch and after school on an as needed basis (Tr. p. 188). She advised that a system of verbal and nonverbal cues to assist the student to remain task-focused would have addressed his attention deficit (Tr. p. 191).

The SETSS math teacher explained that the student's annual goals on his June 2010 IEP would have been addressed through verbal and visual supports including white boards, a SMART board, and use of modeling (Tr. pp. 221-22). She advised that she provided additional instruction to students in organizational skills within a small group setting (Tr. p. 220). Both teachers concurred that the student's organizational and attention needs as described on the June 2010 IEP could have been addressed through the monitoring of homework, use of graphic organizers, highlighting, daily planners, "webs," outlines, redirection and refocusing, preferential seating, and repetition of directions (Tr. pp. 188-89, 195-96, 216-19, 223). Both the SETSS ELA and math

teachers maintained that the recommended general education class with SETSS was an appropriate program for the student, because the student's level of functioning was aligned with the instructional content of the assigned class and because the annual goals enumerated in the June 2010 IEP could have been addressed within the general education setting (Tr. pp. 196-97, 223-24; see E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at \*9 [S.D.N.Y. Mar. 14, 2011] [noting that it was appropriate to consider testimony regarding the nature of a proposed educational placement set forth in the IEP and citing authorities that disapproved of reliance on additional evidence of programs or services that were not mentioned in the IEP]).

Furthermore, the school psychologist stated that a general education class placement with SETSS would have assisted the student in developing strategies to maintain his attention independently and "develop his own way" (Tr. pp. 177-78). I also note that the student's psychopharmacologist conceded on cross examination that if the student was placed in a class of 30 students and received appropriate additional support from the classroom teacher and, depending on the topic and distractions, an additional educator in the classroom who was aware of his particular strengths and weaknesses, the student could progress academically and learn successfully (Tr. pp. 346-51).

The hearing record further demonstrates that in the recommended general education placement with SETSS, the student would have had exposure to nondisabled peers throughout the school day (Dist. Ex. 1 at p. 10). The hearing record establishes the district's efforts to provide the student with a balanced educational program that afforded him maximum exposure to his nondisabled peers while maintaining an adequate level of individual support for his needs, (see Tr. pp. 120-21, 167, 175; Dist. Exs. 1 at p. 9; 3 at p. 3; 4 at p. 2). Given the cumulative evidence contained in the hearing record, I am satisfied that the recommended general education class with SETSS recommended in the June 2010 IEP was an appropriate educational placement for the student in the LRE.

### **Related Services**

The parents argue that the June 2010 IEP was deficient because it failed to recommend a related service to address the student's generalized anxiety disorder. The hearing record reflects that at the time of the June 2010 annual review, the student's mother discussed with the CSE the issue of counseling services to address the student's anxiety (Tr. pp. 461-62; Dist. Exs. 1 at p. 9; 4 at p. 2).<sup>13</sup> The district's school psychologist, who attended the June 2010 CSE meeting, acknowledged that counseling services were discussed during the meeting, but were not ultimately recommended because the evaluative reports available to the June 2010 CSE in general, and the June 2, 2010 York Prep teacher report in particular, lacked indication that the student either required counseling services in order to address anxiety or demonstrated significant needs related to anxiety that affected him academically (Tr. pp. 111, 170; see Dist. Exs. 5; 6; 7 at p. 6; 8; 9; 10; 11; 12). She added that none of the clinical evaluative reports considered by the June 2010 CSE referenced any behavioral concerns in the classroom setting or during the testing process (Tr. pp. 112, 122-23; see Dist. Exs. 5; 6; 7 at p. 6; 8; 9; 10; 11; 12). The school psychologist further testified that there needed to "be a reason to give counseling," and "[y]ou have to have some kind

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<sup>13</sup> The parent advised that the student was receiving private counseling services at parental expense at the time of the impartial hearing, and that the student was not receiving counseling services at York Prep (Tr. pp. 444, 458).

of emotional or behavior issues for giving counseling;" because the student did not "present as having emotional problems that he would need counseling for, ... we did not give counseling" (Tr. pp. 112, 121-23, 170-71). The hearing record indicates that during the review meeting, the June 2010 CSE requested that the parent obtain "documentation from either [the student's] outside clinical providers or his outside private therapist," suggesting that the CSE would have been willing to revisit the counseling issue at a later date; however, there is no indication in the hearing record that either the parent or the district pursued this issue further (Dist. Ex. 4 at p. 2; see Dist. Ex. 1 at p. 9).

A review of the evaluative data available to the June 2010 CSE supports the school psychologist's testimony; particularly the June 2, 2010 York Prep teacher report, which indicated "N/A" under the student's social/emotional functioning, suggesting that this was not an area of concern for the student for which additional support was required (W.T. v. Bd. of Educ. of Sch. Dist. of New York City, 716 F.Supp.2d 270, 292 [S.D.N.Y. 2010]), and the recommendations contained in the June 16, 2008 diagnostic psychiatric evaluation, which did not list counseling services among its recommendations (Dist. Exs. 7 at p. 6; 9 at pp. 8-9; see Dist. Exs. 5; 6; 8; 10; 11; 12). I also note that although the student's psychopharmacologist,<sup>14</sup> who testified on behalf of the parents during the impartial hearing, characterized the student's anxiety as "unusually extreme," he made no recommendation for the student to receive counseling services as part of his educational program (Tr. pp. 323-24, 327-31, 339-46, 362). Based upon the foregoing, I find that the evidence in the hearing record does not support the parents' argument that the June 2010 IEP was deficient because of a lack of related services to address the student's generalized anxiety disorder.

### **Assigned School**

#### **SETSS Implementation**

The parents maintain, the district deprived the student of a FAPE for the 2010-11 school year because the implementation of SETSS at the assigned school did not conform to the level recommended in the student's June 2010 IEP (and violated the mandate that the student be placed in the LRE) (see 34 C.F.R. § 300.550[b]; 8 NYCRR 200.6[a][1]), and the SETSS services did not match the 8:1 student-to-teacher ratio recommended in the June 2010 IEP.

I note that the district is correct in its argument that the parents rejected the public school option and instead unilaterally placed the student in a private school. The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at

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<sup>14</sup> During the impartial hearing, the student's psychopharmacologist clarified that although he is a psychiatrist and familiar with the student's diagnoses of an ADHD, anxiety, and a learning disability, he was not the student's psychotherapist, and stated that he had been prescribing medications for the student "at least since [20]07" (Tr. pp. 322-26). The parents did not produce any other medical professionals who treated their son as witnesses during the impartial hearing.

\*11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). In this case, a meaningful analysis of the parents' claim with regard to implementation of the recommended SETSS at the assigned school would require me to determine what might have happened had the district been required to implement the student's June 2010 IEP, which is in part speculative because in August 2010 it became clear that the parents would not accept the services recommended by the district in the June 2010 IEP and that they intended to enroll the student at York Prep.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the general education placement with SETSS at the assigned school was designed to provide the student with a FAPE. The June 2010 IEP recommended five periods of SETSS per week, but did not identify whether those periods would be push-in or pull-out (Dist. Exs. 1 at pp. 1, 8-9; 4; see Tr. pp. 146-50, 152-54). The school psychologist testified that the SETSS teachers and principals at the assigned school had "great leeway" in the provision of SETSS to students, and, if necessary, the SETSS teachers and the CSE could amend the student's IEP as needed based upon their assessment of the student's individual needs (Tr. pp. 149-50). She further testified that whether the student received SETSS in a push-in or pull-out model was largely dependent on his individual learning style (Tr. p. 154).

Both the SETSS ELA and math teachers also explained that SETSS at the assigned school were both flexible and structured, and could be provided on either a push-in or pull-out basis, depending on a student's individual needs and learning style (see Tr. pp. 184-85, 187-88, 212-213, 227). The SETSS ELA teacher acknowledged that although the student was scheduled to receive five periods of SETSS per week pursuant to the June 2010 IEP, because she was physically present in the ELA classroom five times per week, and the SETSS math teacher was also present in the classroom five periods per week, "each student technically [was] getting ten periods of support," adding "if he needs help I will help him anytime that I'm in the classroom" (Tr. pp. 187-88, 206-07). She also advised that "if a student needs extra help at all, we're always available during lunch and after school, so that's an accommodation that we make for all of our students" (Tr. p. 188).

The SETSS math teacher explained that she provided SETSS on both push-in and pull-out bases, "but mostly push in," stating that she pulled students out on average two or three times per week, rarely for the entire class period, and never in groups of more than seven students (Tr. pp. 212-13, 225-27). The SETSS math teacher testified that during a pull-out session, she reviewed the class work missed by the students to provide continuity with the regular classroom instruction (Tr. pp. 225-227). Although initially advising that she would have "split his five periods a week between math and ELA where [the student] most needed the services," she too acknowledged the possibility that the student could have received up to ten sessions of SETSS per week between ELA and math (Tr. pp. 213-16).

Although the evidence contained in the hearing record suggests that there was a possibility that the student could have received additional sessions of SETSS beyond the five periods

recommended in the June 2010 IEP, up to a maximum of ten per week, I decline to find that the evidence supports the parents' argument that he definitively would have received them, that any additional SETSS sessions the student may have received would have deprived the student of a FAPE or violated the mandate that he be educated in the LRE (K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*3 [2d Cir 2010] [holding that the district satisfied the LRE it provided a mix of restricted and unrestricted elements]), or that when the student received pull-out SETSS, the size of the group would have exceeded the mandates set forth in State regulations (see 8 NYCRR 200.6[f][5]) or the 8:1 student-teacher ratio identified on the June 2010 IEP. I find that the hearing record, in its entirety, does not support the conclusion that, had the student attended a general education program with SETSS at the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

### **Size of the Assigned School and Classroom**

The parents also contend that the size of the general education classes at the assigned school as well as the size of the assigned school were not appropriate for the student, and would have caused him to regress relative to his distractibility. As noted previously, this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the program offered by the district. Although the parents may have preferred a smaller general education setting for the student similar to his York Prep setting, I find that the hearing record does not support that the student needed a smaller setting to enable the student to receive educational benefits.

According to the hearing record, there were approximately 250 total students in the assigned school spanning grades six through eight, and approximately 29 students in each of the seventh grade core academic classes (Tr. pp. 199, 204). The SETSS ELA teacher advised that there were 29 students in the assigned ELA class, 12 of whom had IEPs (Tr. p. 196). According to the SETSS math teacher, 27 students comprised the assigned math class, 8 of whom had IEPs (Tr. pp. 219, 226).

Although the parents argue that according to the student's psychiatrist, the size of the assigned school and general education classes would have been overwhelming to the student, as noted previously, the hearing record reflects that the psychiatrist further opined that if the student received appropriate additional support from the classroom teacher and an additional educator in the classroom who was aware of his particular strengths and weaknesses, the student could progress (Tr. pp. 335, 346-51), and additional support of a special education teacher in the general education environment is what the district proposed on the student's IEP. Moreover, I note that the student had been a member of gymnastics and travel soccer teams, further indicating he is able to function in large group settings (Dist. Ex. 12 at p. 2). In view of the forgoing, I find the parents' concerns regarding the size of the assigned school and general education classes, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ.,

2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

## **Conclusion**

In summary, I find that any procedural errors asserted by the parents were either not supported by the hearing record or given the substantive propriety of the June 2010 IEP, did not rise to a level where relief under the IDEA is appropriate (see Grim, 346 F.3d at 381). Moreover, there is no showing that any procedural error impeded the parent from meaningfully participating in the formulation of the student's IEP (see Cerra, 427 F.3d at 193). I also conclude that the CSE's recommendation of a general education classroom with SETSS was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program was consistent with LRE requirements (see 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]). Consequently, I decline to modify the impartial hearing officer's decision. Having determined that the district offered the student a FAPE for the 2010-11 school year, I need not reach the issue of whether York Prep was appropriate for the student or whether equitable considerations support the parents' claim; thus, the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038). Accordingly, I will dismiss the petition.

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

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
June 20, 2011

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**