



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-043

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

Appearances:

Law Offices of Regina Skyer & Associates, attorneys for petitioners, Sonia Mendez-Castro, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, John Tseng, Esq., of counsel

DECISION

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

Background

At the time of the impartial hearing, the student was attending ungraded classes at Stephen Gaynor (Tr. pp. 222-25, 298, 305; see Parent Exs. A-C).¹ The Commissioner of Education has not approved Stephen Gaynor as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Stephen Gaynor only admits students with disabilities, and provides educational services through middle school (Tr. pp. 223-24, 297, 305-06, 309, 314-15, 359-63). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]; see also Tr. pp. 39-40).

On May 27, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his individualized education program (IEP) for eighth grade

¹ The student has continuously attended Stephen Gaynor since fourth grade (see Tr. pp. 392-95).

during the 2010-11 school year (see Dist. Exs. 3 at pp. 1-2; 6 at p. 1; see also Tr. pp. 445-46). The following individuals attended the CSE meeting: a district school psychologist (who also acted as the district representative), a district regular education teacher, and a district special education teacher; the student's then-current teacher from Stephen Gaynor (via telephone); an additional parent member; and the parents (Dist. Ex. 3 at p. 2; see Tr. pp. 10, 12-14, 222-23, 225, 389, 401).² To develop the student's IEP, the CSE relied upon information from a 2005 psychoeducational evaluation report, a 2009 speech-language evaluation report, the student's then-current teacher from Stephen Gaynor, and a 10-page progress report related to the student's 2009-10 school year at Stephen Gaynor (Tr. pp. 14-20, 24-28, 51, 56-57, 395-97; Dist. Exs. 4 at pp. 1-10; 5 at pp. 1-10; 6 at p. 1).^{3, 4}

According to the 2005 psychoeducational evaluation report, an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) revealed that the student's cognitive functioning fell within the "bright average" range on tests assessing verbal comprehension and within the superior range on tests assessing perceptual reasoning (Dist. Ex. 4 at pp. 3, 6). In the areas of working memory and processing speed, the student generally performed within the average range (id. at p. 6). Additional assessments of language processing revealed that the student's "[h]igher cognitive thinking (i.e. conceptual thinking)" fell within "at least" the bright average range, his receptive language skills fell within the average range, and his expressive language skills fell within the average range (id. at pp. 6-7).

In the student's 2009-10 Stephen Gaynor progress report, teachers provided information about the student's current abilities in the areas of reading fluency and comprehension, spelling, listening comprehension, writing, mathematics, social studies, perceptual functioning/visual memory, handwriting, organization, following verbal and written directions, oral language and communication, behavior, social interactions, work habits, and homework (Dist. Ex. 5 at pp. 1-10).

In the Stephen Gaynor progress report, teacher comments about the student's reading fluency, rate, expression, and sustained reading described his fluency as "inconsistent," but noted

² At the impartial hearing, the student's teacher from Stephen Gaynor who attended the CSE meeting testified that she held a Master's degree in Learning Difficulties, a Master's degree in both general education and special education, a law degree, her New York State dual certification in general education and special education was "pending," and she had been teaching at Stephen Gaynor for four years (Tr. pp. 221-22, 225).

³ Initially, the district evaluated the student in second grade, and found him eligible to receive special education programs and related services as a student with a learning disability (Tr. pp. 377-80, 382). During summer 2005, the parents privately obtained a psychoeducational evaluation of the student, which indicated that the student would be entering third grade (Dist. Ex. 4 at pp. 1-12). At that time, although the parents did not disagree with a district evaluation, they believed that a private evaluation of the student would be "more detailed" (Tr. pp. 380-83, 386-88).

⁴ The district conducted the 2009 speech-language therapy evaluation of the student relied upon at the CSE meeting (Tr. pp. 397-400; Dist. Ex. 6 at p. 1). The district had also previously conducted an occupational therapy (OT) evaluation of the student (compare Dist. Ex. 4 at p. 12, with Tr. pp. 388-89, 397-400). Based upon the results of the related service evaluations, the district determined that the student did not require either speech-language therapy services or OT services, and the parents did not disagree with those determinations (Tr. pp. 387-89, 397-98).

that when focused, the student could "read with appropriate speed and expression" (Dist. Ex. 5 at p. 1). The student did not, however, "use word attack strategies for new or unfamiliar words" and would "flounder until a teacher" modeled the correct pronunciation (id.). The student required "reminders to slow down" and to "pay attention to punctuation" (id.). In reading comprehension, teacher comments described the student as an "active, enthusiastic, opinionated reader" and further reported that the student connected text read to "other novels or to his own experience," made predictions and inferred the "author's motivation from text," identified and understood similes and hyperbole, and understood the concept of symbolism (id.). The student also demonstrated "strong" comprehension of fiction and his "written responses reflect[ed] both thought and understanding" (id.). However, the student exhibited an "inconsistent" understanding of expository text and difficulty "extracting trivial information" from the text (id.). At Stephen Gaynor, the student's "reading program" consisted of "daily reading of novels in the reading group and expository social studies texts" (id.). In addition, the student read texts independently at school and at home, and texts would be discussed in school (id.). According to the progress report, the student had been taught to "question, predict, mak[e] connections, summarize, and clarify" (id.). Teacher comments noted the following methods and strategies used to teach reading to the student: "annotation; note-taking; story mapping to build summarizing skills; strategies for scanning text to support conclusions; and direct instruction in question types, figurative language, and textbook structure" (id.).

In spelling, teacher comments noted that the student received "repeated reviews of the key concepts and rules" in class, and while he applied spelling rules in "isolation," the student "struggle[d]" to recall the rules "out of context" and did not "independently use them to attack new words in his reading" (Dist. Ex. 5 at p. 1). The progress report indicated that the student was "developing an understanding of prefixes and suffixes," but could not "isolate them or use them independently to aid in his spelling" (id.). According to the report, the student benefitted from "teacher modeling" of syllabication and "slowing down when reading aloud" (id.). In addition, because the student did not "transfer his spelling skills to his written work," he required the use of spell-check or teacher identification of errors (id. at p. 2). The report also indicated that the student "struggle[d] with the proper usage of homophones" (id.).

In writing, teacher comments indicated that although the student could write a "basic five sentence paragraph," he used "simplistic" topic sentences and concluding sentences, which did not "reflect the depth of his insights" (Dist. Ex. 5 at p. 2). According to the report, the student required "one-on-one" assistance to organize his "research materials and sequenc[e] his paragraphs" (id.). He also required "teacher assistance and modeling" to use outlines and "brainstorming techniques" to organize his thoughts (id.). The report further indicated that the student received "explicit, individual instruction" to vary sentence structure and to use vocabulary to reflect his "complex thinking" (id.).

In mathematics, teacher comments described the student as "solid in fraction and decimal skills with few exceptions" (Dist. Ex. 5 at p. 3). According to the report, the student had "mastered the concept of a percent" and learned how to convert with "fractions, decimals and percents;" solve "percent" word problems; solve problems with "probability;" and that the student was currently "studying ratios and proportions" (id.). In mathematics, the student needed "continued reinforcement" with percent increases and decreases and "help" with decimal place value (id.). To effectively teach the student mathematics, teacher comments suggested, in part, the following

strategies: "[b]reaking down" percent word problems, "[u]sing color tiles" to estimate percentages, and "[u]sing pennies and dice" to teach concepts in probability (id. at p. 4).

With respect to the student's organizational skills, teacher comments described his attention as "variable" and noted that he needed "teacher assistance and/or reminders to calm down, focus and begin a task" (Dist. Ex. 5 at p. 6). Because the student tended to "rush through an activity" to finish, he needed "teacher monitoring and direction . . . to work at a slow, but steady pace to complete his work and utilize the entire allotted time" (id.). Due to the student's difficulty with organization, he required "teacher reminders" to organize his desk and papers; he could, however, "organize on his [own] when directed to do so by a teacher" (id.). The student could also be distracted during transitions (id.). The progress report further indicated that the student had difficulty following oral directions and required a "teacher to refocus his attention" (id.). The report noted that an effective strategy to assist the student in following verbal directions included having the student "repeat and rephrase the verbal directions" before beginning a task (id.). With written directions, the student could follow simple, familiar directions, but exhibited "variable" ability to follow more complex, multistep directions depending upon the student's "attention to the language of the direction and to the project at hand" (id. at p. 7). The report noted that positive reinforcement acted as an effective strategy to assist the student's "attempts at following directions" and increased the student's independence (id.).

The 2009-10 Stephen Gaynor progress report also described the student's behavior (Dist. Ex. 5 at p. 8). An area of concern included the student's distractibility, which affected the student's ability to attend to lessons that did not "interest" him or that did not allow the student to "use his background knowledge as a hook" (id.). The report indicated that the student was "easily distracted by peers" and would engage in "off topic conversations" with his peers during a lesson (id.). To assist the student, he required "teacher monitoring and reminders to focus or take a break and go for a walk" (id.). At Stephen Gaynor, the student sat "close to the teacher," and it was also noted that "chewing gum" helped the student focus (id.). The report also noted that the student "benefit[ted] from a highly structured environment and clear expectations of behavior," being allowed to "doodle as a way of focusing his attention," and that the student responded "well to a system of rewards for model behavior" (id.).

Based upon the information presented, the CSE noted in the present levels of academic performance section of the IEP that the student demonstrated "high average verbal abilities and superior nonverbal abilities" (Dist. Ex. 3 at p. 3). The CSE noted that based upon teacher reports, the student did not "independently and consistently" use "phonics strategies" that he had learned in reading, which affected his fluency (id.). In addition, the CSE indicated that the student's reading comprehension improved with text read aloud to him, that he could "connect the materials to other readings or to his own experience," and that he had started reading "at the inferential level with teacher support" (id.).

With respect to the student's present levels of academic performance in writing, the CSE noted that he could write a "basic five sentence paragraph with a basic topic sentence" and that the student needed to "expand his writing, use more complex sentences and more varied vocabulary, [and] organize his research and his writing" (Dist. Ex. 3 at p. 3). The CSE also described the student's handwriting as "legible" (id.).

Turning to the student's present levels of academic performance in mathematics, the CSE noted that he "struggle[d] with sequencing his math problems, remembering math facts and focusing on mathematical problems" (Dist. Ex. 3 at p. 3). The CSE also described the student's attention to task as "variable" and noted that he required "frequent refocusing" (id.).⁵

In addition, the CSE incorporated grade-level teacher estimates provided by the student's then-current teacher from Stephen Gaynor into the IEP to further describe the student's present levels of academic/functional performance in the areas of decoding (5.5), reading comprehension (6.5), writing (5.5), computation (6.5), and mathematical problem solving (6.5) (Dist. Ex. 3 at p. 3; see Tr. pp. 245-51; compare Dist. Ex. 3 at p. 3, with Dist. Ex. 5 at pp. 1, 3).⁶

To address the student's academic management needs, the CSE recommended the use of graphic organizers and outlines, breaking down writing assignments, support with organizing information from different sources, use of manipulatives and breaking down mathematics problems, frequent review of mathematics concepts and facts, and refocusing (Dist. Ex. 3 at p. 3; see Tr. p. 22).

In the area of the student's present levels of social/emotional performance, the CSE described the student as "diligent," but that he tended to "rush through assignments" and needed "refocusing" (Dist. Ex. 3 at p. 4). In addition, the CSE noted that although the student's difficulty with organizing materials caused him to "misplace his papers," he could "organize independently when refocused" (id.). The CSE described the student's school behavior as "appropriate," and further noted that the student was "respectful and kind" and had "many friends" (id.). The CSE also noted that the student could be "easily distracted in class by other students or by his own thoughts" (id.). To address the student's social/emotional management needs, the CSE recommended refocusing and reminding the student to organize his materials (id.). The CSE noted that the student's behaviors did not seriously interfere with instruction and could be addressed by either a regular education teacher or a special education teacher (id.).

The CSE developed annuals goals to address the student's needs in the areas of decoding and fluency, reading comprehension, mathematics, and writing (Dist. Ex. 3 at pp. 7-8; see Tr. pp. 36-39). According to the IEP, the student's progress for each annual goal would be measured by achieving 80 percent accuracy during 10 activities, which would be evaluated every four weeks by the student's provider through the use of "observation, classroom participation, homework and examinations" (id.). The CSE also recommended the following testing accommodations: extended time with breaks as needed; separate location; questions read and re-read; and directions read, re-read, and clarified, if needed (id. at pp. 2, 11; see Dist. Ex. 6 at p. 2).

⁵ The student's father reported that the student did not have a diagnosis of an attention deficit hyperactivity disorder (Dist. Ex. 6 at p. 2).

⁶ The student's then-current teacher at Stephen Gaynor testified at the impartial hearing that she based the grade-level teacher estimates upon the student's "performance in school" (Tr. p. 246).

Based upon the information provided, the CSE recommended placing the student in a 12:1 integrated co-teaching (ICT) classroom (Dist. Ex. 3 at pp. 9-10).⁷ The CSE considered, but rejected, recommending placement in a 12:1 self-contained classroom, noting that the student was "bright and motivated" and that an ICT classroom would "provide exposure to the general education curriculum and to general education students" (id. at p. 10; see Dist. Ex. 6 at p. 2). According to the "CSE Review Rationale," the student's then-current teacher from Stephen Gaynor objected to the recommended placement in an ICT classroom based upon the student's "functional level" and "attentional issues" (Dist. Ex 6 at p. 2). The "CSE Review Rationale" also indicated that the student's father "trust[ed]" the Stephen Gaynor teacher's "comments and agree[d] with the teacher" (id.).

By letter dated August 5, 2010, the district notified the parents of the CSE's recommendations, and identified the student's assigned school for the 2010-11 school year (Dist. Ex. 7). At the impartial hearing, the student's father testified that he "promptly notified" the district that the parents could not "agree to the recommendation" until they visited the proposed school, which was not in session at that time (Tr. pp. 415-16). The parents subsequently visited the proposed school on September 14, 2010 (Tr. p. 416).

Due Process Complaint Notice

In a due process complaint notice, dated October 13, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year based upon both procedural and substantive violations (see Dist. Ex. 1 at pp. 1-3). Specifically, the parents asserted that the district failed to rely on evaluations—and improperly relied upon teacher estimates—to determine the student's present levels of academic performance in developing the student's IEP; the CSE failed to include a properly qualified regular education teacher; the IEP contained vague and insufficient annual goals and short-term objectives, and failed to include any annual goals or short-term objectives to address the student's organization needs; the IEP failed to adequately address the student's needs in the areas of attention, focusing, and organization; the student's attentional needs could not be "appropriately addressed" in the proposed ICT classroom; the proposed ICT classroom was too large to address the student's needs in the areas of decoding, reading fluency, scaffolding, prompting, lack of inferencing skills, and organization; and the assigned school was "inconsistent with [the student's] need for a small, enriched classroom setting" and would not allow the student to "access 1:1 instruction, as needed" (id. at pp. 2-3). As relief, the parents requested reimbursement for the costs of the student's unilateral placement at Stephen Gaynor for the 2010-11 school year (id. at p. 3).

⁷ Within the continuum of services, State regulations define ICT services 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]). State regulations require that an ICT classroom "shall minimally include a special education teacher and a general education teacher," and further, that the "maximum number of students with disabilities" in an ICT class "shall be determined in accordance with the students' individual needs . . . , provided that the number of students with disabilities in such classes shall not exceed 12 students, unless a variance is provided" (8 NYCRR 200.6[g][1]-[2]).

Impartial Hearing Officer Decision

The parties convened on November 30, 2010 for an impartial hearing, which concluded on February 18, 2011, after five nonconsecutive days of testimony (Tr. pp. 1, 479). In a decision dated March 15, 2011, the impartial hearing officer concluded that the district offered the student a FAPE in the least restrictive environment (LRE) for the 2010-11 school year, and he denied the parents' request for reimbursement for the costs of the student's unilateral placement at Stephen Gaynor (IHO Decision at pp. 7-11). Initially, the impartial hearing officer noted the district's failure to conduct "current standardized test[ing]" of the student (*id.* at p. 7).⁸ Notwithstanding this fact, however, the impartial hearing officer concluded that even in the absence of updated testing, the information in the "detailed teacher evaluation" from Stephen Gaynor supplied the CSE with accurate and sufficient information to develop an appropriate IEP for the student (*see id.* at pp. 7-9). He was also not persuaded that the student's 2010-11 "IEP process and result" was invalidated by the CSE's reliance upon the "stale" 2005 psychoeducational evaluation report, as argued by the parents (*id.* at p. 9).

The impartial hearing officer also concluded that the CSE appropriately recommended placing the student in an ICT classroom—with the "appropriate identified supports"—because the student could be "educated . . . within a general education environment," especially given the student's "high average to superior cognitive abilities" (IHO Decision at pp. 9-10). The impartial hearing officer also noted that the LRE principles guiding the district's recommended placement for the student were not, however, "within the framework" of Stephen Gaynor's philosophy of providing education services within a "small self-contained class" (*id.* at p. 10). Although the district offered small, self-contained special education classes, the impartial hearing officer concluded that the student was not an "appropriate candidate for such a program" (*id.*). Finally, the impartial hearing officer opined that while neither party addressed the issue, documentary evidence submitted by the parents regarding tuition payments to Stephen Gaynor indicated that they did not intend to enroll the student in public school, and further, that the parents failed to provide the district with the required 10-day notice prior to placing the student at Stephen Gaynor for the 2010-11 school year (*id.*).

Appeal for State-Level Review

On appeal, the parents assert that the impartial hearing officer erred in concluding that the district offered the student a FAPE for the 2010-11 school year.⁹ To support this assertion, the parents argue that the CSE failed to comply with procedural requirements by failing to evaluate the student since 2005; the impartial hearing officer ignored, excused, and minimized the district's failure to conduct evaluations of the student for the 2010-11 school year; and further, that he improperly coerced the parties into an agreement to conduct an evaluation of the student for the 2011-12 school year. The parents also argue that the district violated the Individuals with

⁸ Upon inquiry by the impartial hearing officer, the parents and the district agreed that the district would conduct an updated evaluation of the student, which would be available for the student's "next scheduled annual review" (*see* Tr. pp. 206-19; *see also* IHO Decision at p. 9).

⁹ In the petition, the parents acknowledge that they abandoned the allegation asserted in their due process complaint notice that the CSE failed to include a properly qualified regular education teacher (Pet. ¶ 9 fn.1; *see* Tr. pp. 484-95; Parent Ex. E at pp. 1-2; *see also* IHO Decision at p. 10).

Disabilities Education Act (IDEA) and State regulations by failing to evaluate the student at least once every three years; failing to notify the parents of any decision made that no new data or evaluative information was needed; and failing to seek parental input regarding what additional data, if any, was needed.

The parents also contend that the student's IEP was not reasonably calculated to enable the student to receive educational benefits because the recommended program was not individualized to the student's needs; the recommended program was developed based upon the opinions of individuals who had no first-hand knowledge of the student; the recommended program was not based upon current evaluative data; and the recommended program did not provide sufficient support, organization, or structure required by the student. The parents assert that the impartial hearing officer ignored evidence that the CSE failed to develop annual goals to address the student's needs in the areas of fluency, focusing, and organization.

In addition, the parents assert that although the impartial hearing officer did not address whether the student's unilateral placement at Stephen Gaynor was appropriate, the evidence indicates that the student made progress at Stephen Gaynor and that Stephen Gaynor met the student's special education needs. With regard to equitable considerations, the parents argue that no issues or concerns preclude full reimbursement for the student's tuition costs at Stephen Gaynor, as they have cooperated with the CSE throughout the process. Therefore, the parents assert that they are entitled to reimbursement for the costs of the student's tuition at Stephen Gaynor for the 2010-11 school year.

As a final matter, the parents allege that the impartial hearing officer's decision failed to comply with State regulations, arguing that the impartial hearing officer's decision contains both legal and factual errors and that the impartial hearing officer erred in sua sponte raising the issue of whether the parents timely provided the district with the required 10-day notice.

In its answer, the district asserts that the impartial hearing officer properly concluded that the district offered the student a FAPE for the 2010-11 school year. Specifically, the district argues that the CSE's reliance, in part, upon a 2005 psychoeducational evaluation report of the student to develop the 2010-11 IEP did not constitute a procedural violation or result in a procedurally flawed IEP. The district further argues that contrary to the parents' assertion, the CSE did have evaluative data of the student available in a recent 2009 speech-language evaluation report, as well as information provided in the student's most recent progress reports from Stephen Gaynor. In addition, the district contends that while State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate or specify where that information must come from. The district also argues that while the hearing record is silent as to the district's requirement to notify the parents regarding whether any new or additional information was needed, the procedural violation, if any, does not rise to the level of a denial of a FAPE.

Next, the district asserts that the student's IEP contains adequate annual goals and that his needs in the areas of organization, attention, and focusing are specifically addressed by the academic management needs contained in the IEP. Finally, the district argues that the recommended ICT classroom was appropriate to meet the student's special education needs and that Stephen Gaynor was not appropriate to meet the student's needs. The district also argues that

equitable considerations do not support an award of tuition reimbursement because the parents did not truly consider placing the student in a public school, and the parents failed to provide the district with the required 10-day notice prior to unilaterally placing the student at Stephen Gaynor for the 2010-11 school year.

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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d

111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

The 2010-11 IEP: Evaluative Data and Present Levels of Performance

Turning to the merits of the appeal, the parents initially argue that the CSE's failure to evaluate the student since 2005 violates the procedural requirements of the IDEA, rendering the student's 2010-11 IEP legally inadequate and denying the student a FAPE. In opposition, the district contends that the CSE's reliance upon the 2005 psychoeducational evaluation report did not result in a procedurally flawed IEP, and further, that the CSE complied with regulations in developing the student's IEP by incorporating information from the student's 2009-10 Stephen

Gaynor progress reports to develop the student's present levels of academic achievement and functional performance. Having considered the arguments asserted by both parties and upon an independent review of the hearing record, I find that the evidence supports the impartial hearing officer's conclusion that even in the absence of updated testing, the CSE had accurate and sufficient information to develop an appropriate IEP for the student for the 2010-11 school year (see IHO Decision at pp. 7-11).

As noted above, it is settled law that not all procedural errors render an IEP legally inadequate under the IDEA, and an administrative officer may only find that a student did not receive a FAPE if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see e.g. Application of the Dep't of Educ., Appeal No. 09-024). Assuming for the sake of argument that the district's failure to evaluate the student since 2005 constitutes a procedural violation, the parents neither allege nor point to any evidence in the hearing record to establish that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. In addition, the hearing record indicates that the impartial hearing officer directly inquired about the absence of a request for an updated evaluation by the district in the parents' due process complaint notice, and the parties agreed—without coercion by the impartial hearing officer, as argued by the parents—to evaluate the student (Tr. pp. 206-19). Therefore, I cannot find that the district's failure to evaluate the student since 2005 denied the student a FAPE for the 2010-11 school year.

Next, it is also settled law that with certain exceptions, a district must periodically review, at least annually, and revise, as appropriate, a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Here, the district correctly argues that although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate or specify where that information must come from. In this case, the evidence reveals that the CSE complied with State and federal regulations to accurately and properly report the student's present levels of academic achievement and functional performance by relying, in part, upon the student's most recent 2005 psychoeducational evaluation report, a 2009 speech-language evaluation report, and the most up-to-date information about the student's current skill levels provided in the student's 2009-10 Stephen Gaynor progress report, and by the student's then-current teacher at Stephen Gaynor—including the teacher estimates in the areas of decoding, reading comprehension, writing, computation, and mathematical problem solving (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Notably, the parents do not allege in either the due process complaint notice or in the petition for review that the information reported in the present levels of academic achievement and functional performance in the student's IEP was inaccurate.

A review of the evidence indicates that the student's present levels of academic achievement and functional performance in the 2010-11 IEP were consistent with the information provided by the student's then-current teacher at Stephen Gaynor, who testified that she informed the CSE about the student's "progress;" "answered questions;" and provided the CSE with the student's academic levels, social/emotional levels, executive functioning, and "how he [was] as a student" (compare Dist. Ex. 3 at pp. 3-4, with Tr. pp. 225-26, 245-46; see also Tr. p. 54). The district's school psychologist testified that the CSE reviewed the student's 2009-10 Stephen Gaynor progress report, which she "integrated" into the student's IEP, along with the information provided by the student's then-current teacher at Stephen Gaynor (Tr. pp. 16-19, 25-27; Dist. Ex. 3 at pp. 3-4; see Tr. pp. 20-22). Consistent with the 2009-10 Stephen Gaynor progress report, the IEP's present levels of academic achievement and functional performance accurately describe the student's difficulties in reading, writing, mathematics, focusing, and organization (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 5 at pp. 1-3, 6-8). With respect to the 2005 psychoeducational evaluation report, the district's school psychologist testified that the CSE used the document to indicate the student's cognitive levels, which she opined remained "consistent over time," and that while an updated evaluation may have provided "more information," she believed that the CSE "had enough" information to develop the student's IEP (see Tr. pp. 23-24, 51-53; compare Dist. Ex. 3 at p. 3, with Dist. Ex. 4 at pp. 6-8).¹⁰ She also testified that the student's then-current teacher at Stephen Gaynor provided the CSE with an "extensive description" of the student, which presented the CSE with "a lot of information" from someone who was "working with [the student] every day" (Tr. pp. 52-53).

Based upon the foregoing, I find that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that accurately reflects the student's special education needs (see 34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

Annual Goals

Although the impartial hearing officer did not make a specific determination regarding the annual goals—or the lack thereof—in the student's 2010-11 IEP, the parents contend that the district denied the student a FAPE because the IEP specifically fails to include annual goals to address the student's attentional difficulties, organization, "staying on topic during discussion," and fluency. For the reasons set forth below, I find this argument is without merit and must be dismissed.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability

¹⁰ In the present levels of academic achievement and functional performance, the CSE noted the following: "According to a previous psycho-educational evaluation, [the student] is a bright child with high average verbal abilities and superior nonverbal abilities" (Dist. Ex. 3 at p. 3). Aside from this sentence, it is unclear from the student's IEP, and the parents do not further set forth in evidence, how the district otherwise relied upon the 2005 psychoeducational evaluation report to develop the student's 2010-11 IEP, or alternatively, how the 2005 psychoeducational report failed to accurately describe the student's cognitive skills.

to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

A review of the evidence indicates that according to the district's school psychologist, the CSE identified the student's attentional difficulties as a weakness, which manifested as a tendency to "rush through his work" (Tr. pp. 28-30). In addition, the district's school psychologist noted that although the student could be "distracted" and needed to be "refocused," she did not characterize the student's attentional difficulties as "a serious attentional problem" (Tr. pp. 29-30). The district's school psychologist also testified that the student demonstrated "some organizational issues," he needed "reminders to organize his papers," and that when focused, the student could "organize independently" (Tr. pp. 30, 32-33). Therefore, to address the student's organizational needs, the CSE recommended management needs, such as "reminders to organize his materials" in the IEP—and not a specific annual goal—because the student could organize independently with reminders (Tr. pp. 32-33, 60; see Dist. Ex. 3 at pp. 3-4).¹¹ Similarly, she testified that to address the student's attentional difficulties, the CSE recommended management needs—noting that in the classroom, a teacher would "refocus [the student] when he gets distracted"—and therefore, no specific annual goal was needed (Tr. pp. 36-37, 59-60). Overall, the district's school psychologist characterized the student in her testimony as a "child who has mild attentional issues, mild disorganization," and a tendency to rush, which experienced teachers would "pick up on" and address as needed (Tr. pp. 63-64).

With respect to "staying on topic during discussions," although the district's school psychologist could not specifically recall any CSE discussions on this particular issue, she explained that "it fits into this profile of mild attentional issues," it was not a "major issue," and therefore, the CSE did not develop a specific annual goal to address it (Tr. pp. 64-65).

Reviewing the annual goals in the student's IEP, the district's school psychologist testified that the annual goal developed to address the student's decoding skills was also designed to address the student's fluency, and explained that "it's the decoding of those unfamiliar words that's affecting his fluency" (Tr. pp. 37-38).

Based upon the foregoing, I find that although the student's 2010-11 IEP did not include specific annual goals to address the student's attentional difficulties, organization, and "staying on topic during discussion," the CSE appropriately recommended academic and social/emotional management needs to address these needs, and therefore, the CSE was not required to develop specific annual goals in these areas to enable the student to be involved in and make progress in the general education curriculum (see Dist. Ex. 3 at pp. 3-4, 7-8). Similarly, I find that as described by the district's school psychologist, the annual goal developed to address the student's decoding

¹¹ Academic management needs and social/emotional management needs describe "[e]nvironmental modifications and human/material resources" to assist the student in the classroom (see Tr. p. 45; Dist. Ex. 3 at pp. 3-4).

needs also addressed the student's fluency, and thus, a specific annual goal for fluency was not necessary to enable the student to be involved in and make progress in the general education curriculum (see Tr. pp. 37-38; Dist. Ex. 3 at p. 7).

The Recommended ICT Classroom

Next, the impartial hearing officer concluded that the CSE appropriately recommended placing the student in an ICT classroom—with the appropriate identified supports—because he determined that the student's "high average to superior cognitive abilities" allowed him to be educated within a general education environment (IHO Decision at pp. 9-10). The parents contend, however, that the ICT classroom would not provide sufficient support, organization, and structure required by the student. As explained below, however, I find that the parents' argument is without merit and must be dismissed.

At the impartial hearing, the district's school psychologist testified that the CSE recommended placing the student in an ICT classroom because he was a "bright" student who "should be exposed to the general ed[ucation] curriculum at the general ed[ucation] pace;" and the student's learning disabilities were similar to the learning disabilities within an ICT classroom (Tr. pp. 40-41). She also testified that although the ICT program was "explained" to the parents, the student's then-current teacher at Stephen Gaynor did not agree with the recommendation—indicating that the student's functional levels were "significantly below and that he need[ed] a self-contained class and that he would be lost in such a class"—and the parents expressed agreement with the teacher (Tr. p. 41). The district's school psychologist responded to the teacher that a "small, self-contained class in the community school would be too restrictive for a student who ha[d] [this student's] cognitive and academic potential and that his needs c[ould] be met in the general education environment . . . [w]ith the necessary . . . modifications and support" (Tr. pp. 41-42; see Tr. pp. 56-57; Dist. Ex. 3 at p. 10).

In her testimony, the district school psychologist explained that an ICT classroom would provide the student with access to both a regular education teacher and a special education teacher, who would "individualize the instruction so assignments c[ould] be adapted" (Tr. pp. 42-43). She also testified that the two teachers in an ICT classroom would allow for "refocusing" the student and for the teacher to "provide the necessary support with the decoding and the comprehension skills or math skills or writing" (id.). In addition, she testified that the methodology used by the co-teachers in an ICT classroom would depend upon the teachers, but explained that the students could "be working in small groups," the co-teachers could teach a lesson together, or one teacher could be "doing a little bit more of the teaching" while the other teacher could be "doing more of the individual support within the classroom" (Tr. pp. 43-44). She also noted that two teachers in an ICT classroom allowed one of the teachers to "provide the necessary support" (Tr. p. 44). Testimony also reveals that the ICT classroom teachers worked as a team, in part by pre-planning their classes together and by using their specialized skills collaboratively "to create an environment that's both strong in terms of curriculum and in terms of . . . teaching strategies for various needs and differentiating instructions" (Tr. pp. 96-97).

According to the district's school psychologist, an ICT classroom was designed to address attentional needs similar to the student's, such as requiring "teacher assistance or reminders to calm down, focus, and begin a task" (Tr. pp. 55-56; see Tr. pp. 65-66). In an ICT classroom, the student's

tendency to rush through assignments and misplace his papers would be addressed through reminders, such as being "told to slow down," and the student would be "given time to organize his backpack and his papers" (Tr. pp. 59-60).

Based upon the foregoing, I find that contrary to the parents' assertions, the CSE's recommended placement in an ICT classroom with the supports identified in the student's IEP would have provided the student with sufficient support, organization, and structure to appropriately address his academic, social/emotional, attention, and organization needs, and thus, offered the student an appropriate placement in the LRE.

Conclusion

Upon due consideration of the evidence in the hearing record, I find that the impartial hearing officer properly concluded that the 2010-11 IEP and recommended placement in an ICT classroom offered the student a FAPE in the LRE for the 2010-11 school year. Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Stephen Gaynor was an appropriate placement (Burlington, 471 U.S. at 370). In light of the determinations made herein, I have also considered the parties' remaining contentions and find that they are without merit and I need not address them.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 14, 2011**

**ROBERT G. BENTLEY
STATE REVIEW OFFICER**