



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-154

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:

Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Richard A. Liese, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 the Winston Preparatory School (Winston Prep) for the 2010-11 school year. Respondent (the district) cross-appeals from the impartial hearing officer's interim decision to the extent to which it awarded pendency for the period prior to the filing of the parents' due process complaint notice. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time the impartial hearing convened in May 2011, the student was attending twelfth grade at Winston Prep (Tr. pp. 308, 311).¹ Winston Prep is a nonpublic school that 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 and related services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

¹ I note that the hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits are cited in instances where both a Parent and a District exhibit are identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

Background

Formal standardized testing indicates that the student's cognitive abilities are in the average range of functioning and that his academic achievement is in the average range (Parent Ex. E at pp. 2, 6, 8, 12, 14-15). The student has received diagnoses of an anxiety disorder not otherwise specified, a learning disorder not otherwise specified, and a "nonverbal learning disorder" (NVLD) (*id.* at pp. 8-9). Based on teacher report, at the end of eleventh grade, the student demonstrated "on grade" level skills in decoding, reading comprehension, and writing skills; math computation and problem solving skills at the tenth and eighth grade levels, respectively; and listening comprehension skills at the thirteenth grade level (Dist. Ex. 8 at p. 3). The student has difficulty in the area of executive functioning including organizing his time, planning and prioritizing his class work, and does not participate readily in class (Tr. pp. 113, 291, 294, 296; Parent Ex. E at pp. 3-4). The student also exhibits difficulty with social pragmatics and interaction with peers, including difficulty initiating and engaging in conversation, maintaining eye contact and using appropriate body language (Dist. Ex. 8 at pp. 3, 5).

On January 4 and 11, 2008, the student underwent an evaluation by a child clinical psychologist and the referring physician (Parent Ex. E at pp. 1, 11).² The resultant developmental neuropsychiatric evaluation report reflected that the student's behavior during testing was extremely cooperative, and that the student completed all tasks presented, put forth good effort, and was very persistent on challenging items (*id.* at p. 2). The evaluation report reflected that the student was administered a battery of tests, which revealed that the student's full scale IQ of 99 was in the average range of functioning; his academic achievement was in the average range; his executive functioning abilities relating to his ability to solve novel concepts, reason, and use inductive logic fell in the low average to average range; and his performance on selected neuropsychological subtests reflected abilities ranging from borderline to high average functioning (*id.* at pp. 2, 3, 6, 8, 12-15). The student's adaptive skills were reported to range from low to moderately low based on responses provided by his mother (*id.* at p. 15). The student's visual-motor integration and visual perception scores were in the low average range and his motor coordination performance fell in the extremely low range (*id.* at pp. 4, 13). In the mental status portion of the evaluation report, the evaluators indicated that the student reported that he could feel very anxious at times, especially when required to perform in front of others, and that for the majority of time, his mood was good although he felt "very bored" in some classes, particularly those where the teacher lectured rather than interacted with the students (*id.* at p. 6). The evaluators noted that overall, the student was extremely cooperative during the interview, but that he was wary about discussing his feelings and emotions beyond his frustration with his current school (*id.* at p. 7). The evaluation report included, among other things, recommendations for a small academic environment focusing on frequent positive reinforcement and reduction of anxiety, individual therapy and medication consultation, cognitive behavior therapy, parent counseling and

² The January 2008 developmental neuropsychiatric evaluation report indicated that the referring physician who participated in the administration of the student's evaluation was also a clinical professor of psychiatry and had followed the student since March 2007 (Parent Ex. E at pp. 1, 11).

family therapy, medical/neurological follow-up, and educational recommendations related to the student's NVLD (id. at pp. 9-11).

In March 2008, the student's parents requested an evaluation by the Committee on Special Education (CSE) due to academic and behavioral concerns at the student's then-current nonpublic school (Parent Ex. F at p. 1). A district psychologist conducted an observation and clinical interview of the student on March 12, 2008 and reviewed the January 2008 private developmental neuropsychiatric evaluation (id.).³ On March 18, 2008, the district psychologist conducted projective testing to obtain insight into the student's social-emotional functioning (id.). The resulting psychological screening report revealed, among other things, that the student was "highly anxious and depressed" and that he carried "deep feelings of helplessness and inadequacy" (id. at p. 3). The psychologist indicated that the student lacked insight into his many areas of strength and adequacy, the reasons behind his inappropriate behaviors in school, and concluded that his feelings were impacting both his academic and social/emotional functioning at school (id.). She recommended that the student continue his current regimen of counseling and medication management by his physician (id.).

The hearing record reflects that the student attended Winston Prep for tenth grade during the 2008-09 school year (Tr. p. 356; Dist. Ex. 4 at pp. 1; 7). Standardized testing completed in the spring of that school year reflected that the student achieved overall academic performance in the high average range, with somewhat lower scores in the low average range in math reasoning (Dist. Ex. 2).

On July 21, 2009, the CSE convened to develop an individualized education program (IEP) for the student for the 2009-10 (eleventh grade) school year (Parent Ex. G at p. 1). The resultant IEP recommended that the student attend a collaborative team teaching (CTT) class with a 12:1 student-to-teacher ratio and related services of individual and group counseling once each per week (id. at pp. 1, 13).

The hearing record reflects that the student continued to attend Winston Prep for the 2009-10 school year (Dist. Exs. 3; 4; 5). During the fall 2009 semester, the student earned grades ranging from B- to A+ (Dist. Ex. 7). In a fall 2009 progress report, the student's "focus teacher" noted that the student continued to be motivated to succeed academically and that his strengths were in concrete understanding of text, fund of knowledge, and in the content of his writing (Dist. Ex. 4 at p. 1).⁴ The focus teacher also noted that the student's primary area of weakness was his pragmatic language skills; specifically his difficulty communicating his ideas to others, using appropriate eye contact and body language, and sustaining his attention during conversation and various tasks (id.).

³ While the observation and clinical interview resulted in a written document that reportedly included a list of the student's inappropriate behaviors and the student's perception of those behaviors, that document is not a part of the hearing record (Parent Ex. F at p. 1).

⁴ The district school psychologist at Winston Prep testified that each student is assigned a focus teacher with whom they meet daily in order to discuss areas of difficulty (Tr. p. 48). The student's literature teacher at Winston Prep testified that the focus teachers provide 1:1 direct instruction to students in their areas of need (Tr. pp. 313-14).

The fall progress report included "focus" goals in the areas of pragmatic language, reading comprehension, and written language as well as a description of the methods with which the goals would be addressed (id.). The fall progress report further reflected that the student would be grouped with other students whose primary learning deficits related to executive functioning and expressive language, including written expression, organizing and planning assignments and problem solving and who required a multimodal presentation whenever possible (id. at p. 3). The fall progress report reflected the student's current strengths and needs with regard to his literature and writing, algebra II/trigonometry, science, post-war America and art classes; indicated goals to be addressed in each class; and described strategies and techniques that would be utilized to address the goals (id. at pp. 3-8).

On October 27, 2009, a district school psychologist conducted a two-hour classroom observation of the student at Winston Prep (Dist. Ex. 3 at pp. 1-3). According to the report of the observation, despite a somewhat noisy classroom environment in history, the student sat quietly and took notes while other students discussed their projects (Tr. p. 61; Dist. Ex. 3 at p. 1). The student participated in the discussion when the topic changed to the space shuttle launch (Dist. Ex. 3 at p. 1). During his literature class, the student sat quietly while others discussed their essays and while other students read their vocabulary sentences (id. at p. 3). He did not volunteer nor was he called upon and the student did not hand in homework when it was collected (id.). Later on, during a discussion of Buddhism and the "cycle of life," the student raised his hand, was called on, and contributed appropriately to the discussion by making an analogy between the events in a movie and Buddhism and the "cycle of life" (id.).

The student's teachers at Winston Prep also prepared a winter progress report for the 2009-10 school year (Dist. Ex. 5). In the winter progress report, the student's focus teacher indicated that pragmatic language skills continued to be the student's primary area of weakness and were therefore the main emphasis of his focus sessions (id. at p. 1). The focus teacher indicated that the strategies utilized to address the student's needs with regard to pragmatics and maintaining focus of attention included modeling of appropriate skills, frequent verbal and visual cues, participation in weekly focus groups, redirection to task, and utilization of high interest/challenging material (id. at pp. 2-7). The focus teacher noted that the student had significant difficulty with generalizing the conversational skills learned in focus sessions to other contexts and that he had limited awareness of his deficits in his pragmatic language skills (id.). In the winter progress report, the student's teachers summarized the academic instruction provided to the student in each of his classes and indicated that the student had made "very good progress" in literature and writing; "fair progress" in algebra II/trigonometry; "good progress" in earth science; and that in American History, he had improved his written organization, reading comprehension, and academic organization skills while advancing his knowledge of history during the semester (id. at pp. 2-5).

On April 14, 2010, the parents executed an enrollment agreement with Winston Prep for the 2010-11 school year (Parent Ex. I at pp. 1-2). The parents paid the required deposit within the next several days and made monthly payments through February 2011, at which time the tuition for the 2010-11 school year was paid (Tr. p. 388; Parent Exs. H; I at p. 1; L; M).

In a vocational questionnaire dated May 21, 2010, the student's father provided the district with information regarding the student's post-graduation plans for use in the development of the

student's IEP for the 2010-11 school year (Tr. p. 76; Dist. Ex. 6). The student's father indicated, among other things, that he expected the student to attend a four-year college and live in a "college dorm;" that the student was especially interested in history and literature; that the student demonstrated a strength in writing and seemed interested in teaching and journalism; and that he felt that the student needed to develop his interpersonal skills in order to reach his goals (Dist. Ex. 6). The questionnaire also provided information regarding the student's functioning with regard to independent living/personal management skills and indicated that the parent felt that the student required instruction in time management, organization, self advocacy, interpersonal skills, appropriate behavior, and problem solving (id.). The parent also indicated that he would like more information from the district regarding services that would assist the student in meeting his vocational goals (id.).

On May 24, 2010, the CSE convened for the student's annual review and to develop his IEP for the 2010-11 school year, when he would be in the twelfth grade (Dist. Exs. 8 at p. 1; 9; 10 at p. 1). Meeting attendees included the parents; a district school psychologist; a regular education teacher; a special education teacher; an additional parent member; and from Winston Prep via telephone, the headmaster and the student's focus teacher (Tr. pp. 47, 104-05, 357; Dist. Ex. 8 at p. 2).⁵

The May 2010 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and functional performance and social/emotional performance (Tr. pp. 73-75, 77-78; Dist. Exs. 8 at pp. 3, 5; 10 at pp. 1-2). The resultant May 2010 IEP listed academic management needs, including the provision of graphic organizers and outlines, proofreading and editing checklists, and access to a dictionary/thesaurus for reference (Dist. Ex. 8 at p. 4). Social/emotional management needs noted in the May 2010 IEP were opportunities for school leadership positions and positive reinforcement for class participation (id. at p. 5). The May 2010 IEP contained nine annual goals as well as testing accommodations of extended time, a separate location, and directions read and reread aloud (id. at pp. 6-13, 17). The May 2010 IEP also contained a transition plan which delineated a number of long-term adult outcomes and transition services for the student (id. at p. 18).

The May 2010 CSE recommended that the student be placed in a general education setting and be provided with special education teacher support services (SETSS) three periods per week in a 8:1 student-to-teacher ratio (Dist. Ex. 8 at p. 1). The May 2010 CSE also recommended related services consisting of one 40-minute individual and one 40-minute group (of 3) counseling sessions per week (id. at p. 17). The May 2010 IEP indicated that the CSE also considered a general education setting without supports for the student and rejected that placement because the student required additional support at that time (id. at p. 16). Minutes taken at the May 2010 CSE meeting state that the CSE also considered a "CTT" placement for the student (Dist. Ex. 10 at p.

⁵ Testimony by the district school psychologist indicated that both she and the district special education teacher serve as district representatives at CSE meetings and that it was an oversight that neither of them signed in as the district representative for the May 24, 2010 CSE meeting (Tr. p. 49). She further testified that the district special education teacher typically serves as the district representative in CSE meetings for students attending Winston Prep (Tr. p. 103).

2).⁶ The parents objected to the recommended SETSS program at the May 2010 CSE meeting (Tr. pp. 57, 358).

In a letter dated June 11, 2010, the district summarized the recommendations made by the May 2010 CSE and identified the particular school to which it assigned the student for the 2010-11 school year (Dist. Ex. 9).

In a letter to the CSE dated August 20, 2010, the student's father acknowledged that he had received the district's June 2010 letter (Parent Ex. B at pp. 1, 2-3). The student's father also informed the district that he would visit the assigned school in September and advise the CSE of his response to its "offer" at that time (*id.* at p. 1). In the interim, the parent advised the CSE that he would send the student to Winston Prep and that he would seek reimbursement for that placement until he had determined the offered program to be "appropriate and acceptable" for the student (*id.*).

In a letter dated September 29, 2010, the parents informed the district that after numerous attempts to schedule a tour, they had visited the school to which the student had been assigned and had found it to be inappropriate for several reasons (Parent Ex. C at p. 1). The parents also advised the CSE that they would continue to send the student to Winston Prep and would seek reimbursement for that placement until such time as the parents had "judge[d] a placement to be appropriate and acceptable" for the student (*id.*).

Due Process Complaint Notice

In a due process complaint notice dated February 11, 2011 the parents requested an impartial hearing, contending that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, and requested that the district fund Winston Prep as the student's pendency (stay put) placement (Dist. Ex. 11 at pp. 1, 3, 4).

In particular, the parents alleged an "invalid" IEP; an inappropriate placement recommendation; that the CSE team was improperly constituted; that the CSE did not fully evaluate the student in all areas of suspected disability; and that the CSE failed to consider current, sufficient, and appropriate evaluatory and documentary material to justify its recommendations (Dist. Ex. 11 at p. 1). According to the parents, the May 2010 CSE changed the student's programming recommendation from the prior school year's recommendation for a CTT program with related services to a recommendation for a general education setting with related services and SETSS without reviewing or considering any new or additional evaluations or reports (*id.* at pp. 1-2). The parents further asserted that the May 2010 IEP did not accurately reflect the student's current levels of performance and needs; contained annual goals that were inadequate, not measurable, and "too few and too vague to adequately or appropriately address" the student's needs; and included an inadequate transition plan (*id.* at p. 2). With respect to the specific program and services recommended by the May 2010 CSE, the parents asserted that the student required "more individual intervention and support from a trained and experienced teacher" than what was

⁶ According to the student's father, the May 2010 CSE did not consider or discuss a CTT program for the student (Tr. pp. 359-60).

recommended by the May 2010 CSE and that the educational program and services in the May 2010 IEP were not appropriate or sufficient to enable the student to make academic and social progress (id. at p. 2). Regarding the assigned school, the parents asserted that it was too large and would not be able to provide the student with the individualized support and attention that he requires to make progress (id.). They further argued that they were advised that the assigned school would not be able to provide the student with all of his related services and that the students in the SETSS classes were functioning at widely varying levels (id. at p. 3).

The parents also asserted that Winston Prep was an appropriate placement and that equitable considerations supported a request for reimbursement of tuition costs (IHO Decision at p. 3). The parents requested that the impartial hearing officer find that the district failed to provide the student with a FAPE for the 2010-11 school year and, among other relief, order the district to reimburse the parents for the student's tuition costs at Winston Prep (id. at p. 4).

Impartial Hearing Officer Decision

The impartial hearing began on May 3, 2011 and concluded on August 24, 2011, after three days of proceedings (Tr. pp. 1, 154, 263, 389-90). On the first day of the impartial hearing, the parents requested an interim decision directing the student's pendency placement, to which the district did not object, and which was granted on the record by the impartial hearing officer (see Tr. pp. 38-39). In an interim decision dated July 13, 2011, the impartial hearing officer determined that Winston Prep was the student's pendency placement for the 2010-11 school year (Interim IHO Decision at p. 2).

By decision dated October 17, 2011, the impartial hearing officer concluded that the district offered the student a FAPE for the 2010-11 school year and that the evidence established that the district's recommended educational program was reasonably calculated to enable the student to receive educational benefits for that school year in the least restrictive environment (LRE) (IHO Decision at p. 24).

With respect to the parents' challenge to the district's compliance with requirements for a regular education teacher's inclusion at the May 2010 CSE, the impartial hearing officer found that, even if the district's regular education teacher at the CSE meeting did not comport with federal and State regulations, the evidence did not demonstrate that such a "procedural inadequacy" rose to the level of a denial of a FAPE (IHO Decision at pp. 18-19). As it related to the parents' contention at the impartial hearing that neither they nor the personnel from Winston Prep were provided with an adequate opportunity to "fully" participate in the CSE meeting, the impartial hearing officer found that there was "sufficient evidence to show that the CSE members and [the parents] were afforded meaningful participation" and further rejected the parents' assertion that the district predetermined the student's program (IHO Decision at pp. 19-20). The impartial hearing officer also found that the May 2010 CSE considered particular reports, that the May 2010 CSE made its recommendations on the basis of new and additional evaluations, and that the information in these evaluations were used to formulate the May 2010 IEP (id. at p. 20).

Relative to the May 2010 IEP, based on a number of factors, the impartial hearing officer found that the present levels of performance "accurately reflected" the student's "areas of need in

reading, prewriting skills, listening comprehension, math, math problem solving, and writing" as described by the supporting documents considered by the May 2010 CSE, the classroom observation, and the information provided to the May 2010 CSE by the personnel from Winston Prep (IHO Decision at p. 22). The impartial hearing officer also concluded that the counseling services on the May 2010 IEP appropriately addressed the student's social needs and further noted that the IEP made provision for the student's academic management needs (id.). The impartial hearing officer concluded that the annual goals in the May 2010 IEP "were objectively measurable; consistent with [the student's] needs and abilities as described in the hearing record and IEP, and that the goals were designed to meet the student's needs resulting from [his] disability and to enable the student to be involved in and make progress in the general education curriculum" (id. at pp. 23-24). The impartial hearing officer also found that any errors on the transition plan included in the IEP were "procedural" and did not cause a deprivation of educational benefits (id. at pp. 20-21). She further concluded that the student's placement in the recommended twelfth grade SETSS class could have been implemented and that the evidence showed that the program at the assigned school would have been appropriate for the student (id. at p. 24).

Based on her findings and conclusions, the impartial hearing officer denied the parents' request for reimbursement of the tuition costs for Winston Prep for the 2010-11 school year (IHO Decision at p. 25). The impartial hearing officer also ordered that with the exception of granting pendency from February 11, 2011 forward, all other relief requested in the due process complaint notice was otherwise denied (id.).

Appeal for State-Level Review

The parents appeal, requesting the reversal of the impartial hearing officer's decision that the district offered the student a FAPE and findings that Winston Prep was an appropriate unilateral placement, and that the equities support an award of tuition reimbursement. The parents also attach to their petition a copy of the impartial hearing officer's resume, and assert that the impartial hearing officer failed to disclose that she served as a trustee for two school districts, which they contend constitutes a conflict of interest and deprived them of the opportunity to request her recusal. With regard to the student's pendency placement, the parents allege that the impartial hearing officer impermissibly modified her July 13, 2011 interim decision in her final decision and improperly narrowed the district's pendency obligations with respect to the 2010-11 school year to the period following the filing of the parent's request for an impartial hearing.

With respect to whether the district offered the student a FAPE, the parents assert that the impartial hearing officer failed to credit their assertion that the May 2010 CSE was invalidly constituted because no appropriate regular education teacher was present and allege that this procedural violation impeded the student's right to a FAPE. The parents also assert for a variety of reasons that the impartial hearing officer erroneously rejected their claim that the parents and the Winston Prep personnel who attended the May 13, 2010 CSE were not afforded a meaningful opportunity to participate in the development of the May 2010 IEP. The parents also assert that the district did not demonstrate that the parents' concerns for their son's education were meaningfully considered and that the hearing testimony indicated that the May 2010 CSE had predetermined its program recommendation. The parents further contend that the impartial hearing officer erred in (1) dismissing the parents' contention that there was no new or additional

evaluations to support a change in the recommended program from a CTT program to a general education setting with SETSS, (2) finding that the May 2010 CSE adequately reviewed certain documents before it and considered sufficient evaluative material (3) finding that the May 2010 CSE evaluated the student in all areas of disability; and (4) rejecting the parents' assertion that the May 2010 CSE lacked a sufficient basis to justify a change in the student's placement recommendation to a less restrictive setting with less individual support and that the evaluative materials did not support such a change in the student's placement. The parents also assert that the May 2010 CSE did not consider private evaluations conducted in 2008. Additionally, the parents assert that the impartial hearing officer erred in concluding that the May 2010 IEP was appropriate with respect to the student's present levels of performance and annual goals and in concluding that the May 2010 IEP's transition plan was adequate. The parents also assert that the May 2010 IEP did not "directly" address the student's anxiety and did not address the student's executive functioning and attentional issues.

With respect to the May 2010 CSE's placement recommendation in the IEP that the student be in a general education setting and receive SETSS programming, the parents assert that the recommended placement was not appropriate for the student. The parents further contend that, contrary to the impartial hearing officer's finding, the district did not meet its burden to show that the offered placement would have been able to have been implemented at the commencement of the 2010-11 school year. The parents also dispute the impartial hearing officer's finding that the particular school to which the student was assigned would have been appropriate because that school would not have met the student's need for individual help, and/or would not have provided the student with the level of support he needed. The parents also assert that the students in the assigned classroom had a wide range of functional levels.

The parents additionally allege that the impartial hearing officer erred in not addressing the appropriateness of Winston Prep and whether equitable considerations supported an award of tuition reimbursement. The parents contend that Winston Prep was an appropriate placement, that the student made progress at that school, and that equitable considerations supported an award of tuition reimbursement.

The district submitted an answer denying the parents' allegations on appeal with respect to the regular education teacher and CSE composition, the lack of parental participation in the CSE meeting, predetermination of the May 2010 IEP, and review of both older and more recent evaluative data regarding the student. As for the May 2010 IEP, the district rejects the parents' claims regarding the inadequacy of the present levels of performance, the annual goals, the transition plan, and placement of the student in a general education setting with SETSS. The district further asserts that the parents' contention that it did not show that the May 2010 IEP was able to be implemented at the beginning of the school year at the assigned school was speculative and unsupported by the hearing record. The district further alleges that the parents' contentions related to the particular school and SETSS classroom to which the student was assigned are speculative, have no merit and/or would have been adequately addressed in the SETSS classroom, which was the LRE for the student. With respect to the parents' contention that they were prevented from seeking the impartial hearing officer's recusal because she failed to disclose her district trustee duties, the district asserts that the claim is frivolous, that it should not be considered as it was presented for the first time on appeal, and that the parents' request that the impartial hearing

officer decision be annulled or reversed on such a basis be rejected. The district asserts that the impartial hearing officer properly found that it offered the student a FAPE for the 2010-11 school year.

With regard to Winston Prep, the district disputes the parents' contentions that the unilateral placement is appropriate. The district asserts that Winston Prep was not the LRE for the student and further, that the school did not provide the student with "formal" counseling services that the student required. Finally, the district alleges that equitable considerations favor the district.

With regard to the parents' contention that the impartial hearing officer impermissibly modified the July 2011 interim decision, the district asserts that the impartial hearing officer did not improperly modify that order and that the impartial hearing officer properly limited pendency from February 11, 2011 forward. The district interposed a cross-appeal "in the alternative" from the July 2011 interim decision, contending that if the impartial hearing officer modified the interim decision, that portion of the interim decision which awarded pendency for the period prior to the filing of the parents' due process complaint notice was erroneous.⁷

In their response to the cross-appeal, the parents request that the district's cross-appeal be dismissed. The parents allege that the impartial hearing officer's pendency order became final and binding upon the parties because the district did not appeal it at the time it was issued. With respect to the district's procedural defense in its answer that the additional evidence attached to the parents' petition should not be considered, the parents assert that they only obtained that evidence subsequent to the impartial hearing.

The district submitted a reply, asserting that State regulations authorize it to appeal the impartial hearing officer's interim decision regarding pendency as a part of its appeal from the final determination of the impartial hearing officer.

Preliminary Matters

Additional Evidence

I will first address the additional evidence attached to the parents' petition. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-027; Application of the Bd. of Educ., Appeal No. 10-111; Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No.

⁷ The district's December 27 2011 amended pleading is improperly captioned as an answer when it also contains a cross-appeal. In this instance the parents submitted a responsive pleading to the cross-appeal as contemplated by State regulations, thus minimizing any prejudice; however, I caution the district to caption its pleadings correctly or risk dismissal. I also note that the parents' four-page responsive pleading is captioned as a "reply" and if it were considered as such, would exceed the scope of subject matter permitted by state regulations. However, since it is the district that is responsible due to its own improperly captioned pleadings in the first instance, I will consider all of the parents' allegations as a response to the district's answer and cross-appeal.

10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Among the proffered additional documentary evidence is a copy of the resume of the impartial hearing officer. While the resume appears to have existed at the time of the impartial hearing, the parents' attorney sets forth that he just recently became aware of the impartial hearing officer's status as a trustee for the two school districts. In my view, the responsibility for disclosure of this information rested with the impartial hearing officer. Upon review, I find that the additional evidence is necessary to render a decision and therefore, I will accept the resume as additional evidence.

Allegations Relating to the Impartial Hearing Officer

I now address the parents' allegation that the impartial hearing officer failed to disclose her relationships with other school districts and that they constituted a substantial conflict of interest, or at the very least, an impermissible appearance of impropriety. The IDEA and its implementing regulations set forth the requirements for an impartial hearing officer. Among other things, an impartial hearing officer may not be "an employee of the State educational agency or the local educational agency involved in the education or care of the [student]" or be "a person having a personal or professional interest that conflicts with the person's objectivity in the hearing" (20 U.S.C. § 1415[f][3][A][i][I], [II]; 34 C.F.R. § 300.511[c][1][i][A], [B]; see also NY Educ. Law § 4404[1][c]; 8 NYCRR 200.1[x], [x][3]).

Further, it is well settled that an impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An impartial hearing officer must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

Based on my independent review, and contrary to the contentions of the parents, I find that the hearing record does not support a reversal of the impartial hearing officer's decision on the basis that she acted with bias. I note that the parents do not allege that the impartial hearing officer is a trustee for or an employee of the school district involved in this case. I also note that the parents do not set forth in their petition any specific facts to show that the impartial hearing officer exercised any bias, unfairness, or impartiality during the impartial hearing against the parents, and I find no evidence of actual bias. The hearing itself was conducted in a manner that was consistent with the requirements of due process. I further note that although the parents disagree with the conclusions of the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75). While I agree with the parents insofar as it would have been a better course of action for the impartial hearing officer to advise the parties of her relationship with other school districts in order to avoid any unnecessary perceptions of impropriety,⁸ I decline to reverse her decision on this basis alone, especially when it does not appear to have affected the parties' presentation of their cases in this instance. To further mitigate any potential prejudice to the parents, I have engaged in an independent and impartial review of the hearing record in this case and have similarly reached the conclusion that the district offered the student a FAPE.

Scope of Impartial Hearing

I now turn to the parents' allegations that the impartial hearing officer erroneously decided the parents' CSE participation claims, as well as claims that the May 2010 CSE did not consider the parents' concerns relative to the student's education and that the May 2010 CSE had predetermined the program recommendation. It is well settled 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. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint 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][ii]; 8 NYCRR 200.5[i][7][b]). The parents' February 2011 due process complaint notice does not assert any claims that may be reasonably read to assert that the parents were not afforded a meaningful opportunity to participate in the development of the May 2010 IEP and/or to participate in the May 2010 CSE meeting, that the May 2010 CSE did not consider the parents' concerns related to the student's education, or that the May 2010 CSE had predetermined its program recommendation. Additionally, while the hearing record contains some testimony

⁸ Participation in the affairs of another school district would not necessarily preclude an impartial hearing officer from serving; however, disclosure would provide the parties with an opportunity to be heard and for the impartial hearing officer to address any concerns the parties may have.

relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized an amendment of the parents' February 2011 due process complaint notice to include these issues. Accordingly, I will not address these issues (B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 4 [E.D.N.Y. Jan 6, 2012]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-010; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112; (see also C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at * 12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 783 F.Supp.2d 497, 506 [S.D.N.Y. 2011]).⁹ For these reasons, I also find that the impartial hearing officer erred in determining issues that were not raised in the parents' due process complaint notice (see Application of the Bd. of Educ., Appeal No. 11-143; Application of a Student with a Disability, Appeal No. 11-073; Application of the Bd. of Educ., 10-0671; Application of the Bd. of Educ., Appeal No. 10-020).

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

⁹ I note that the parents' February 2011 due process complaint notice includes a provision that would seek to "reserve" the parents' right to object to other matters or to raise other issues (see Dist. Ex. 11 at pp. 3-4). However, to allow the parents to raise additional issues without the district's agreement pursuant to a reservation of rights clause would render the IDEA's statutory and regulatory provisions meaningless (see B.P. and A.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 5 [E.D.N.Y. Jan 6, 2012]; 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]; Application of a Student with a Disability, Appeal No. 11-010).

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

Composition of the May 2010 CSE

I will now address the parents' contention regarding the composition of the May 2010 CSE. The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, the district's regular education teacher who attended the May 2010 CSE meeting was a regular education teacher (Tr. p. 104). However, the district did not establish that the regular education teacher was a teacher "of the student" and I am not persuaded by the evidence that the attendance of the regular education teacher, in this circumstance, comported with the requirements of federal and State regulations (see Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The district's regular education teacher at the May 2010 CSE meeting was not teaching at the time of the May 2010 CSE meeting; nor was it reasonably anticipated at the time of the CSE meeting that she might implement the student's IEP for the 2010-11 school year as she did not teach in a classroom at any point during the 2010-11 school year (see Tr. pp. 104-105).

However, I find that the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a

FAPE, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 -*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[2]; 8 NYCRR 200.5[j][4][ii]). The parents assert that the presence of an appropriate district regular education teacher would have been invaluable to the May 2010 CSE in assessing whether the change in the recommended placement of the student from a CTT program to a general education setting with SETSS, in determining the supports necessary for the student in the recommended setting, and in assessing whether the student could have functioned in a less restrictive setting with appropriate supports. However, as discussed below, upon my independent review, I find that the recommended placement was appropriate, that the May 2010 IEP provided the student with appropriate supports in the recommended setting, and that the recommended setting was in the LRE. Accordingly, I agree with the impartial hearing officer's conclusion that the parents' contentions regarding the district's regular education teacher and the composition of the May 2010 CSE does not support a finding that the student was denied a FAPE (see IHO Decision at pp. 18-19).

Evaluative Information and the May 2010 CSE Meeting

I will next consider the parents' contentions regarding the evaluative information before the May 2010 CSE. An 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 S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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]), and 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;). 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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's

performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2], [f][1]).

The hearing record reflects that the May 2010 CSE had before them adequate and appropriate current evaluative information with respect to the student, which they utilized in the development of the student's May 2010 IEP. In particular, testimony by the district's school psychologist, who was a member of the May 2010 CSE, indicated that the CSE considered the prior year's IEP, the standardized test scores contained in the October 2009 Winston Prep Standardized Test Report; the October 2009 classroom observation conducted by the district; the fall 2009 and winter 2010 progress reports prepared by the student's teachers at Winston Prep; the vocational interview completed by the parent; and a 2009-10 report card from Winston Prep containing the student's grades during the fall semester (Tr. pp. 49-50, 53-54, 58-59, 76, 98; see Dist. Exs. 2-7; Parent Ex. G). The school psychologist further testified that the May 2010 CSE discussed and utilized the information reflected in these reports to inform its decision regarding recommendations for the student and also indicated that the May 2010 CSE incorporated this information into the May 2010 IEP to address the student's deficits and to recommend an appropriate placement and program for the student (Tr. pp. 55, 58-60, 72-76). The district's school psychologist also testified and the hearing record shows that the May 2010 CSE received, considered, and used information from the student's current teacher from Winston Prep during the May 2010 CSE meeting (Tr. pp. 77, 78, 87, 98, 116, 131-32, 145-46; Dist. Ex. 8 at pp. 3, 17).

I note that the test results and the progress reports from Winston Prep are detailed and provide a substantial quantity of information with respect to the student's needs (see Dist. Exs. 2; 4; 5). The parents allege that the evaluative information is in part inadequate because the May 2010 CSE derived functional levels for academics based on estimates by the student's teachers. However, the May 2010 CSE did have current test data and school report information (see Dist. Exs. 2; 4; 5; see also Dist. Ex. 8 at p. 3). While State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 10-099). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at *10). Such a viewpoint from a student's current teacher may be highly relevant when developing the written statement of the student's performance. Here, I note that the parents make no claim that the teacher estimates are actually incorrect. Further, while the parents assert that the May 2010 CSE did not fully evaluate the student in all areas of suspected disability, they do not assert that the May 2010 CSE failed or refused to evaluate the student in any particular area of need or aspect of his disability. The parents assert that the May 2010 CSE should have reviewed certain evaluative material prepared in 2008 (see Parent Exs. E; F); however, the parents do not assert that they requested that these evaluations be reviewed but that this was not done. Further, the 2008 evaluations are not current evaluative information or data. Moreover, there is nothing in the hearing record to suggest that the current evaluative data or material with respect to the student and considered by the May 2010 CSE, does not provide sufficient information to develop an appropriate IEP, including an appropriate program recommendation. Additionally, the impartial

hearing officer correctly concluded that the current evaluative data considered by the CSE included, contrary to the parents' claim, new information relevant to the student; and, as indicated above, she correctly concluded that this information was reviewed and considered by the May 2010 CSE (see IHO Decision at p. 20; see also Tr. pp. 49-50, 53-54, 76; Dist. Exs. 2-6). With respect to the parents' specific claim that the May 2010 CSE lacked a sufficient basis to initiate a change in the recommended placement, this belies the fact that the hearing record establishes, as the impartial hearing officer concluded and as indicated above, that the May 2010 CSE considered, discussed, and used current evaluative data and information, as well as opinion from the student's teacher, in the development of the student's IEP, including the student's placement (see Tr. pp. 49-50, 53-54, 55, 58-60, 72-78, 87, 98, 116, 131-32, 145-46; Dist. Ex. 8 at pp. see also Dist. Exs. 2-7, IHO Decision at pp. 19, 20). As discussed below, the evaluative data and information establishes that the recommendation to place the student in a general education setting, with SETSS and counseling is appropriate for the student's needs and is the student's LRE.¹⁰

May 2010 IEP

Present Levels of Performance and Needs

I will next address the parents' claims that the May 2010 IEP was inadequate with respect to describing the student's present levels of performance and areas of need. The IDEA provides that an IEP must, among other things, include a statement of present levels of academic achievement and functional performance, including a description of how the student's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; see 34 C.F.R. § 300.320[a][1][i]); 8 NYCRR 200.4[d][2][i][a]; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25-*26 [S.D.N.Y. Sept. 29, 2009]).

The hearing record reflects that the May 2010 CSE appropriately developed the student's present levels of performance based on evaluative documents provided by Winston Prep as well as information obtained at the May 2010 CSE from personnel at Winston Prep, including the student's focus teacher (see Tr. pp. 72-75, 76-78, 79-80, 98; Dist. Exs. 2-5; see also Dist. Ex. 8 at pp. 3, 5). The present levels of academic performance section of the May 2010 IEP reflected that, according to the student's Winston Prep focus teacher, the student's decoding and reading comprehension were on grade level but that he needed to develop his ability to analyze text on a more critical and inferential level as he tended to focus on the details and lose the bigger picture (Dist. Ex. 8 at p. 3). This information reflects both the fall 2009 and winter 2010 progress reports from Winston Prep (see Parent Ex. 4 at pp. 1, 2; Dist. Exs. 5 at p. 2; 8 at p. 3). With regard to writing skills, the May 2010 IEP reflected that the student was also on grade level but that he

¹⁰ With respect to the parents' claims relating to the recommendations in the district's previous year's IEP, I note that a CSE is required to meet annually and to develop an IEP to address a student's documented needs at that particular point in time. Therefore, the fact that a subsequent CSE recommends a different program or placement than what was recommended in a previous year does not, in and of itself, mean that the recommendation in the current IEP does not meet the student's needs. Nor does the IDEA require the district to "justify" its recommendation by conducting a reevaluation each time it determines that the student's placement on the continuum should be modified, especially when the existing evaluative data is sufficient to develop an IEP.

needed to improve in his clarity, word choice (vocabulary), and in his independent use of prewriting skills (Dist. Ex. 8 at p. 3). These needs were consistent with the needs identified in the goals included in the fall 2009 progress report which reflected that the student needed to improve in his elaboration and organization of ideas; strengthen his pre-writing skills such as brainstorming, mapping, and outlining; and increase his independence in all areas of written language production (see Dist. Ex. 4 at p. 1). These needs were also noted to be areas of continued weakness in the winter 2010 progress report (Dist. Ex. 5 at p. 2). The May 2010 IEP's present levels of academic performance section also noted the student's more significant deficit in math problem solving, which had been reported in the fall 2009 and winter 2010 progress reports in their descriptions of the student's deficits in reasoning and problem solving and which was also reflected by the student's scores on the math reasoning subtest of the WIAT-II, which was reported in the standardized tests report results from Winston Prep (Dist. Ex. 2; see Dist. Exs. 4 at pp. 4-5; 5 at pp. 3-4). Additionally, I note that overall, the student's scores as reflected in the standardized tests report were consistent with the description of the student in the present levels of performance section of the May 2010 IEP (see Dist. Exs. 2; 8 at p. 3).¹¹ With regard to pragmatics, the student's present level of performance reflected his difficulty with social language; specifically in initiating conversation and in maintaining eye contact and using appropriate body language (see Dist. Ex. 8 at p. 3). The fall 2009 and winter 2010 progress reports similarly reflect that the student continued to display significant difficulty when interacting with both peers and teachers including making eye contact, using appropriate body language, initiating and maintaining conversation, and making informal conversation (small talk) (see Dist. Exs. 4 at p. 1; 5 at p. 1).

While the parents assert that the student's anxiety was not mentioned in the May 2010 IEP, upon review, I find that the May 2010 IEP sufficiently described the student's present levels of social and emotional performance. Based on current information provided by Winston Prep, the May 2010 IEP reflected the student's difficulty interacting with peers; his difficulty contributing to informal conversation; his difficulty participating in social groups, including a lunch group; his difficulty maintaining attention and eye contact; his need for redirection to tasks; and his limited class participation (Dist. Ex. 8 at p. 5). The winter 2010 progress report reveals a similar description of the student's then current performance at Winston Prep (see Dist. Exs. 5 at p. 1; Ex. 8 at p. 5).

With regard to the student's organizational needs, I note that although the May 2010 IEP did not provide a detailed description of the student's organizational difficulties, based on information provided by the student's focus teacher at Winston Prep, it reflected the student's need for reminders to use prewriting skills (see Dist. Ex. 8 at p. 3). According to his then-current focus teacher, the student's prewriting skills included brainstorming, mapping, and outlining, which are strategies that assist students in organizing their writing (see Dist. Ex. 4 at p. 1). Further, the May 2010 IEP also indicated specific academic management needs, including the provision of graphic organizers, outlines, and editing checklists, which were designed to address the student's organizational needs related to writing and resulted from discussion at the May 2010 CSE meeting

¹¹ The student's standardized tests report reflected that the student received a standard score of 116 in the high average range on the numerical operations subtest of the WIAT-II; however, the student's teacher reported that the student's math computation skills were at a tenth grade level (compare Dist. Ex. 2, with Dist. Ex. 8 at p. 3).

with the student's focus teacher from Winston Prep (Tr. pp. 78-79, 131-32; Dist. Ex. 8 at p. 4). Additionally, as discussed in more detail below, the May 2010 IEP also addressed the student's organizational needs with specific and particularized goals (id. at pp. 6, 7, 11).

Accordingly, I find that the hearing record demonstrates that the present levels of academic performance and learning characteristic on the May 2010 IEP provided an accurate description of the student's present levels of performance upon which appropriate annual goals and special education services could be recommended. Further, as indicated above, in light of the management needs, annual goals, and services and programs recommended by the May 2010 IEP, that IEP sufficiently described the student's social/emotional levels of performance and needs and the absence of a more complete description of the student's social/emotional needs does not result in a denial of a FAPE.

Annual Goals

I now turn to the parents' contentions with respect to the annual goals. 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 to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (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, and when periodic reports on the progress the student is making toward annual goals will be provided to the student's parents (8 NYCRR 200.4[d][2][iii][b], [c]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3][i], [ii]).

I agree with the impartial hearing officer that the annual goals in the May 2010 IEP are measurable and targeted to the student's areas of need. The May 2010 IEP contained nine annual goals in the areas of reading comprehension, written expression, mathematics, self advocacy, conversational language skills, personal goal setting, prioritizing academic responsibilities and organizational skills, focus of attention, and classroom participation (Dist. Ex. 8 at pp. 6-13). A review of the hearing record indicates that the student has weaknesses in each of these areas, but most significantly in math problem solving, and that these goals are targeted to each of these relevant areas (see Tr. pp. 72-75, 76-78, 79-80, 84-85, 98, 121-30; Dist. Exs. 2-5).

Further, contrary to the parents' allegations, the May 2010 IEP included a goal that directly addressed the student's executive functioning needs, which were described by his Winston Prep teacher as "planning, organizing, prioritizing" and "getting work done" (Tr. p. 296; Dist. Ex. 8 at p. 11). The student's organizational needs in writing were also addressed by the student's reading comprehension and writing annual goals which addressed the development and use of organizational strategies such as outlines and graphic organizers (Dist. Ex. 8 at pp. 3, 6, 7, 11). Additionally, the student's executive functioning skills were also imbedded within three annual goals. The reading comprehension goal addressed the student's ability to make and support conclusions and inferences, compare and contrast elements of what he read, and use graphic organizers (id. at p. 6). The writing goal addressed developing the student's ability to discuss

material, make comparisons, conclusions and predictions, and to use organizational strategies such as outlines, and graphic organizers to write well-developed pieces with clarity of ideas (*id.* at p. 7). The math goal addressed developing the student's ability to apply and adapt a variety of strategies to solve complex math word problems (*id.* at p. 8). The district's school psychologist testified that the May 2010 CSE had addressed the student's executive functioning needs by the goals relating to the development of critical reading comprehension skills and the development of written texts which addressed, among other things, critical reading and comprehension and making comparisons, conclusions, predictions and bringing out specific evidence from the text (*see* Tr. pp. 113-15; *see also* Dist. Ex. 8 at pp. 6, 7).

Upon review, I also find that the annual goals in the May 2010 IEP are measurable (Tr. p. 82; *see* Dist. Ex. 8 at pp. 6-9, 11-13). In particular, each annual goal provided a description of the specific skills that the student was expected to demonstrate (Dist. Ex. 8 at pp. 6-9, 11-13). Moreover, eight of the nine annual goals set forth the percentage of accuracy or the frequency of performance which the student was required to demonstrate in order to indicate mastery of the goal (*see id.* at pp. 6-9, 11, 12). Additionally, all but one of the nine annual goals reported the frequency that reports of the student's progress would be provided to the parents.

Based on the above, I find that the annual goals in the May 2010 IEP appropriately targeted the student's areas of need; contained sufficient specificity by which to direct instruction and intervention, and to evaluate the student's progress or gauge the need for continuation or revision; contained adequate evaluative criteria; and overall, included sufficient information with respect to when relevant reports would be provided to the student's parents.

Transition Services

I now turn to the parents' objections relative to the transition plan in the May 2010 IEP. 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 a Student with a Disability, Appeal No. 10-069, Application of the Dep't. of Educ., Appeal No. 08-080).

A review of the student's transition plan reflects that it is consistent with other information in the hearing record that the student intended to attend a four year college after graduating from high school and that his areas of interest included history and literature (Tr. pp. 88, 292-93; see Dist. Exs. 6; 8 at p. 18). Further, the district's school psychologist testified that the May 2010 CSE developed the transition plan with the parents' input and that it utilized the information provided by the parents in the vocational assessment to help create the transition plan (Tr. p. 88). The district's school psychologist also testified that the transition plan would be utilized by a guidance team to assist the student in moving toward the goals outlined in the plan (Tr. p. 89). I note that the parents correctly assert that the sections of the transition plan regarding the student's diploma objective and the respective parties who would be responsible for implementing the services in the student's transition plan were not filled out by the May 2010 CSE (see Dist. Ex. 8 at p. 18); however it did not result in a denial of a FAPE to the student. To avoid needless disputes, I caution the district to complete the appropriate sections of the transition plan. I also find that the long term adult outcomes and transition services set forth in that section of the May 2010 IEP are sufficiently specific and relevant to the student's post-secondary school needs and aspirations. I also note that the parents have raised no issues relevant to the specific post-secondary school needs and the relevance of the specific post-secondary goals/long term adult outcomes set forth in the May 2010 IEP, or of the appropriateness of the specific transition services recommended for the student in that IEP. Accordingly, I agree with the impartial hearing officer and find that the omissions in the transition plan do not deny the student a FAPE.

Placement – General Education with a SETSS Program

Next, I will turn to the parties' dispute as to whether the student's placement in a general education setting with SETSS programming was an appropriate recommendation for the student. For the reasons discussed below, I do not agree with the parents that the placement offered in the May 2010 IEP would not have provided the student the level of individual attention and support he required and I find that the hearing record establishes that the May 2010 CSE's placement recommendations were appropriate to meet the student's needs in the LRE.

As discussed in detail above, the hearing record reflects that the student was functioning at or above grade level and in the average to above average range in all academic areas except mathematics (see Tr. pp. 52, 58-60; Dist. Exs. 2; 8 at p. 3). The district's school psychologist testified that the May 2010 CSE took this into account in making its decision to recommend

placement of the student in a general education setting with SETSS (Tr. p. 59). She testified that the student could appropriately be placed in a general education class with exposure to a variety of students, not limited to students who have IEPs; and that he would benefit from being with a general education population of students achieving at or above grade level and having peer models (Tr. pp. 94, 138, 144). According to the district's school psychologist, the May 2010 CSE believed that the student should not be placed in a restrictive environment for areas where he was demonstrating high academic ability (Tr. pp. 59-60). She further testified that it was not necessary to remove a student with his profile from a general education setting for his areas of strength, but that he would benefit from SETSS in which he would obtain focused assistance with his deficits in mathematics (Tr. pp. 52, 59-60, 73, 94). The May 2010 CSE supported the student's placement in a general education setting with SETSS programming by recommending that the student's IEP include related services to address the student's deficit in his social and emotional performance, which the school psychologist testified could be addressed through counseling (see Tr. p. 94; Dist. Ex. 8 at pp. 1, 15, 17).¹² The district's school psychologist testified that the May 2010 CSE recommended group counseling because discussion at the CSE meeting and the reports indicated that the student was having "some difficulty with social interaction and communication skills with his peers," his body language and his focus, and that counseling would be "beneficial" (Tr. pp. 55-57). She also testified that the May 2010's CSE's counseling recommendation included individual counseling once a week for 40 minutes because the student would be transitioning to a new school (id.).¹³

The SETSS teacher described SETSS and how it may be used to meet the needs of students and noted that it offers flexibility that allows her to provide support to students with regard to their needs in the general education classrooms (Tr. pp. 178-79). She indicated that her students and the regular education teachers inform her about what they are working on, such as upcoming projects, and that she frequently addresses the students' needs related to these general education assignments in her class (id.). The special education teacher also indicated that she met with the eleventh and twelfth grade regular education teachers at least twice per week to discuss students, that they may brainstorm on how to address specific concerns related to a student, that she may review the regular education teacher's lesson plans and give some insight or suggestions as to how they might better support that student, that she had created graphic organizers to be used in the general education setting, and that the regular education teacher had sent her hard copies of materials related to upcoming assignments so that she could prepare to work on them with the students in her SETSS classroom (Tr. pp. 177-79). Additionally, her testimony indicated that everyone who works with the SETSS students has a copy of their IEP so as to review their goals

¹² The parents have not raised any issues relating to the appropriateness of the May 2010 CSE's recommendation that the student be provided with counseling as a related service to meet his social and emotional needs.

¹³ I do not agree with the parents' contention that the student's anxiety was not addressed in the May 2010 IEP. The May 2010 IEP recommended counseling services, both individual and in a group setting, and also included goals which addressed the student's needs in among other things, classroom participation, self advocacy, increasing his ability to engage with novel adults, and improving his conversational language skills (Tr. pp. 121-22; Dist. Ex. 8 at pp. 9, 13). According to the student's father, with the informal "counseling-like" services that the student received at Winston Prep during the 2009-10 school year from his literacy teacher at Winston Prep, who was not a trained psychologist, the student's anxiety abated (Tr. pp. 290-93, 380-81).

and present levels of performance in order to meet their academic and social needs (Tr. pp. 199-200).

The SETSS teacher further described her SETSS class, which typically begins with a "do now" which is independent work intended to get the students thinking about the topic that they are working on by generating their prior background knowledge in the area and that she follows this by modeling a specific strategy (Tr. pp. 175-77). The students then practice the strategy while she supports them by circulating among them as they work independently or in small groups, informally assessing their work and interacting with the students on a 1:1 basis, and toward the end of the lesson, assessing whether the students understand and are able to apply the strategy (Tr. pp. 176-77). The SETSS teacher indicated that a small group is comprised of only two to three students and that she determines who works together based on the particular assignment and the students' levels, at times pairing a student who can support his or her partner with a weaker student and at times making homogeneous groups, to which she provides the support (Tr. pp. 179-80). She indicated that she is able to differentiate instruction using the same content material, but makes modifications and adjustments to meet each student at "their point of learning," sometimes using varied instructional modalities (Tr. pp. 180-81). She described how she varies the expectations and the level of support she provides for each student based on their functional level (Tr. pp. 181-82). For example, she may expect one student to respond to a document-based question with a complete paragraph whereas another student may be expected to do a "bullet" response, and that the goal of the activity (i.e., whether the goal is to learn content or process) determines what type of response she assigns the students (*id.*).

The SETSS teacher testified that she was capable of implementing the annual goals on the student's May 2010 IEP (*see* Tr. pp. 172-73, 190-91, 193, 194, 197, 200). She testified how she addressed the skills that were reflected in the critical reading comprehension goal in the student's IEP in her class during the 2010-11 school year; that she had provided the type of writing support reflected in the student's writing goal to her SETSS group; that she could have implemented the student's math goal; she described a lesson that she had conducted early in the year on assessing one's own needs and creating goals with everyone in her SETSS class, which was similar to two of the student's IEP goals related to setting goals for himself and organizing materials; she described that she had previously worked with students to increase their self-awareness and implement self-monitoring techniques similar to that described in the student's goal regarding improving his ability to maintain focus; and with regard to increasing the student's classroom participation, she noted that she had documented her students' classroom participation at the end of each class using a log which she later used to assess the students' progress (Tr. pp. 182-83, 186-87, 189-94, 197-99, 200-01). The SETSS teacher also indicated that she was able to implement the academic management needs on the May 2010 IEP and that she was currently using these tools in her class (Tr. p. 172; *see* Dist. Ex. 8 at p. 4). The SETSS teacher stated that she had proofreading and editing checklists displayed on the classroom wall, that she used graphic organizers and outlines for much of the students' writing, and that a dictionary/thesaurus was available in the classroom (*id.*). With regard to social/emotional management needs, the SETSS teacher indicated that positive reinforcement is a "good practice" and testified that she utilized positive reinforcement by responding to students' classroom participation with "accolades" or giving them a "reward" and that she reminds students to be involved and encourages their participation with

the phrase "ask a question, answer a question" (Tr. pp. 173-74). She also explained that the school had opportunities for leadership positions including a student government; a mentoring program where students in the high school mentor students in the middle school; and a program called College for Every Student (CFES) where actual training is provided to students on being leaders, peer mentors, and in activities such as conflict resolution (Tr. pp. 173-75; see Dist. Ex. 8 at p. 5).

Additionally, with regard to the student's challenges with peer interactions, the SETSS teacher testified that she believed the 8:1 student-to-staff ratio in the SETSS classroom provided opportunity for students to engage and interact with each other in smaller groups; that she was close by to facilitate and encourage their speaking, collaboration, and contributions; and that she provided structured opportunities for students where the stage is set for them to communicate with one another and have conversations (Tr. pp. 202-03). She also indicated that some of the students who had been in her SETSS classroom the previous year had received counseling services and that she met with counselors twice per month formally and several times per week informally to discuss what was going on with students, ask questions about them, and determine how to best support their needs (Tr. p. 168). She also indicated that she spoke with her students' parents once or twice per month as well as at parent/teacher conferences (Tr. pp. 168-69).

Accordingly, based on the above, I find that that the evidence in the hearing record establishes that the May 2010 CSE's placement recommendation of a general education setting with SETSS and supported by individual and group counseling as a related service was appropriate to meet the student's needs and is the student's LRE. The evidence supports the conclusion that the May 2010 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Assigned School

Functional Grouping

I next turn to the parents' contentions regarding the implementation of the student's IEP at the school to which the student was assigned. I note that the parents elected not to enroll the student in the public school. The parents contend that they were told that the SETSS class had a wide range of functioning levels. In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). 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. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). 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 *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir.

Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 14, 2011]). 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]).

Even if the student had attended the proposed school, the evidence would not support the parents' claim. The SETSS teacher explained that the student would probably have fit within the group of student's in the class and that, if necessary, the grouping would be modified to accommodate the student's attendance in the SETSS classroom in the public school (Tr. pp. 165 256-57).

Availability of SETSS Program, Size of School and Assigned Classroom

The parents also claim that there was insufficient space for the student in the SETSS class and that he would be able to receive SETSS programming three times a week. They further assert that the student would be in general education classes of up to 30 students; that the assigned school was too large, that the middle and high school students would eat lunch together, and that the demands this environment would place on the student's social and pragmatic language skills would be too great and cause the student's anxiety to increase. In addition, the parents were concerned that the student would not receive the level of support he needed in the assigned school's SETSS class.

Once more, assuming for the sake of argument that the student had attended the public school and the district had been required to implement the student's IEP, the parents' contention that the assigned school would not have been able to implement the recommended SETSS program is not supported by the hearing record. While the hearing record reflects that the SETSS teacher's class had a full complement of students at the beginning of the 2010-11 school year and that, during that school year, she taught two and not three SETSS classes per week (Tr. pp. 163, 224, 227, 229), the hearing record also reflects that the student would have received the three periods a week of SETSS programming set forth in the May 2010 IEP at the assigned school. The principal of the assigned school testified unequivocally, that had the student attended the assigned school, he would have been provided with three periods per week of SETSS programming, either by the school's twelfth grade SETSS teacher and/or from another person from the school's special education team (Tr. pp. 270, 273-75). Further, reflecting that she was the main SETSS provider for the student's grade level, the SETSS teacher testified that the student would likely have been in her class, that the composition of her class would likely or "probably" have been changed to accommodate the student, and that "we would have had to make room for [the student]" (Tr. pp. 223, 256-59). The principal testified that the twelfth grade SETSS teacher had flexibility in her program because she did not teach 25 hours a week (Tr. p. 282). Additionally, the parents' concern that the student would not receive the level of support he needed in the assigned school's SETSS class is not persuasive, as the placement recommended in the May 2010 IEP was designed to address the student's needs. Finally, there is nothing in the hearing record that supports the parents' contention that, based on the student's difficulties with social and pragmatic language skills and

his anxiety, the size of the assigned school would prevent the student from being provided with a FAPE.¹⁴

In view of the forgoing evidence regarding grouping and the provision of services at the proposed school, I find there is insufficient evidence to conclude that 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]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

Pendency

I will now turn to the parties' dispute regarding when the district's obligations began under pendency.¹⁵ In order to invoke the pendency provisions of the IDEA, a due process proceeding must be pending (Application of a Student with a Disability, Appeal No. 08-050; Application of a Child with a Disability, Appeal No. 07-136; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; Honig v. Doe, 484 U.S. 305, 323 [1987]; Mackey v. Bd. of Educ., 386 F.3d 158, 160 [2d Cir. 2004]; Bd. of Educ. v. Schutz, 290 F.3d 476, 481-82 [2d Cir. 2002]; Letter to Winston, 213 IDELR [OSEP 1987]). In this case, the proceeding began with the February 11, 2011 filing of the parents' due process complaint notice (see Dist. Ex. 11; Answer ¶ 18). As a consequence, the right to invoke the student's pendency placement did not arise until February 11, 2011 (Application of a Student with a Disability, Appeal No. 08-050; Application of a Child with a Disability, Appeal No. 07-136). Therefore, I agree with the district that it was not until this date that the district was financially responsible for the costs of the student's pendency placement at Winston Prep (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at * 8 [S.D.N.Y. Sept. 6, 2011]). The impartial hearing officer's July 2011 interim decision is at best, unclear;¹⁶ however, the matter was later clarified in her final decision, which indicated that the student was entitled to pendency on February 11, 2011 (IHO Decision at p. 5). Accordingly, I will not overturn the impartial hearing officer's determination that the student was entitled to pendency

¹⁴ I note here that the parents' due process complaint notice did not raise any issues relating to lunchtime procedures (see Dist. Ex. 11). Even if they had, the hearing record does not support the parents' allegation on appeal, that middle school and high school students ate lunch together (see Tr. pp. 216, 231).

¹⁵ With respect to the parents' contention that the July 2011 interim decision became final and binding when no party appealed it subsequent to its issuance, the district correctly explains that applicable State regulations at 8 NYCRR 279.10(d) expressly provide that a party may seek review of an interim ruling of an impartial hearing order in an appeal from the final determination of the impartial hearing officer.

¹⁶ Read in its entirety, the interim decision appears concerned with identifying Winston Prep as the student's pendency placement rather than the particular date when the student's right to his pendency arose.

at Winston Prep beginning on February 11, 2011, and it is not necessary to further address the district's cross-appeal.

Conclusion

Having determined, for the reasons discussed above, that the evidence in the hearing record establishes that (1) the impartial hearing officer was not biased in favor of the district, (2) the district is financially responsible for the costs of the student's pendency placement with respect to the 2010-11 school year commencing on February 11, 2011 when the parents filed their due process complaint notice, and (3) the parents' allegations regarding the May 2010 IEP, the student's placement, and the assigned school and SETSS classroom are insufficient to establish that the district did not offer the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Winston Prep was appropriate or whether equitable considerations support the parents' claim (M.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. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of the determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
January 30, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER