



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-103

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

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

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the York Preparatory School (York Prep) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it offered an appropriate educational program to the student for the 2009-10 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing the student was attending seventh grade at York Prep and receiving educational services through the school's "Jump Start" program.¹ York Prep is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's overall cognitive functioning is within the average range (Dist. Ex. 16 at p.

¹ Jump Start is described in the hearing record as York Prep's program for students with diagnosed learning challenges (Tr. p. 287; see Tr. pp. 64-65, 129). Students enrolled in Jump Start meet with their Jump Start teachers twice a day as a group to work on organization and homework (Tr. pp. 291, 301). In addition, each student receives individual tutoring twice a week from their Jump Start teacher (Tr. p. 301). The daily group sessions last approximately 40 minutes while the twice weekly individual sessions last approximately 42 minutes (Tr. p. 302).

3).² As measured by standardized testing, the student's decoding, reading comprehension, and spelling skills are in the average range; however, school estimates suggest that the student's skills in reading and writing are a year delayed (Dist. Exs. 5 at pp. 3-4; 16 at pp. 4-5). The student's mathematical skills, as measured by standardized test results and school estimates, are more significantly delayed; notably, the student presents with weaknesses in calculation and math reasoning skills (Dist. Exs. 5 at pp. 3-4; 16 at pp. 5-6). In addition, the student demonstrates significant difficulty attending and experiences performance anxiety (Dist. Exs. 5 at pp. 3-6; 16 at pp. 8-9; 17). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see Tr. p. 415; 8 NYCRR 200.1[zz][10]).

With respect to the student's educational history, the hearing record reflects that the student attended private school for kindergarten through fifth grade (Tr. p. 381). During the student's kindergarten year, school staff contacted the student's parents and expressed concern regarding the student's behavior at school including her withdrawal, anxiousness, difficulty concentrating, and lying (Tr. pp. 381-82). When the student was in first grade, the parents sought psychological and medical evaluations of the student, the results of which reportedly indicated that the student had an attention deficit hyperactivity disorder (ADHD) as well as auditory processing difficulties (Tr. pp. 383-84; see Dist. Ex. 16 at p. 1).³ The student was prescribed medication for the ADHD; however, in second grade the medication was discontinued due to adverse side effects (Tr. p. 385-87). In third grade, the private school recommended that the parents seek outside tutoring for the student, which the parents obtained through the Sylvan Learning Center (Tr. pp. 387-88; see Dist. Ex. 14 at p. 3). In July 2007, just prior to starting fifth grade, the student began receiving counseling from a private psychiatrist for her ADHD and anxiety (Dist. Ex. 14 at pp. 2-4; Parent Ex. K). Due to concerns regarding the student's academic performance and escalating anxiety, her parents subsequently referred her to the committee on special education (CSE) in or around March 2008 (Dist. Ex. 14 at p. 1).

In response to the parents' CSE referral, on March 29, 2008 the district completed a social history of the student with the student's mother serving as the informant (Dist. Ex. 14 at p. 7). The interviewer reported that, according to the student's mother, the student had always struggled with school work but, as the work became more difficult, the student had become more anxious and self-conscious about her ability to keep up with peers (id. at p. 2). The student's mother indicated that the classes in the student's private school were too large for the teachers to provide the student with the level of help she required and that the student's peers ridiculed the student for her inability to master lessons and for her lack of self-confidence in her own abilities (id.). The interviewer noted that the student spent most of her time preparing for classes at home and at the Sylvan Learning Center, but that despite her efforts the student was usually required to attend summer school (id. at p. 4). According to the interviewer, the student's parents wanted the student placed

² I note that the hearing record contains duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both the district's and parent's exhibits are identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

³ The student reportedly received reading support services in first grade (Dist. Ex. 16 at p. 1).

in a setting that could provide the student with the academic and social/emotional support she required (id.).⁴

In addition to the social history, on May 31, 2008 the district conducted a psychoeducational assessment of the student (Dist. Ex. 15). The evaluating psychologist noted that at the time of the evaluation the student attended a general education setting in a private school and did not receive any "formal services" in her school (id. at p. 1). However, the student received at-home tutoring in math two times per week (id.). The psychologist reported that the student "seemed pleasant and polite" and that she was able to hold an age-appropriate conversation (id.). He further described the student as attentive, focused, and motivated during the evaluation (id.). According to the psychologist, the student indicated that her least favorite subject was math (id.). The psychologist noted that the student was somewhat reserved and nervous about being evaluated in math and that she worked slowly on a math subtest (id.). He noted that the student otherwise worked at a steady pace, did not ask for assistance or clarification, and seemed to understand all instructions and directions (id.). The psychologist opined that the results of the evaluation were valid and reliable (id. at p. 2).

The psychologist reported that he did not conduct intelligence testing as a part of his evaluation because the student had been reliably evaluated in August 2007 and the scores she attained placed her in the average range of intellectual functioning (Dist. Ex. 15 at p. 2).⁵ In order to assess the student's educational abilities the psychologist administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to the student (id.). Administration of the test yielded the following standard scores (and percentile ranks): word reading 105 (63), reading comprehension 98 (45), numerical operations 96 (39), math reasoning 83 (13), mathematics composite 87 (19), and spelling 91 (27) (id. at pp. 2, 4). According to the psychologist, the student performed in the average range on measures of word reading, reading comprehension, and spelling (id. at pp. 2-3). However, the psychologist reported variability in the student's math skills, noting that the student performed much "higher" on tasks that evaluated her ability to add, subtract, multiply, and divide one to three digits numbers than on tasks that required her to understand number concepts, consumer math concepts, geometric measurement, basic graphs, and solve one-step word problems (id. at p. 2). The psychologist indicated that the student's numerical operations subtest score was in the average range while her math reasoning skills were in the low average range (id. at p. 3). The psychologist refrained from making specific recommendations, stating that final recommendations for the student awaited completed evaluations and reports and attendant review by the district's CSE (id.).

While the district was conducting its initial evaluation of the student, the student's parents obtained letters from the student's psychiatrist and school principal advocating for the student's placement (Dist. Ex. 13; Parent Ex. K). In a letter dated April 21, 2008, the student's psychiatrist

⁴ The parent reported that the student's fifth grade teachers expressed concern regarding the student's emotional state and her ability to "keep up" with the other students for the following school year (Tr. p. 389). The private school reportedly asked the student to leave (Tr. p. 390).

⁵ A neuropsychological evaluation conducted in 2007 reportedly revealed that the student demonstrated slow processing speed; graphomotor difficulties; and weak attentional, visual-organizational, and sequencing skills despite intact verbal skills and intellectual aptitude (Dist. Ex. 16 at p. 1).

indicated that the student met the criteria for ADHD, combined type, as well as for a generalized anxiety disorder, severe type (Parent Ex. K). He opined that the student required a change of schools, noting that the student was suffering from a "treatment-resistant case" of ADHD that had "ravaged" her ability to function in her then-current academic placement (id.). The psychiatrist noted that in spite of medication trials and twice weekly psychotherapy the student continued to manifest core symptoms of ADHD which left her unable to keep up with academic demands (id.). According to the psychiatrist, the student was also strained by an anxiety disorder that left her tense and apprehensive and she feared the negative consequences that her ADHD made unavoidable (id.). The psychiatrist commented that school had always been a place of negativity and emotional distress for the student (id.). He noted that the student had managed these stressors with resilience but that "no child can be expected to hold up under all of these demands without the risk of eventual psychic deterioration" (id.). The psychiatrist indicated that the student, with her family's support, had earned acceptance to a "wonderful" program that could finally offer relief to the student after years of academic difficulty and distress (id.). According to the psychiatrist, the structure and support offered by the Jump Start program at York Prep offered the student exactly what she needed to both restore her academic and personal functioning and to thrive into her middle school years (id.). The psychiatrist opined that it was "great news" that the student had a place in the Jump Start program and stated that "all that is needed is proper and appropriate financial assistance for her family to realize the potential of this moment" (id.).

In a letter dated May 12, 2008, the student's private school principal recommended that, for the student's "continued success," she be placed in a middle school environment that "would be more suited to meet her needs within a smaller class size setting" (Dist. Ex. 13). The principal opined that a smaller teacher-to-student ratio would be "advantageous" to the student in many areas including organization and study skills (id.). The principal reported that the student's lack of confidence, especially as exhibited in testing anxiety, interfered with her overall academic growth and assessment of skill mastery (id.).

The CSE convened on July 3, 2008 for the student's initial CSE meeting (Dist. Exs. 10 at pp. 1-2; 29). Meeting participants included the district representative who also served as the special education teacher or related service provider, a school psychologist, a regular education teacher, a school social worker, the student's mother and an additional parent member (Dist. Exs. 10 at p. 2; 29). The student's present levels of performance as described in the resultant July 3, 2008 individualized education program (IEP) reflected the results of the May 2008 psychoeducational evaluation and March 2008 social history conducted by the district (Dist. Ex. 10 at pp. 3-5).⁶ The July 2008 IEP included annual goals related to solving math word problems and improving written expression (id. at p. 6). The CSE determined that the student was eligible for special education programs and services as a student with an other health impairment and recommended that the student attend a general education class and receive three periods of special education teacher support services (SETSS) per week (id. at pp. 1-2, 7). CSE meeting minutes indicated that counseling services were considered by the CSE but that the parent preferred the student receive counseling from her private psychiatrist (Dist. Ex. 29). The CSE recommended that the student be afforded testing accommodations of extended time (1.5), special location, and

⁶ According to July 3, 2008 CSE meeting minutes, the student's mother clarified that the student experienced anxiety prior to exams (Dist. Ex. 29).

directions read and reread aloud (Dist. Ex. 10 at p. 9). According to meeting minutes, the student's mother reported that staff from the student's then-current private school, along with the student's family, had decided that the private school was "not the school" for the student (Dist. Ex. 29). The student's mother shared that the family had been looking at private schools and would consider public schools (id.). The July 2008 CSE meeting minutes further indicated that the parent declined the procedural safeguards notice (id.).

For the 2008-09 school year the student attended York Prep where she received the following first semester academic grades: English 6 (79), Math 6 (65), Fundamentals of Reading 6 (81), History 6 (85), and Science 6 (70) (Dist. Ex. 11 at p. 1).. The student's effort during the first two quarters of the 2008-09 school year ranged from "excellent" in Music 6 and Drama 6 to "unsatisfactory" in History 6 and Science 6 (id.). According to the student's academic report her first semester average was 75 (id.).

The CSE reconvened on June 1, 2009 for the student's annual review (Dist. Ex. 8 at pp. 1-2). Present for the meeting were a special education teacher who also served as the district representative, a regular education teacher, and a school psychologist (Dist. Tr. p. 29; Dist. Ex. 8 at p. 2). In addition, the school psychologist from York Prep participated in the CSE meeting by telephone (Dist. Ex. 8 at p. 2). The student's present levels of performance as reflected in the June 2009 IEP indicated that, based on school estimates, the student was functioning at an "upper" fifth grade level in reading and writing and a "mid" fifth grade level in math (id. at p. 3). The June 2009 IEP indicated that the student struggled with significant attention needs which greatly affected the student's ability to learn, as well as her organization (id. at pp. 2-3, 5). According to the June 2009 IEP, the student required constant refocusing (id. at p. 3). The June 2009 IEP included annual goals related to decoding and interpreting math visuals, solving computation and word problems, reading comprehension, writing and editing, vocabulary and writing mechanics, organization, and improving on-task behavior (id. at pp. 7-10). The June 2009 IEP also included long term adult outcomes and transition services (id. at pp. 11, 19). The CSE recommended that the student's SETSS services be increased from three periods per week to five periods per week, noting that school staff and reports indicated that the student was struggling in all academic areas (id. at pp. 3, 17). To address the student's academic and social/emotional management needs, the June 2009 IEP indicated that the student would require refocusing and redirection, as well as preferential seating (id. at pp. 3-4). The June 2009 IEP reflected access to the student's IEP and collaboration with the special education teacher as program modifications and supports for school personnel (id. at p. 16). Testing accommodations remained the same as in the student's previous July 3, 2008 IEP (id. at p. 18).

In a letter dated June 8, 2009, the district notified the parents of the assigned school for the general education/SETSS placement recommended for the student for the 2009-10 school year (Dist. Ex. 9).

The student's June 2009 report card from York Prep reflected the following second semester academic grades: English 6 (82), Math 6 (74), Fundamentals of Reading 6 (78), History 6 (72), and Science 6 (71) (Dist. Ex. 11 at p. 1). The student's reported effort in her academic classes ranged from "satisfactory" in English 6 and Fundamentals of Reading to "unsatisfactory" in History 6 (id.). Her second semester average was 75 (Dist. Ex. 12). The headmaster commented that the student's performance was "[o]kay" but noted that the student "can and hopefully will, do

better" (Dist. Ex. 11 at p. 1). The dean commented that the student demonstrated "good work and efforts to make progress and improvements throughout the year" and encouraged the student to take advantage of the supports available to her (*id.*). A progress report further detailed the student's abilities with regard to reading comprehension, the writing process, organization/work habits, test preparation, self-awareness, and Jump Start (*id.* at pp. 2-3).⁷ The progress report indicated that with respect to reading comprehension the student could independently determine the main idea and understand literal meaning (*id.* at p. 3). She required prompting or support to gather relevant details, infer meaning, and use effective strategies to deal with reading challenges (*id.*). According to the progress report, when provided with direct supervision the student could self-monitor her attention, concentration, and "the efficiency of strategies" (*id.*). The student further required direct supervision to complete the steps of the writing process (*id.*). With respect to organization and work habits, the progress report indicated that with support the student could complete her homework on a nightly basis, meet the expectations of homework assignments, complete long term papers/projects to the best of her ability, and maintain her binder/backpack/locker and prepare for class (*id.*). The student required direct supervision to maintain her planner and hand in homework on time (*id.*). According to the progress report, with support the student could identify information to be covered on tests and make use of all available resources in preparation for tests (*id.* at p. 2). However, the student required direct supervision to allot an appropriate amount of time to prepare for tests and to use study strategies (*id.* at pp. 2-3). With support, the student was able to identify the strength and challenges that affected her school success and advocate to get her needs met by classroom teachers (*id.* at p. 2). The progress report indicated that the student required direct supervision to implement strategies that were helpful to her (*id.*). With respect to Jump Start, the student's progress report indicated that the student "often" attended morning check-in, "always" attended afternoon study hall, was actively engaged in 1:1 sessions, and demonstrated appropriate behavior (*id.*). Teacher comments contained in the progress report indicated that the student had made a lot of progress during the 2008-09 school year, specifically with regard to being accountable for her school work (*id.*). The report noted that the student's "bubbly, sweet, and respectful personality were always a pleasure to work with," even when the student's academics were a bit "wobbly" (*id.*). The report indicated that the student spent a lot of time working on organization and catching up on missing work or lack of test preparation (*id.*). The report identified the following goals for the student: to maintain and exceed current effort levels and performance, to monitor organization, to improve test preparation skills, and to focus on and improve math skills (*id.*).

In a letter to the district dated June 9, 2009, the student's mother indicated that due to a "mix up" in the mail she had not received timely notice of the student's June 1, 2009 CSE meeting (Dist. Ex. 19). She noted that she called several numbers to cancel the meeting, but had failed to contact anyone in time (*id.*). The student's mother requested that the CSE meeting be rescheduled, noting that she wanted to be present for the meeting and that she had additional information that she believed would be useful to the CSE in making a decision regarding services for her daughter (*id.*).

⁷ The progress report appears to have been written by the student's Jump Start teacher (Dist. Ex. 11 at p. 3; *see* Tr. p. 469).

In a subsequent letter to the CSE chairperson dated June 16, 2009, the student's mother indicated that she had received the district's June 8, 2009 letter as a result of the June 1, 2009 CSE meeting (Dist. Exs. 9; 20; Parent Ex. G).⁸ She reiterated that she was not aware of the June 1, 2009 CSE meeting and therefore had not participated in it (*id.*). The student's mother "respectfully request[ed]" that a new CSE meeting be scheduled and that a placement officer or representative from the placement office attend the meeting to explain the program/placement recommended for the student (*id.*).

In July 2009, the parents obtained a neuropsychological evaluation of the student for the stated purpose of reassessing the student's learning profile and emotional functioning in order to obtain an updated summary of the student's need for academic support (Dist. Ex. 16 at p. 1). The student was evaluated by a psychologist and another individual whose professional background was not identified (*id.* at p. 10). The evaluators noted that the student was consistently polite and cooperative throughout testing, although she appeared somewhat shy and often had to be asked to repeat her responses because they were nearly inaudible (*id.* at p. 2). The evaluators reported that the student often persevered on challenging tasks and questions until she was able to provide an answer, at times "well exceeding" expected time limits (*id.*). According to the evaluators the student responded well to encouragement and validation of her efforts (*id.*). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following index scores (and percentile ranks): full scale IQ 101 (53), verbal comprehension 110 (75), perceptual reasoning 104 (61), working memory 88 (21) and processing speed 91 (27) (*id.* at pp. 2-3). Based on the test results the evaluators stated that the student's overall cognitive functioning was within the average range (*id.* at p. 3). According to the evaluators, the student's language-based thinking and reasoning skills were well developed; however, the student's nonverbal abilities were more variable (*id.*). Specifically, the evaluators reported that the student's abstract perceptual reasoning skills were in the superior range, that her nonverbal sequencing skills were average but less well developed, and that the student had relative difficulty on a task measuring visual-spatial reasoning and organizational abilities (*id.*). The evaluators commented that in general the student's processing speed was low compared to her other cognitive abilities (*id.* at p. 4). The evaluators noted that the student was better able to scan and analyze visual information without a graphomotor component, as opposed to with a motor component, and further noted that the student's slowed decision speed was evident throughout testing (*id.*). According to the evaluators, the student's performance on working memory tasks was an area of relative and normative weakness (*id.*). The evaluators indicated that the student had difficulty remembering and sequencing strings of numbers and letters (*id.*). Based on the student's performance the evaluators concluded that the student demonstrated strong verbal and nonverbal abstract reasoning skills but that her academic functioning was compromised by deficits in working memory, slowed processing speed, and visual organization and sequencing difficulties (*id.*).

The evaluators assessed the student's academic achievement using the WIAT-II, Gray Oral Reading Tests-Fourth Edition (GORT-4) and Test of Written Language-Third Edition (TOWL-3) (Dist. Ex. 16 at p. 5). According to the evaluators, the student attained the following standard scores (and percentile ranks) on the WIAT-II: word reading 100 (50), reading comprehension 110 (77), pseudodecoding 107 (68), reading composite 104 (61), numerical operations 75 (5), math

⁸ Although the text of Parent Ex. G and Dist. Ex. 20 are the same, the letters are addressed to different individuals.

reasoning 78 (7), mathematics composite 74 (4), and spelling 92 (30) (id.). The student also received the following scaled scores (and percentile ranks) on the GORT-4: rate 12 (75), accuracy 9 (37), fluency 10 (50), comprehension 9 (37) and oral reading quotient 97 (42) (id.). Based on the student's performance on the WIAT-II, the evaluators concluded that the student's overall reading abilities were average (id.). The evaluators noted that the student was able to read a list of words and decode nonsense words according to sound-letter correspondence and that the student demonstrated strong reading comprehension skills (id.). The evaluators commented that the student's reading rate on both the WIAT-II and GORT-4 was faster than expected but lowered the student's reading accuracy, which was compromised by her visual organization and sequencing problems (id.). They opined that the student's reading accuracy and comprehension would be enhanced if she read more slowly and carefully (id.). With respect to mathematics the evaluators reported that the student's basic arithmetic skills were poor, that she had difficulty with multi-digit subtraction and multiplication, was unable to perform simple addition, and also struggled with fractions and decimals (id. at p. 6). The evaluators opined that the student's visual organization and sequencing deficits made it difficult for her to accurately process and solve written mathematics problems and the student's working memory deficits made it difficult for the student to solve even basic math problems in her head (id.).

To assess the student's written language, the evaluators administered the TOWL-3 to the student, which yielded the following scaled scores (and percentile ranks): contextual conventions 1 (<1), contextual language 10 (50) and story construction 9 (37) (Dist. Ex. 16 at p. 5). The evaluators characterized the student's writing skills as "variable" (id. at p. 6). They noted that while testing indicated that the student was able to demonstrate some basic abilities, she had difficulty integrating and applying these skills during the writing process (id.). Within the assessment the student was able to create a story that had characters, a basic plot, and a resolution but which also reflected the student's poor graphomotor skills, and difficulty applying grammar, syntax, and spelling rules to her writing (id.).

The evaluators assessed the student's ability to process auditory stimuli using the Test for Auditory Processing Disorders in Children (SCAN-C) (Dist. Ex. 16 at p. 6). According to the evaluators, although previous testing had indicated that the student presented with significant weaknesses in auditory processing, the results of current testing indicated that the student's auditory processing was within the normal range (id. at p. 7). The evaluators noted, however, that the student demonstrated some difficulty identifying words in the presence of background noise (id.). To assess the student's ability to attend to stimuli, the evaluators administered the Conners' Continuous Performance Test (CPT) (id.). According to the evaluators the student was able to initiate and sustain appropriate attention throughout the entire task and overall the student's response pattern was indicative of well-developed attention controls (id.). The evaluators noted that the results of this testing were in contrast to the student's previous evaluation where significant attention problems were present (id.). To assess the student's visual motor skills the evaluators administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) and the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II) (id.). The student's performance on the VMI was in the low average range, with a standard score of 81 (10); however, she attained a standard score of 99 (47) on the Bender Gestalt II, which placed her performance in the average range (id.). According to the evaluators, on the VMI the student was able to process and reproduce designs that were generally similar to the model, but lost points for missing key details within the drawings (id. at p. 8). The evaluators reported that the student's performance

improved on the Bender-Gestalt II, a similar task that is scored based on overall similarity to the original design rather than focusing on fine details (id.). The evaluators concluded that the student's difficulty with accurately recreating fine details within these designs reflected her graphomotor delays (id.).

To assess the student's emotional functioning the evaluators administered the Thematic Apperception Test and Rorschach Inkblot Test to the student (Dist. Ex. 16). According to the evaluators, overall projective testing indicated that the student continued to struggle with feelings of performance anxiety due to her learning difficulties and yearned to experience feelings of accomplishment and pride in her work (id. at p. 9). The evaluators opined that the student may, at times, become avoidant of challenging and emotionally demanding situations in order to prevent experiencing negative emotions (id.). They noted, however, that the student demonstrated a general sense of trust in her relationships with others and her responses reflected optimism about her ability to seek help when needed and a sense of security that the help she needed would be available for her (id.).

The evaluators concluded that the student continued to exhibit deficits in the areas of working memory, processing speed, graphomotor functioning, and visual organization and sequencing and that these deficits compromised the student's academic functioning and led to difficulties with reading accuracy, math, and writing (Dist. Ex. 16 at p. 9). They offered the following diagnostic impressions of the student: learning disorder not otherwise specified (LD-NOS) and anxiety disorder NOS (id.). The evaluators recommended that the student continue to attend school in a small structured supportive program (id.). They further recommended that the student continue to receive Jump Start support services to address her cognitive deficits; extended time on all exams, written assignments, and projects to accommodate her nonverbal learning disability and slower processing speed; and use of a laptop for all writing assignments, note taking, essays, and written examinations due to graphomotor difficulties and slower processing speed (id. at pp. 9-10). The evaluators opined that the student would benefit from pre-written class notes; should be required to complete fewer math problems given her slow speed, visual organization problems, and working memory deficits; and would benefit from using large grid graph paper for all math assignments (id. at p. 10).

In a July 14, 2009 psychiatric update, the student's treating psychiatrist characterized his work with the student as a "tale of two school years." (Dist. Ex. 17). According to the psychiatrist, during the first year the student "struggled miserably" and due to her learning needs (ADHD) was "lost" amidst a school with large class sizes and inadequate attention to her particular needs" (id.). The psychiatrist noted that several trials of medication failed to address the student's core symptoms in that school setting (id.). He further noted that the student's sense of self and self-esteem suffered "tremendously" as the student struggled and failed to keep up with the academic demands (id.). According to the psychiatrist, despite his best efforts, by the end of the year the student was anxious and depressed as she tried to cope with another failed school year (id.). The psychiatrist opined that, "after a badly needed transfer" to York Prep, the student's "life was transformed" (id.). He indicated that, although the student still faced "the same neuropsychiatric disorder that made learning difficult on a daily basis," the attention and focus the student had received at York Prep, in addition to the small class sizes, enabled the student to flourish (id.). The psychiatrist characterized the change in academic environment as "nearly miraculous" in terms of its effect on the student, noting that the student began to succeed as a sixth grader and to develop

a sense of confidence "that has been wonderful to see" (*id.*). The psychiatrist strongly recommended that the student continue in a similar academic environment and opined that the student's mental health would be "seriously imperiled" by a return to the wrong school environment (*id.*). The psychiatrist further stated that "the costs of ADHD are not so much the poor grades, but the many and various insults and injuries to a child's ego that accumulate slowly and insidiously over time," and pleaded that the student be spared "more of this damage" (*id.*). He concluded by recommending an academic environment for the student that included a reliance on small class sizes and an inclusion-based approach with the right balance of structure and nurturance, as well as access to special educational interventions and support on a daily basis (*id.*).

The CSE reconvened on July 16, 2009 at the request of the parents (Dist. Ex. 5 at p. 2). Meeting participants included a special education teacher who also served as the district representative, a regular education teacher, a school psychologist, the student's mother and her educational advocate, and an additional parent member (Tr. pp. 32-33; Dist. Ex. 5 at p. 2). The CSE reviewed the July 2009 neuropsychological evaluation report and psychiatric update and revised the student's present levels of performance to reflect the new information provided by the parents (Tr. pp. 37-39, 51, 76, 126-27; Dist. Ex. 5 at pp. 4, 6). The student's IEP goals were also revised; specifically, goals related to organization and on task behavior were removed from the IEP while a goal related to the student reducing anxiety and improving self-concept was added to the IEP (compare Dist. Ex. 8 at pp. 7-10, with Dist. Ex. 5 at pp. 9-12). The CSE recommended that the student's program be changed from general education with SETSS five times per week to placement in a 12:1 integrated co-teaching (ICT) class for core academic classes (Dist. Ex. 5 at pp. 1-2).⁹ In addition, the CSE recommended that the student receive individual counseling one time per week for forty minutes (*id.* at p. 2). The CSE revised the program modifications and supports for school personnel listed on the student's IEP to include collaboration between the special education instructor and regular education instructor with access to the IEP for training/learning/sharing of strategies for the student's progress, as well as collaboration between the provider, special education instructor and regular education instructor with access to the IEP to share skills and strategies for the benefit of the student (*id.* at p. 17).

In a letter dated August 13, 2009, the district informed the parents of the assigned school for the student's proposed ICT class for the 2009-10 school year (Dist. Ex. 7).

In a letter to the CSE chairperson dated August 14, 2009, the student's mother reported that at the conclusion of the July 16, 2009 CSE meeting she and her advocate had stated for the record that they did not believe the ICT class recommended by the CSE would be appropriate for the student as it would not adequately address her unique special needs (Parent Ex. C). The parent

⁹ Integrated co-teaching services is defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services ([see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf](http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf)). I note that the parties have also used the term "collaborative team teaching" (CTT) to describe the student's recommended program for the 2009-10 school year. For consistency within this decision, I will use the term "ICT" classroom when referring to the district's recommended program.

informed the CSE chairperson that she had signed an enrollment contract with York Prep and made a deposit to ensure that the student would have a placement in the event that the CSE did not offer an appropriate program/placement for the student (id.).¹⁰ The student's mother indicated that as of the date of the letter she had not received a program/placement offer from the district and that as a result of the district not offering a program/placement in a timely manner, she had no alternative but to unilaterally place the student at York Prep (id.). The student's mother informed the CSE chairperson that she planned to seek tuition reimbursement from the district (id.).

In a second letter to the CSE chairperson, dated August 18, 2009, the student's mother stated that she had received the August 13, 2009 letter from the district and had called the assigned school in an effort to set up an appointment to visit (Parent Ex. B). According to the student's mother, she was informed by the assigned school that there would be no one on staff until August 31, 2009 and that she would not be able to make an appointment to view the school until that time (id.). The student's mother reported that she spoke with the assistant principal of the assigned school who was able to answer some of her questions regarding the ICT class, curriculum, class size, and support services, among other things (id.). The student's mother indicated that she was concerned that the ICT class at the assigned school had 25 students in it, which was similar to the private school the student had previously attended (id.). The student's mother reported that she raised class size at the July 16, 2009 CSE meeting and thought that the CSE members were in agreement that a smaller setting would be best for the student (id.). The student's mother stated that accepting a school that she had not seen "would be a mistake," because it had taken almost two years to rebuild the student's self esteem and make her realize that she was not a failure (id.).

In a due process complaint notice dated September 29, 2009, the parents asserted that the district denied the student a free appropriate public education (FAPE) for the 2009-10 school year (Dist. Ex. 2). The parents specifically alleged, among other things, that the July 16, 2009 CSE failed to recommend an appropriate program for the student because the size of the assigned classroom and school building were inappropriate (id. at p. 4). The parents further alleged that the student-to-teacher ratio and teaching methodology at the proposed placement were inappropriate for the student (id.). In addition, the parents alleged that the CSE denied the parent meaningful participation in the placement process; that the CSE ignored concerns expressed by the parent and the advocate at the CSE meeting; that the CSE predetermined the program recommendation; that the CSE failed to properly consider the programs available within the continuum of services; that the transition plan was prepared prior to the meeting denying the parent input into its development; and that the transition goals were not discussed or formulated at the meeting (id. at pp. 3-4). In addition, the parents asserted that the July 16, 2009 CSE failed to consider independent evaluations provided to the CSE and, moreover, that the CSE failed to conduct their own independent evaluations (id. at p. 3). Other assertions by the parents included that the IEP was not reasonably calculated to confer educational benefit upon the student; that the goals and objectives on the IEP did not reflect all of the student's educational, social, and emotional needs; that not all of the goals and objectives were developed at the meeting; that the parent was not given a copy of the IEP at the meeting; that the related services were not appropriate to meet the student's individual needs;

¹⁰ The hearing record indicates that on April 26, 2009 the parents signed an enrollment contract for the student for York Prep for the 2009-10 school year (Dist. Ex. 18 at pp. 6-8). In May 2009, the parents made an \$11,000 payment to the private school (Dist. Ex. 18 at p. 5; Parent Ex. N).

and that the CSE team was not duly constituted (id. at pp. 3-4). In addition, the parents asserted that the district did not have a valid IEP in effect at the beginning of the school year (id. at p. 5). As a remedy, the parents requested tuition reimbursement, the cost of evaluations, and bus transportation, together with costs and fees (id. at p. 6).

Upon attending York Prep, the student received the following first semester grades for the 2009-10 school year: English 7 (70), Math 7 (70), Fundamentals of Reading 7/8 (70), History 7 (60), and Life Science (63) (Dist. Ex. 26 at p. 2). The student's average for the first semester was a 67 (id.). During the first two quarters of the 2009-10 school year the student's effort in Fundamentals of Reading, Life Science, and History 7 was rated as "unsatisfactory" (id.).¹¹

The impartial hearing convened on January 8, 2010 and concluded on June 25, 2010 after five days of proceedings (Tr. pp. 1-647). In a decision dated October 15, 2010, the impartial hearing officer found that a properly composed CSE team recognized that the student was approximately one year behind academically and that the student exhibited deficits in attention, low self-esteem, and anxiety (IHO Decision at pp. 10-11). Noting that the student had a classification of an OHI and that the CSE recommended an ICT placement in which the student could model the behavior of regular education students, and at the same time receive extra help in organization from a special education teacher, the impartial hearing officer found that the ICT model with the related service of counseling was reasonably calculated to provide educational benefit to "a student like" the student in this case (id. at p. 11). The impartial hearing officer found, however, based on a psychoeducational evaluation, a letter from the principal of the private school that the student had previously attended, and an update from the student's psychiatrist that the size of the assigned class and school would be "overwhelming" and "possibly detrimental" for the student (id.). The impartial hearing officer noted that the hearing record reflected the student's failing grades at the private school the student had previously attended, "albeit in a rigorous program, in a classroom of 25-30 students" and therefore found that the recommendation by the district was not appropriate (id.).

With regard to the parents' unilateral placement, the impartial hearing officer found that York Prep was not appropriate for the student because it did not adequately address some of her unique needs which were identified in her most recent IEP (IHO decision at p. 11). The impartial hearing officer pointed to testimony of the student's teachers that they do not routinely consult the students' IEPs, which were kept in a file room; that the York Prep teachers never mentioned the special accommodation in the student's IEP that she should be given time and a half when she takes tests and quizzes in a separate location; and that York Prep did not provide counseling to the student (id. at pp. 11-12). In addition, the impartial hearing officer found that the Jump Start sessions, which included children in grades six through 12, were not appropriate because of a mandate that children should be grouped within three years of their chronological age and functional development (id. at p. 12). Accordingly, the impartial hearing officer denied the parents' request for tuition reimbursement at York Prep (id.).

On appeal, the parents assert that the impartial hearing officer's analysis of the appropriateness of York Prep contained multiple errors of law and fact. As relief, the parents seek

¹¹ York Prep personnel attributed the student's poor performance during the 2009-10 school year to family difficulties (Tr. pp. 307, 355-56).

an order annulling that part of the impartial hearing officer's decision which denied tuition reimbursement based on a mistaken finding that the parents failed to demonstrate the appropriateness of York Prep for the student and further assert that the equitable considerations favor the parents. The parents specifically assert that, contrary to the impartial hearing officer's decision, York Prep was an appropriate placement for the student because the school addressed the student's unique needs as identified in her IEP and psychoeducational evaluation. The parents assert that, based on extensive testimony of the student's Jump Start teacher and three of the student's classroom teachers, York Prep addressed the special needs of the student including her problems with attention and organization as well as her reading, writing and math deficits. Moreover, the parents assert that testimony that the student's teachers do not routinely consult IEPs was not a basis for denying tuition reimbursement as private school teachers do not have to conform to IEPs. In addition, the parents assert that the impartial hearing officer erred in finding that test accommodations were not afforded to the student at York Prep, reiterating the point that private placements do not have to conform to IEPs, but moreover, adding that the hearing record reflected that test accommodations were available to the student. In addition, the parents assert that the impartial hearing officer erred in finding that York Prep was obligated to provide the related service of counseling and, moreover, that York Prep provided counseling to the student, that the student's emotional state improved at York Prep, and that the student received private psychiatric therapy. In addition, the parents assert that the impartial hearing officer erred in citing the functional age range of the student's Jump Start classmates as a basis for denying tuition reimbursement.

The parents further assert that the equitable considerations favor the parents; that they cooperated with the CSE process; and that they had an "open mind" throughout the CSE process. For relief, the parents seek annulment of that part of the impartial hearing officer's decision which denied the parents requested relief and an order directing the district to pay the parents full tuition reimbursement for York Prep for the 2009-10 school year.

In an answer to the parents' petition, the district asserts that the impartial hearing officer correctly determined that the parents failed to demonstrate the appropriateness of York Prep for the student and that equitable considerations preclude an award of reimbursement. Alternatively, the district asserts that the parents only demonstrated the appropriateness of the Jump Start program at York Prep and, as such, any reimbursement award should be limited to the amount that the parents have actually paid to date.

Additionally, the district cross-appeals the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year. The district argues that the impartial hearing officer erred in determining that the size of the assigned ICT class and size of the school where the ICT class was located constituted a basis for concluding that the district failed to offer the student a FAPE for the 2009-10 school year. For relief, the district requests that the parents' tuition reimbursement claim be dismissed.

In an answer to the cross-appeal, the parents deny many of the allegations made by the district and assert that the impartial hearing officer properly concluded that the student was denied a FAPE. In their answer, the parents cite to documents reviewed by the July 16, 2009 CSE in support of their claim that the student required a small class size, detail how the assigned ICT class as implemented would vary from the program listed on the student's IEP, question the range of

academic levels in the assigned class, and assert that the July 16, 2009 IEP did not include a goal referring to the student's attention deficit.

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at

114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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]).

Returning to the parties' dispute in the instant case, I will first consider the district's assertion in its cross-appeal that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE for the 2009-10 school year.

Upon review of the hearing record, I am not persuaded by the assertions of the parents that the student required a small class size to enable the student to receive educational benefits. As noted above, the CSE initially met on June 1, 2009 to develop the student's IEP for the 2009-10 school year (Dist. Ex. 8). At that time, the CSE determined that the student's SETSS services should be increased from three sessions per week to five sessions per week based on information from York Prep that the student was struggling in all academic areas (id. at pp. 3, 17). Subsequently, the CSE met on July 16, 2009 at the request of the student's mother, at which time it considered additional information presented by the student's parents including the July 2009 private neuropsychological evaluation of the student and the July 2009 psychiatric update prepared by the student's private psychiatrist (Tr. pp. 38-39, 51, 76). The IEP developed by the July 16, 2009 CSE reflected the information provided by York Prep at the June 1, 2009 CSE meeting, as well as the additional information presented to the CSE by the student's mother on July 16, 2009 (Dist. Ex. 5). Based on this new information the CSE changed its recommendations and modified the student's IEP to accurately reflect the results of evaluations to identify the student's needs (see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]).

To address the student's academic, attending, and social/emotional needs, the CSE recommended that the student be placed in a 12:1 ICT placement for core academic classes and

that she receive individual counseling one time per week for 40 minutes (Dist. Ex. 5 at pp. 1, 19). The CSE also recommended that refocusing, redirection, and preferential seating be used to address the student's academic and social/emotional management needs and that she be afforded testing accommodations which included extended time (1.5), exams administered in a separate location, and directions read and reread (id. at pp. 3-4, 19). The district representative testified that in looking at the new information presented by the parent, and considering all of the information revealed at the CSE meeting through discussion with the parent, the CSE determined that SETSS was not appropriate for the student, that she required a special education teacher throughout her core subjects, and that an "integrated co-teacher" was better (Tr. p. 39). The district representative reported that the student's academic and social/emotional needs were discussed at the July 2009 CSE meeting and that the opinion of "everyone who sat at the table" was that an ICT placement was a more appropriate setting (Tr. pp. 40-41; see Tr. p. 425).

In addition, the July 2009 CSE considered options such as SETSS and a special class within a community school, but given the nature of the student's difficulties the district representative testified that the student's needs could be addressed by an ICT placement (Tr. p. 55). The district representative explained that in the ICT placement the special education teacher would be available to the student throughout the day, whereas with the previous SETSS recommendation the special education teacher would only be available to the student for one period per day (Tr. pp. 56-57). He further commented that placing the student with non-disabled students would assist the student in "multiple ways" (Tr. p. 58). The district representative noted that the curriculum in the ICT placement would be "on level" and the class would provide the student with models for academic and social behavior (Tr. pp. 58-59, 95). He suggested that there would be cooperation and collaboration between all of the students and that the placement would provide the student with the ability and opportunity to work with students without IEPs (Tr. pp. 58-59). The district representative testified that even though the ICT placement was of "normal class size" it was run based on group theory, where the class was always broken down into smaller groups (Tr. p. 59). He described a "normal" class as having approximately 25 to 30 students and the ICT class as having a maximum of 12 students with IEPs (id.). In addition to the ICT placement, the district representative opined that the provision of counseling services to the student would help her integrate and to deal with situations that arose in the school setting (Tr. p. 60).

The district representative testified that the documents provided to the CSE by the student's mother were influential in recommending an ICT placement for the student (Tr. p. 76). He agreed that the student's attending problems were significant enough to place the student in an ICT placement (Tr. p. 77). With respect to class size, the district representative opined that both ADHD and anxiety were medical concerns and that once they were addressed from a medical perspective, it was not necessary for a child with the conditions to be within a small class setting (Tr. p. 78). He acknowledged that in extreme cases there may be a need for environmental changes (Tr. p. 79).

In addition, testimony by the school psychologist for the district (who also participated in the student's July 2009 CSE meeting) supports a finding that the placement and services recommended by the July 2009 CSE were appropriate for the student. Initially, I note testimony by the district psychologist indicated that the material reviewed by the CSE showed that the student's predominant educational needs stemmed from attending difficulties, and that the student had received a diagnosis of an ADHD, which was consistent with a classification of an other health impairment (Tr. pp. 127-28). The district psychologist also testified that, based on the student's

reported performance, it appeared to him that she would benefit from participation in a school environment where she would have exposure to general education but also special education support (Tr. p. 128). He further stated that an ICT model seemed the most appropriate recommendation for the student to derive educational benefit and make progress in school (*id.*). The psychologist confirmed that the CSE recommended a change from SETSS to an ICT placement based on its determination that the student had "serious" attending difficulties and problems with anxiety (Tr. pp. 163-64). With respect to the CSE's decision to recommend counseling as a related service, the psychologist noted that several documents including the psychiatric update and psychoeducational report suggested that the student required counseling services (Tr. p. 131).

In addition, testimony by the district's special education teacher supports a finding that the ICT placement and services recommended by the July 2009 CSE were appropriate for the student and reflective of her needs in math, writing, organization, and attention as identified in her July 2009 IEP. The hearing record includes testimony from a district special education teacher who teaches math and science in one of the district's ICT classrooms (Tr. pp. 217-18).¹² As detailed by the special education teacher, the ICT placement is staffed by different regular education and special education teachers for different academic subjects who collaborate daily and weekly to discuss students' needs and share teaching strategies (Tr. pp. 219-20, 223, 231, 242-43, 258-60, 264). The special education teacher identified various curricula used by the teachers in the ICT placement including "CMP, Connected mathematics" for math and the Teacher's College curriculum for ELA (Tr. pp. 223-24). He indicated that the CMP "approach" attempted to connect math lessons to student's "everyday usage" (Tr. p. 223). He characterized the Teacher's College curriculum as "writing intensive" (Tr. p. 224). The special education teacher identified additional programs used in the ICT placement to help students "catch up to their grade level" in ELA and build decoding, fluency, vocabulary, and comprehension skills including Recipe for Reading, the Wilson Reading Program, and the Grape Leaf Program (Tr. p. 229).

The district representative for the July 2009 CSE meeting testified that one of the models used in an ICT placement is "station teaching," which he defined as the class breaking up into three or four groups with each of the ICT teachers teaching one group and the other groups working independently (Tr. pp. 95, 265-66). He indicated that all of the groups are heterogeneous and that the students rotate through the stations (Tr. pp. 95-96). According to the district ICT special education teacher, each group contains students functioning at various levels, confirming that a student functioning at a third grade instructional level might be in the same group as a student functioning at a seventh grade instructional level, and that the students at the "high end" help out the other students at their table (Tr. p. 231-32, 265). The special education teacher also reported that the ICT placement uses manipulatives for math, an area identified as a relative need on the student's July 2009 IEP, including base ten blocks, number blocks, number lines, and number strips for kinesthetic learners (Tr. pp. 234-35, 239; *see* Dist. Ex. 5 at pp. 3, 4). He also described how the ICT placement addresses students' needs relative to self-esteem in math (Tr. pp. 237-38).

¹² The special education teacher testified that he held a bachelor's degree in English, a master's degree in ELA and was pursuing his second master's degree in secondary special education (Tr. p. 219). He indicated that he was in the New York City Teaching Fellows program and was one class away from completing his master's degree (Tr. pp. 222, 261-62).

The hearing record reflects that students in the ICT placement receive additional assistance from the classroom teachers if required, through use of "pull outs" (Tr. p. 266). Pull outs occur outside of the ICT classroom if a large group of students (eight to twelve) do not understand a lesson or at the back of the classroom if only one or two students require assistance from the teacher (Tr. pp. 266-67, 274). According to the special education teacher, to redirect or refocus students in the ICT placement who have attending difficulties such as the student in the instant case, "hand signals" and opportunities for physical movement are provided as well as checklists for students to self manage their behavior with rewards for successfully completing "all the checks" (Tr. pp. 230, 233-34, 236). Other strategies employed in the ICT placement include the use of an interactive "smart board," graphic organizers, scaffolding, parallel teaching, paired reading, and preferential seating close to the smart board and the front of the room (Tr. pp. 226-227, 234, 240). The special education teacher stated that for students with an attention deficit disorder or an ADHD such as this student, he first develops a rapport with the student, then "give[s] attention to appropriate behaviors" and prompts and verbally reinforces "correct" behavior (id.).

During the impartial hearing the student's mother agreed that at the time of the July 2009 CSE meeting the student required an ICT class "to make gains" (Tr. p. 415; see Tr. p. 425). However, the parents assert that the student requires placement in a class with fewer students than the specific ICT classroom assigned by the district. In support of the parents' assertion, they make a comparison between the private elementary school that the student previously attended where she struggled academically and socially with the assigned ICT class based upon class size (25 to 30 students). Upon review, I am not persuaded by the parents' assertion that the district's ICT class is comparable to the private elementary school that the student previously attended. Although the hearing record reflects that the private elementary school was a setting in which the student struggled academically and socially, and a May 2008 letter from the principal of the private elementary school recommended that the student be placed in a middle school environment "that would be more suited to her needs within a smaller class size setting;" and references the student's "challenges" and test anxiety, the hearing record does not provide specific information regarding the student's program at the private elementary school or the student's academic performance while attending the school (Dist. Ex. 13). Information from the school's website, entered into evidence, states that the school followed a "rigorous academic curriculum" (Dist. Ex. 28). I note that the evidence in the hearing record indicates that the student was enrolled in a general education program at her previous private school and, unlike the district's recommendations in this case, she did not receive any "formal" services; however the student's parents provided her with tutoring during third grade (Tr. pp. 387-88, 407; Dist. Ex. 15 at p. 1).

Accordingly, the hearing record shows that the student's private elementary school program that she previously attended is not comparable to the district's recommended program because the private school did not include special education support for the student and, moreover, the recommended ICT placement for the 2009-10 school year included an additional teacher in the same size classroom and special education support in all academic classes. In addition, unlike the student's private elementary school, the district's recommended program included individual counseling services provided in the school setting and designed to address the student's anxiety and low self-esteem. Furthermore, as indicated above, the district recommended ICT placement provided opportunities for the student's instruction to occur in small groups as necessary as well as strategies to address her attention and organization needs.

In addition, although the July 2009 psychiatric update from the student's private psychiatrist recommended an academic environment for the student that included "a reliance on small class sizes;" and the July 2009 neuropsychological evaluation indicated that the student should attend school in a "small, structured, supportive program" (Dist. Exs. 16, 17), I note testimony by the district psychologist that students with serious attending difficulties did not necessarily benefit from a smaller classroom environment and that size alone was "not necessarily the determinant of anything" (Tr. p. 164). Rather he suggested that a student's ability to benefit from a particular class depended on how well-run the classroom was, how attentive and trained the teachers were and what classroom management was like (*id.*). The psychologist opined that any student would benefit from being given more teacher time and more opportunities (Tr. p. 165-66). He indicated that other factors such as the number of teachers and teacher background were also important, and that special education "techniques" were also considered (Tr. pp. 97-99). Upon review of the hearing record, I am persuaded that, when evaluating the appropriateness of a placement for this student, the CSE considered whether the student needed a small class size, whether the student needed a special education teacher full or part time and whether it would be beneficial for the student to be educated solely with other special education students or whether, with the use of supplementary aids and services, the student could be educated satisfactorily with regular education students (see 20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21).

In addition, I find that the CSE recommendation of the related service of counseling demonstrates that the CSE properly considered the student's social/emotional needs and provided a means for the student to be able to make educational progress in an ICT class without restricting the size of the class. Providing the student with a tour to familiarize her with the school building, spending time with the student during the transitioning period, making a "bridge" between the student's previous school and the district school, working with the student on the counseling goal included in the her IEP, and communicating with the student's parents, teachers, as well as outside providers (with parental consent) are specific ways described in the hearing record of effectively addressing the student's social/emotional needs through counseling (Tr. p. 187, 189, 193-94; 195-96, 197, 199-200, 201-202, 203-205, 207-208). Accordingly, a review of the hearing record reflects that the counseling recommended on the student's IEP was designed to address the student's anxiety, and provided an opportunity to enable the student to attend the assigned ICT class in the district school and receive educational benefits.¹³

Turning next to the parents' assertion that the student's 2009-10 IEP did not contain a goal referencing the student's attention deficit, a review of the hearing record shows that the student's June 1, 2009 IEP included an annual goal targeting the student's "on task" behavior while the student's July 16, 2009 IEP did not (Dist. Exs. 5; 8 at pp. 10, 15). The hearing record does not indicate why the "on task" behavior goal was not carried over to the student's 2009-10 IEP. However, the transition plan included in both the June and July IEPs includes a goal related to the student being cognizant of her learning style and verbalizing her learning struggles and learning

¹³ I note that the recommended school shared the school building with two other public schools; that between the three schools there were approximately 1350 students in the building; that the three schools shared the lunch room and common spaces such as the auditorium, gym and library; and that the guidance counselor agreed that students with serious attending difficulties benefited from closer teacher supervision and smaller classrooms (Tr. pp. 209-10, 211, 213, 120).

strengths (Dist. Ex. 5 at p. 20). Initially, I note that the student's mother was accompanied to the July 2009 CSE meeting by an advocate who had worked as both a special education teacher for BOCES and a Jump Start teacher at York Prep (Dist. Ex. 24 at p. 1). The district representative testified that the IEP goals were reviewed with the student's mother and her advocate and the student's mother did not dispute that claim during the impartial hearing (Tr. pp. 53-54). As detailed above, the July 2009 CSE considered the student's attending difficulties while developing the student's IEP, a fact reflected by the change in program recommendation and the classroom and testing accommodations recommended for the student. Moreover, the purpose of improving a student's attending is so that the student can achieve the academic goals indicated in the student's IEP. Where, as here, the student's IEP details the student's need and includes recommendations that address the need, I find that a separate goal was not required in this instance in order to offer a FAPE, and further find that the absence of an attending goal on the student's July 2009 IEP did not result in a denial of FAPE for the student.

As noted above, I find that the CSE carefully considered the student's academic, attending, and social/emotional needs and recommended a program reasonably calculated to confer educational benefits to the student. The hearing record reflects that the July 2009 CSE considered the student's attending difficulties and changed its recommendations for the student for the 2009-10 school year based in part on the student's needs in this area (Tr. pp. 77, 163-64). In doing so the CSE balanced the student's anxiety, attending difficulties, and need for special education support with her ability to participate in a general education setting based on her average cognitive ability and potential for academic achievement (see Dist. Exs. 15; 16).¹⁴ Based on the above, I find that the district's recommended program for the 2009-10 school year was reasonably calculated to confer educational benefits to the student.

I will next consider the parents' assertion that the manner in which instruction was provided in the assigned ICT classroom, as described in the hearing record, does not comport with the recommendations contained in the student's 2009-10 IEP. The parents specifically refer to the special education teacher's classroom practices of pulling students into a different room for instruction and conferencing with students in the back of the classroom and the parents argue such practices more closely resemble a SETSS placement than an ICT placement. In essence, these allegations raise the question of whether the district would have appropriately implemented the student's IEP had the parents decided to place the student in the district's recommended program; however, the district has never had the opportunity to implement the student's IEP because the student has never been enrolled in the recommended program or attended the assigned ICT class at the district school. A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). An IEP is implemented if the student is enrolled in a district's recommended placement (see generally Application of a Student with a Disability, Appeal No. 08-005; Application of a Child with a Disability, Appeal No. 07-043). Upon review of a claim that a

¹⁴ I note that the student's history teacher at York Prep testified that there were 19 students in his class, eight of whom had IEPs (Tr. p. 443). He did not indicate that there was any additional staff assigned to the classroom.

district has failed to implement a student's IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007). It has been held that a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). (10-013). In this case, the district proposed an IEP for the student; however, the district did not have the opportunity to implement the student's IEP as a result of the parents' decision not to enroll the student in the district's school. Therefore, it would be highly speculative to determine the degree to which the student may or may not have made educational progress had she attended the district school, even if, assuming for the sake of argument, the district staff would have deviated from the student's IEP and State regulations governing an ICT class (see Application of the Bd. of Educ., Appeal No. 10-104). Moreover, this issue is based in a hypothetical state of facts that could not be and was not presented in the due process complaint notice nor decided by the impartial hearing officer, and it is not appropriate to decide this issue which arises for the first time on appeal.

Even if review of this issue was appropriate, the evidence in the hearing record casts doubt on the validity of the parents' argument.¹⁵ I note that the pull out and conferencing sessions, as described by the special education teacher, are consistent with the description of an ICT model (see 8 NYCRR 200.6[g][2]). The special education teacher testified that the pull outs were based on students' homework performance (Tr. p. 257) and there is no indication that the students removed from the class were only those students with disabilities. Nor is there any indication that the same students were pulled out everyday. Furthermore, conferencing by the ICT regular education or special education teacher in the back of the classroom with an individual or small group of students who need additional help is consistent with the ICT model.

Addressing the parents' assertion that the range of academic functioning of the students in the proposed ICT class was too broad, the State regulations require that students with disabilities placed together for purposes of special education shall be grouped by similarity of individual needs (8 NYCRR 200.6[a][3][i]). The class profile created by the special education teachers of the assigned class indicated that the reading abilities for the special education students enrolled in the class ranged from the 3.6 to 4.5 to the 6.6 to 7.5 grade levels and the students' math abilities, with the exception of one student, ranged from the 3.6-4.5 to the 6.6 to 7.5 grade levels (Dist. Ex. 21 at p. 4).¹⁶ All of the special education students were judged to have average intellectual ability as

¹⁵ Reliance on this evidence is unnecessary to reach the conclusion that the district offered the student a FAPE by preparing an appropriate IEP and offering an ICT placement to the student.

¹⁶ The class profile shows one student performing at the 1.6 to 2.5 grade level in mathematics (Dist. Ex. 21 at p. 4).

well as age appropriate levels of physical development and social development (*id.* at pp. 4-5). The hearing record shows that based on teacher estimates from York Prep the student was functioning academically within the same range as the students in the assigned ICT class (Dist. Ex. 5 at p. 3). Additionally, the student's intellectual ability, as measured by standardized testing, was in the average range and the student was reported as having "excellent behavior at school and at home" (Dist. Exs. 14 at p. 4; 16 at p. 3). The special education teacher for the assigned class testified that the student's instructional levels were similar to the other students in the ICT class, as was her social/emotional performance, and that many of students in the class struggled with inattention (Tr. pp. 228-30, 238). Accordingly, I find that the parents' assertion that the range of academic functioning of the students in the proposed ICT class was too broad to be unpersuasive.

Based upon a careful review of the evidence contained in the hearing record, I disagree with the impartial hearing officer, and conclude that the district's recommended special education program and related services proposed in the July 2009 IEP was reasonably calculated to enable the student to receive educational benefit in the LRE (*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to *J.R. v. Bd. of Educ. of the City of Rye Sch. Dist.*, 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see *Cerra*, 427 F.3d at 195; see also *Mrs. B.*, 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 09-034; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having found that the district offered the student a FAPE in the LRE, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (*Mrs. C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated October 15, 2010 which found that the district failed to offer the student a FAPE and directed the district to reimburse the parents for the costs of the student's tuition at York Prep for the 2009-10 school year are annulled.

**Dated: Albany, New York
December 29, 2010**

**JUSTYN P. BATES
STATE REVIEW OFFICER**