



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-081

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Karyn R. Thompson, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Abbie Smith, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Windward School (Windward) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student exhibits cognitive skills in the average to low average range, with relative weaknesses identified in the areas of working memory; phonological processing; expressive language; auditory processing; visual memory, planning and organization; and attention (Dist. Exs. 4 at p. 14; 6 at p. 11). She exhibits difficulty with spelling; written expression; reading decoding, comprehension, and accuracy; and math problem solving and fluency (Dist. Exs. 4 at p. 16; 7). The student reportedly easily loses focus during class, and requires information to be repeated as

well as support to complete assignments (Dist. Ex. 7). During the 2011-12 school year, the student attended Windward (Parent Exs. I; K; L).¹

The parents referred the student for a private speech-language evaluation in March 2009 during first grade due to concerns about her articulation and language processing skills (Tr. p. 126; Dist. Ex. 8 at p. 1). At that time, the student was attending public school in a general education first grade setting at a district elementary school and received after-school support from her classroom teacher three days per week, and weekly support from the school's reading specialist (Tr. pp. 125-26; Dist. Ex. 8 at p. 1). Subsequent to the evaluation, the student received private speech-language therapy and, in fall 2009 during second grade, the parents referred her to the CSE (Tr. pp. 124, 127; Parent Ex. J at p. 2). The fall 2009 CSE determined that the student was eligible for special education and related services as a student with a speech or language impairment, and she began receiving special education teacher support services (SETSS) and in-school speech-language therapy (Parent Ex. J at p. 3; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

For the 2010-11 school year during third grade, the student's SETSS was increased to five sessions per week in an 8:1 student to teacher ratio (Parent Ex. J at p. 3). In fall 2010, the student was evaluated by a private psychologist and received diagnoses of a disorder of written language, a learning disorder – not otherwise specified, and an attention deficit hyperactivity disorder (ADHD), combined type (Dist. Ex. 4 at pp. 1, 16).

In January 2011, the CSE convened at the parents' request to discuss additional testing accommodations (Dist. Exs. 10; 11 at p. 2). The CSE discontinued the student's speech-language therapy at that time and recommended the addition of a testing accommodation to the student's IEP (Dist. Ex. 11 at p. 2; see Tr. p. 101). In a letter dated February 18, 2011, the parents expressed their concern about the student's academic struggles, their disagreement with the CSE's decision to modify the student's promotion criteria, and their request that the student be considered for a placement in a "full time special education class for bright, learning disabled children" (Parent Ex. D). They further requested that the "school-based support team . . . re-open [the student's] case" (id.). For the remainder of the 2010-11 school year, the student continued in the general education setting and received daily SETSS (Dist. Ex. 11 at p. 1).

On June 14, 2011, the CSE convened for the student's annual review and to develop her IEP for the 2011-12 school year (fourth grade) (Dist. Ex. 3). The CSE changed the student's classification to a student with an other health-impairment (OHI) and, for fourth grade, recommended placement in an integrated co-teaching (ICT) class (id. at p. 7).^{2, 3} The IEP also provided the student with the testing accommodations of extended time, separate location, directions read and reread, and questions read and reread, and modified her promotion criteria (id.

¹ Windward 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).

² The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this proceeding (Tr. pp. 104-05; see 34 CFR 300.8 [c][9]; 8 NYCRR 200.1[zz][10]).

³ In this case, the terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (see e.g. Tr. pp. 138, 157, 173-77, 217, 219, 224). For consistency in this decision, the term ICT will be used.

at pp. 7, 10). The district sent the parents a Final Notice of Recommendation (FNR) also dated June 14, 2011 that summarized the program recommendations made by the CSE for the student and assigned the student to a specific public school site (Dist. Ex. 14).

By letter dated June 16, 2011, the parents expressed to the district that they believed the student should be able to meet 100 percent of the criteria for promotion and that the student needed supports to enable her to succeed on tests rather than lower performance standards (Dist. Ex. 13). The parents also stated their belief that the student required a small, structured private school setting to meet her needs, as recommended by a private evaluator (id.).

In a July 5, 2011 letter to the district, the parents stated that they received a copy of the June 14, 2011 IEP and FNR, and informed the district that they did not agree with the ICT placement recommendation (Dist. Ex. 15). The parents stated that the student required "far more support" and a specialized school to remediate her academic weaknesses (id. at p. 1). The parents also reiterated their disagreement with the modified promotion criteria (id.). Further, the parents stated that it was "not clear" whether the student would receive SETSS during the 2011-12 school year and if she would not be, this was "yet another deficiency with the recommended program" (id. at pp. 1-2).

According to the parents, in August 2011 the district sent a letter informing them of the student's placement in a general education class with one teacher for the 2011-12 school year (Parent Ex. G). The parents sent a letter dated August 11, 2011 to the principal of the particular school to which the student was assigned stating that they did not agree with either the general education placement or the previously recommended ICT placement (id.). The principal responded in an e-mail on August 12, 2011 and informed the parents that the district could not place the student in an ICT class without parental consent, and because the parents did not consent to the ICT class, the prior IEP recommending SETSS was in effect (Parent Ex. M; see Dist. Ex. 11 at p. 1). The parents replied by e-mail on the same date and confirmed that they did not sign the consent for an ICT class because they believed the student required more support than would be provided in that setting (id.).

In an August 24, 2011 letter, the parents notified the district of their intent to place the student at Windward for the 2011-12 school year at district expense if it did not cure the alleged procedural and substantive errors in the development of the student's IEP specified in their letter and offer the student an appropriate placement (Dist. Ex. 16). The parents also requested transportation for the student to and from Windward for the 2011-12 school year (id. at p. 2). The parents further stated that unless a new IEP recommending an "appropriate full time special education program and placement" was developed, the parents would unilaterally place the student at Windward "and sue the district for reimbursement" (id.).

The student attended Windward during the 2011-12 school year and received instruction in language arts, math, social studies, science, art, music, and physical education (Parent Ex. I at pp. 2-8).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated October 19, 2011, alleging that the district denied the student a FAPE for the 2011-12 school year on both substantive and procedural grounds (Dist. Ex. 1). Among other things, the parents alleged that: (1) the district denied the parents the opportunity for meaningful participation by failing to respond to the parents' letters and by failing to have an additional parent member at the CSE meeting; (2) the student's category of special education eligibility was unclear because her June 2011 IEP indicated she was classified with an other health-impairment but the FNR indicated she was classified with a speech or language impairment; (3) the goals contained in the student's June 2011 IEP were generic and vague, and did not provide a "baseline" from which to work; (4) the recommended ICT placement was not appropriate for the student as it was insufficient to meet her needs because she required a small, structured and supportive setting for students with similar needs and cognitive skills; (5) the recommended placement was not reasonably calculated to confer a benefit to the student as the student required a specialized school to remediate her academic weaknesses; (6) the student's June 2011 IEP inappropriately modified (lowered) the student's promotion criteria; and (7) the general education placement offered to the student was inappropriate because it was contrary to the student's IEP developed at the June 2011 CSE meeting and the parents' recommendations (*id.* at pp. 3-5). The parents alleged that the student was entitled to transportation to the student's private school (*id.* at pp. 5-6). The parents further alleged that the student's program at Windward for the 2011-12 school year was appropriate to meet her academic and social/emotional needs and was reasonably calculated to enable the student to receive educational benefits, and that there were no equitable considerations that would bar reimbursement (*id.* at p. 6). The parents requested that they be reimbursed for the student's tuition at Windward for the 2011-12 school year, as well as be reimbursed for transportation services (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 21, 2011 and concluded on February 13, 2012, after three days of proceedings (Tr. pp. 1-253). In a decision dated March 7, 2012, the IHO determined that the district failed to offer the student a FAPE, that Windward was appropriate for the student, and that equitable considerations supported an award of tuition (IHO Decision at pp. 9-13). The IHO also determined that the parents were entitled to reimbursement of transportation costs to and from Windward, and ordered that the district reimburse the parents for tuition and transportation for the 2011-12 school year (*id.* at pp. 13-14).

Regarding the district's recommended program, the IHO determined that the June 2011 IEP was substantively deficient because the CSE recommended an ICT placement which was insufficient to address the student's language-based learning disability and ADHD (IHO Decision at p. 12). The IHO further determined that the student required a small, structured special education class to address her learning, language, attention, and organizational issues, and that the student would not have enough time to sufficiently comprehend and follow directions; would not receive the refocusing and repetition that she required; and would not receive sufficient individual, small-group, and multisensory instruction to meet her needs in an ICT class "with 25 or more students" (*id.*). The IHO determined that an ICT class would "exacerbate" the student's ADHD and anxiety such that she would be unable to derive educational benefit and make progress (*id.* at pp. 12-13). The IHO also noted that the parents' attorney had indicated that classification was

disputed "subject to clarification" but that it was not otherwise contested during the impartial hearing (*id.* at p. 13). The IHO proceeded to determine that the hearing record indicated that OHI was an appropriate classification for the student (*id.*). The IHO also found the district improperly modified the student's promotion criteria, finding that the modification was "disingenuous," contradictory to the district's claim that the student achieved average test scores and made progress, was an "abrogation of the CSE's responsibility to develop a program with appropriate supports to enable [the student] to make progress in accord with her potential," and that there was "no educational justification for the modified promotion standards" (IHO Decision at p. 12).

Regarding the private school placement, the IHO determined that Windward was appropriate for the student (IHO Decision at p. 13). Specifically, he determined that Windward offered the student a supportive, structured, small class environment with intense language-based curriculum, multisensory instruction, individual attention, and small group activities, and that the program effectively addressed the student's attention, learning, language, writing and spelling deficits (*id.*). The IHO determined that the curriculum at Windward was individualized to each student and provided the refocusing, repetition, modifications, supports, and strategies that the student required (*id.*). The IHO further determined that at Windward there was a low student-to-teacher ratio and students were grouped heterogeneously in larger classes and homogeneously for small group instruction, which encouraged both appropriate social interaction and development and intensive academic instruction (*id.*). He also determined that the student made academic and social progress at Windward, and had improved self-esteem and less anxiety about school (*id.*). He further found that the student's program at Windward "seem[ed]" reasonably calculated to ensure that the student benefited educationally and made academic and social progress (*id.*).

The IHO also determined that equitable considerations supported an award of tuition reimbursement because the parents fully cooperated and communicated with the CSE and they made a timely impartial hearing request (IHO Decision at p. 13).

IV. Appeal for State-Level Review

This appeal by the district ensued. The district alleges that the IHO's determinations that the recommended ICT class would not allow the student to derive educational benefit and make progress; would not provide the student with enough time to sufficiently comprehend and follow directions; not provide the required refocusing and repetition; and not allow for sufficient individual, small group, and multisensory instruction are contrary to the hearing record. The district argues that the ICT class would have been sufficient to meet the student's needs and was reasonably calculated to provide the student with educational benefits. The district alleges that the IHO's determination that the modified promotion criteria on the IEP deprived the student of a FAPE is unsupported by the hearing record. The district argues that the modified promotion criteria was recommended because the student has an ADHD and her skill levels are inconsistent at times, and that the modified criteria was a "backup plan" that would permit consideration of teacher observation, assessments/grades, and attendance in determining whether the student should be promoted to the next grade. The district also contends that the parents' objection to the modified promotion criteria is disingenuous given their placement of the student at Windward, which has a "much less rigorous program."

Regarding the parents' unilateral placement of the student, the district alleges that the parents failed to demonstrate how the student's program at Windward was specially designed to meet her unique needs. According to the district, the parents presented only three documents regarding Windward, two of which provided only general information about Windward. It further alleges that the third document, a report from the parents' expert witness, failed to provide specific information regarding the student's curriculum, teaching methodologies, assessment strategies, functional grouping, or how Windward is assisting the student in making progress in her areas of deficit. The district also notes that the parents did not present the testimony of any Windward staff who had worked with the student or who could testify as to how the program is specially designed to meet the student's unique needs. The district further contends that Windward was not appropriate for the student as it was too restrictive an environment and failed to provide any mainstreaming opportunities to the student.

Lastly, the district alleges that the equities favor the district and that the IHO's finding that they favor the parents is erroneous because the parents never intended to place the student in public school for the 2011-12 school year. For relief the district requests that the IHO's decision awarding reimbursement of tuition and transportation costs to the parents be overturned.

The parents answer the district's petition and allege that the IHO issued a carefully reasoned decision and that the district has presented no persuasive arguments as to why it should be overturned. The parents request that the IHO's decision be upheld in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 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 CFR 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 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 CFR 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]).

VI. Discussion

A. Integrated Co-Teaching Placement

Turning first to the district's argument that the ICT placement was appropriate for the student, the hearing record shows that the CSE reviewed the following documents during the development of the 2011-12 IEP: a March 2009 speech-language evaluation report; an October 2009 social history report; a November 2009 teacher report; a November 2009 district psychoeducational assessment report; an October 2010 private psychoeducational consultation report; a May 2011 teacher report; and information contained in an "updated" June 2011 private psychoeducational consultation report (Tr. pp. 31-35, 63-65, 88-93; Dist. Exs. 4-9; Parent Ex. E; see Dist. Ex. 3 at pp. 1-3). June 2011 CSE meeting attendees included the school psychologist who had conducted the student's November 2009 psychoeducational assessment, the student's special education teacher, the student's regular education teacher, the parents, and by telephone, the private psychologist, who conducted the October 2010 private psychoeducational consultation (Tr. pp. 35-36; Dist. Ex. 3 at p. 11).

The present levels of performance and individual needs contained in the June 2011 IEP reflected information obtained directly from the May 2011 regular education teacher's report, both of the private psychoeducational consultation reports, and information from the special education teacher who provided the student's SETSS (Tr. pp. 35-36; compare Dist. Ex. 3 at pp. 1-3, with Dist. Exs. 4 at p. 5; 5; Parent Ex. E at pp. 1-2).⁴ The IEP noted the student's cognitive evaluation scores obtained in October 2009, reflecting average verbal comprehension, perceptual reasoning, processing speed and full scale scores within the average range, with a low average score in the area of working memory (Dist. Ex. 3 at p. 1). In the area of academics, the IEP indicated that the student's decoding and reading comprehension skills were below average, her spelling skills were "below expectancy," and her math and writing skills were within the third grade level, which was consistent with the results obtained during the June 2011 updated psychoeducational consultation (id.). According to the IEP, the student exhibited below grade level phonological processing and reading vocabulary skills (id.). Additionally, the student demonstrated inconsistent and variable attention skills, and she required "much structure and redirection" (id.).

The special education teacher who participated in the CSE meeting provided information reflected in the June 2011 IEP, which indicated through specific examples how the student had demonstrated improvement in decoding since September 2010 while using a multisensory

⁴ Neither party raises issues on appeal regarding the student's present levels of performance as reflected on the June 2011 IEP.

language program (Dist. Ex. 3 at p. 2). According to the special education teacher, the student had "made gains" in each of the sections she had received targeted instruction (id.). The IEP noted that the student benefitted greatly from "chunking" syllables to improve the accuracy of decoding unknown multisyllabic words, and from a prompt to read all parts of the word (id.). The IEP further reflected that the student "worked hard" in guided reading groups to increase her vocabulary and comprehension by using strategies such as keeping a log, attempting to find word meanings through context, and using resources such as a dictionary and background knowledge (id.). When provided with verbal prompts and picture cues, the student shared ideas with a group, asked questions and made predictions, used text to support her ideas, inferred characters' feelings, and enjoyed reading out loud (id.). In the area of written expression, the student's teachers reported and the IEP reflected that the student generated ideas independently and although she exhibited improvement in the organization of her writing, she continued to need supports such as graphic organizers, teacher modeling, and practice (id.). The student continued to work on self-monitoring her work for capitalization, punctuation, word usage and word omissions; most errors she self-corrected following a prompt to check her work (id.). According to the IEP, the student's spelling skills in isolation had shown "great improvement" since September 2010 (id.). With prompts, the student often identified misspelled words and corrected them (id.). In math, the IEP indicated that the student had developed a "solid strategy" for solving addition and subtraction problems accurately and although she was working on selecting the most efficient strategy for problem solving, using her method usually yielded the correct response (id. at p. 3). In the area of multiplication, the student demonstrated understanding of "facts in groups" with pictures and manipulatives (id.). The student required additional time for memorization of multiplication facts (id.). The IEP noted that "overall," the student had shown progress in each academic area (id.).

According to the June 2011 IEP, the student's classroom supplies were organized, and she demonstrated the ability to initiate her work independently (Dist. Ex. 3 at p. 2). The student completed her homework on a daily basis, which reflected occasional errors (id.). The IEP indicated that the student learned best when she was actively involved in her learning, and benefitted from visual and tactile modalities (id.). According to the IEP, the student was conscientious and responsible, and preferred to work at her own pace and follow her planned path to work completion (id.). The student's independent work habits had improved and she referred to directions written on the board to help keep her on task; while she generally focused on lessons and activities in structured situations, she occasionally became distracted (id. at pp. 2-3). The IEP noted that the student had benefitted from visual supports in her classroom regarding routines, and had succeeded in staying focused during lessons, as evidenced by her ability to retell her task at hand, follow directions, and initiate conversation on the current topic during whole class lessons (id. at p. 3). The June 2011 IEP indicated that the student's behavior was age appropriate, she had positive relationships with peers and adults, had many friends in class, and when working in a group, benefitted from partners she was able to communicate with well (id. at pp. 2-3).

The school psychologist testified that the annual goals contained in the June 2011 IEP were developed by the CSE participants, including the special education teacher who had known the student for "quite a while," and the student's regular education teacher (Tr. p. 40). According to the school psychologist, the CSE reviewed all of the goals at the meeting to ensure they were appropriate and reflected how participants "saw" the student and the information contained in the student's reports (id.). The school psychologist noted that the CSE developed a classroom self-regulation annual goal after reviewing the private psychologist's reports regarding the student's

attention needs related to her diagnosis of ADHD, and need to develop self-monitoring skills and improve the accuracy of her work (Tr. pp. 40-41; Dist. Ex. 3 at p. 4). In the area of reading comprehension, the CSE developed an annual goal to improve the student's inference skills, to support her performance on the State exams and improve passage comprehension; the decoding annual goal developed for the student was designed to improve her ability to break words up into syllables and identify target words rather than substituting unknown words during reading activities (Tr. pp. 41-43; Dist. Ex. 3 at pp. 4-5). To address written expression skill needs, the CSE developed three annual goals to improve the student's self-monitoring and correcting of capitalization, punctuation, and word usage; and improve spelling accuracy (Tr. pp. 43-45; Dist. Ex. 3 at pp. 5-6). The CSE developed two math goals to improve the student's mastery of multiplication facts, and identification of the correct operation and use of an efficient strategy to solve word problems involving addition, subtraction, multiplication, and division (Tr. pp. 45-47; Dist. Ex. 3 at p. 6).

Although the CSE did not have the private psychologist's June 2011 psychoeducational consultation update report "in hand" at the CSE meeting, the private psychologist verbally provided information from the report to CSE participants at the meeting (Tr. pp. 88-89). The private psychologist stated to the school psychologist that "everything that was in the document" was relayed to the CSE (Tr. p. 91). A review of the June 2011 private psychoeducational update report indicated that the student achieved the following subtest standard scores (percentiles) following an administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH): letter-word identification, 93 (32nd percentile); reading fluency, 100 (49th percentile); calculation, 86 (17th percentile); math fluency 81 (10th percentile); spelling, 94 (35th percentile); passage comprehension, 97 (43rd percentile); writing samples, 98 (43rd percentile); word attack, 99 (47th percentile); and picture vocabulary, 98 (45th percentile) (Parent Ex. E at pp. 1, 3). The one subtest (incomplete words) administered to the student from the WJ-III Tests of Cognitive Abilities yielded a standard score of 86 (18th percentile); and the student achieved vocabulary and reading comprehension subtest scores in the 18th and 19th percentile respectively, on the Gates-MacGinitie Reading Tests (*id.* at p. 3). On an administration of the Gray Oral Reading Tests-Fourth Edition (GORT-4), the student achieved subtest scores in the following percentiles: rate (84th); accuracy (50th); passage (75th); comprehension (63rd); and oral reading quotient (73rd) (*id.* at p. 3).

The private psychologist reported that the student continued to exhibit "variable and below-expected performance" on academic achievement measures, citing grade equivalent scores for selected subtests (Parent Ex. E at p. 3). The report also cited the student's weaker performance on the Gates-MacGinitie Reading Tests, described as an "independent timed reading test," than the GORT-4, which the private psychologist indicated was an "interactive measure" (*id.* at p. 1). The private psychologist acknowledged in her report that the student had exhibited progress during the 2010-11 school year and responded well to the SETSS instruction that focused on phonological processing and attention skills (*id.* at p. 2). She further reported an "absence of significant improvement in spelling and independent reading," and recommended that the parents "consider" a specialized school for the student to remediate her academic "weaknesses" (*id.*). While the results of the academic achievement measures yielded some subtest scores in the low average range, the majority of the student's subtest scores were well within the average range, commensurate with the student's cognitive abilities (Tr. pp. 69, 99-100). According to the school

psychologist, these assessment results did not warrant placing the student in a full-time special education program (Tr. pp. 69, 100-01).

During the June 2011 CSE meeting, CSE members discussed possible placement recommendations including continuing the student's current general education placement with SETSS, or placement in an ICT class (Tr. pp. 36-37, 132-33; Dist. Ex. 3 at p. 10). The school psychologist testified that SETSS consisted of "part-time assistance from a special ed[ucation] teacher" and that an ICT class provided full-time assistance from both a special education and a regular education teacher (Tr. pp. 37, 70). State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). Although the student had exhibited progress previously, the school psychologist testified that for the 2011-12 school year, the student required special education teacher support throughout the day (Tr. p. 78). The student's mother stated that she and the private psychologist expressed their opinion that the student needed a more supportive setting; however, the district members of the CSE did not believe a more restrictive placement than an ICT class was necessary (Tr. pp. 133-34; Dist. Ex. 3 at p. 10). The school psychologist acknowledged the private psychologist's report recommending a smaller setting where the student could receive increased support provided by a special education teacher during the day, which according to the school psychologist, was an ICT class (Tr. p. 37). The school psychologist testified to the opportunities for individualized attention and small group instruction within the ICT setting (Tr. pp. 39-40, 67, 71-72). The IEP indicated that the CSE considered and rejected placement of the student in a special class because it was too restrictive for her (Dist. Ex. 3 at p. 10).

In conjunction with the full-time support of a special education teacher in the general education classroom, the June 2011 IEP indicated that the student benefited from visuals, multisensory modes of learning, opportunities for repetition and practice, and previewing and reviewing of concepts (Dist. Ex. 3 at p. 3; see Tr. pp. 39, 71-72). According to the IEP, directions should be provided to the student verbally and in writing as a visual reminder (Dist. Ex. 3 at p. 3; see Tr. p. 39). The student benefitted from structured activities, with graphic organizers and models, and required teacher prompting to use checklists to help her increase her self-monitoring of her work for accuracy (Dist. Ex. 3 at p. 3; see Tr. pp. 39-40). Although the student's 2010-11 regular education teacher opined that placement in general education with SETSS met the student's needs, the IEP indicated that due to the student's academic needs and attention difficulties, she required placement in the ICT program, which was an "increase" in special education support (Dist. Exs. 3 at pp. 3, 7; 5 at p. 3).

Although the parents argue that the student required a smaller, more structured and supportive setting than the recommended ICT class, the information the CSE reviewed and used during the development of the student's 2011-12 IEP, which showed cognitive and academic skills within the average to low average range of functioning, progress achieved during the 2010-11 school year, and the services provided in the IEP including the modifications from part time SETSS services in a general education setting to an ICT setting with a full time special education teacher

and a variety of management and testing accommodations supports a finding that the program and placement provided in the June 2011 IEP was reasonably calculated to provide the student with educational benefits in the LRE in which the student would be placed with her nondisabled peers to the maximum extent appropriate (Newington, 546 F.3d at 119-20).

B. Promotion Criteria

Turning next to the parties' dispute over the promotional criteria in the student's IEP, I note that if a student has been determined to be eligible for special education services, a CSE must include in the contents of an IEP: (1) present levels of performance; (2) disability classification; (3) measurable annual goals; (4) short-term instructional objectives and benchmarks; (5) special education program and services; (6) testing accommodations; (7) participation in State and district-wide assessments; (8) participation in regular class; (9) transition services; (10) twelve-month services; (11) projected date of annual review; and (12) placement (8 NYCRR 200.4[d][2][i]-[xii]). State regulations do not require that IEPs contain promotion criteria (see 8 NYCRR 200.4[d][2]; see also 34 CFR 300.320). Guidance from the Office of Special Education indicates that "[i]f the [CSE] determines that the criteria for the student to advance from grade to grade needs to be modified, the IEP would indicate this as a program modification. This information would most appropriately be indicated in the IEP in the "Supplementary Aids and Services/Program Modifications/Accommodations" section of the IEP" ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Updated April 2011", available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf> at p. 53).

I note that in this matter the IHO did not make any findings regarding the student's annual goals, nor is either party raising the issue of goals on appeal. The school psychologist testified that the student's annual goals reflected that she was not always consistent in her functioning and "still had not mastered some of the techniques and strategies that she needed to be successful for English language arts and math" (Tr. p. 49). Because the student was required to take State exams and score at least a "2" to be promoted in fourth grade, the district recommended modified promotion criteria as a "backup plan," to ensure her promotion to the next grade in the instance the student's attention difficulties resulted in inconsistent performance on the State exams (Tr. pp. 47-48, 74-75). The June 2011 CSE discussed the issue of modifying the student's promotion criteria and the district determined that during the 2011-12 school year, in order to be promoted, the student would be required to meet 85 percent of the fourth grade ELA standards, and 90 percent of the fourth grade math standards as "evidenced by student work, teacher observation, assessments/grades, and attendance" (Tr. p. 131; Dist. Ex. 3 at p. 10).

The hearing record reflects that the parents believed the modified promotion criteria on the IEP was a means of "social promotion" and a method by which the district could promote the student without her demonstrating mastery of the ELA and math grade level standards (Tr. p. 132; Parent Ex. D at p. 1). The parents' characterization of the district's use of the promotion criteria is not supported by the hearing record. The hearing record shows that if the student's performance on State exams was lower than what was needed to be promoted to the next grade, she was still required to show mastery of 85 and 90 percent of ELA and math standards, respectively, which is not inappropriate given the student's needs. As stated previously, due to the fact that promotion criteria is not required by federal or State regulations, and the district expected that the student

would achieve State exam scores of "2" or above and only in the case of a "bad day" would she need the "backup plan" of modified criteria, I find that the evidence above regarding the modified promotional criteria set forth in the June 2011 IEP did not render the special education and related services offered to the student inappropriate to address her needs and does not support the conclusion that the district denied the student of a FAPE (see Tr. pp. 47-48).

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed. The hearing record contains evidence showing that the June 2011 IEP recommending placement in an ICT class was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether Windward was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; 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 that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 7, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year school year, and directed the district to pay for the student's tuition costs at Windward.

Dated: **Albany, New York**
 October 26, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER