



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-084

Application of a STUDENT SUSPECTED OF HAVING 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:

Law Offices of Susan Deedy, attorneys for petitioners, Susan J. Deedy, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligueller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which found that respondent (the district) correctly determined the student was ineligible for special education and related services and denied the parents' request to be reimbursed for their daughter's tuition costs at the Parents for Torah for All Children (P'TACH) program at Yeshiva University High School for Girls for the 2010-11 school year. The appeal must be dismissed.

During the 2010-11 school year, the student was enrolled in an eleventh grade class at P'TACH, which she has attended since the 2008-09 school year (Tr. pp. 193-94). P'TACH has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Dist. Ex. 21; see 8 NYCRR 200.1[d], 200.7).

The student has received diagnoses of type 1 diabetes mellitus, hypothyroidism,¹ and celiac disease (Tr. p. 279; Parent Exs. C; O; T).² The student's eligibility for special education and related services as a student with an other health-impairment (OHI) is in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

¹ Hypothyroidism relates to the thyroid hormone and the proper balance of metabolism (Tr. p. 281).

² Celiac disease is an autoimmune condition in which the body creates antibodies against the intestines (Tr. p. 281).

Background

The student was first referred to the district's Committee on Special Education (CSE) in March 2006 as a result of her difficulties with reading comprehension and short-term recall of information (Parent Ex. J at p. 1). A psychoeducational evaluation conducted in May 2006 found the student to have relative weaknesses in her reading comprehension abilities and working memory; however, both were within the average range (Parent Ex. M at pp. 3-10). The evaluator noted that although the student displayed "weakness in reading rate and arithmetic," she was able to maintain good grades and achieve scores in the average range on standardized testing, indicating that she was not "severely burdened by her limitations to the point of them affecting her capacity to learn" (id. at p. 10). The CSE found that the student was ineligible for special education and related services at that time (Dist. Ex. 9 at p. 1).

The student's January 2009 report card generated by P'TACH indicated that the student attained 90s in all of her classes except Judaic law, in which she received an 83 (Dist. Ex. 13). The student's teachers indicated that she was demonstrating progress and had made efforts to improve her performance (id.).

On June 9, 2009, the district's school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 7). The school psychologist noted that during the evaluation, the student was "amiable and sociable" and that rapport "was easy to establish and maintain" (id. at p. 1). Additionally, the student did not exhibit behavioral difficulties and maintained her attention to a task (id. at p. 4). The school psychologist included information regarding a recent teacher report that indicated the student demonstrated "effective decoding and word attack skills" and "excellent organizational skills" (id. at p. 2). In addition, the report reflected that the student was "well liked" and maintained several friendships (id.). According to teacher report, the student exhibited difficulties with applying newly learned information, spelling, and writing organized sentences (id.). The student also presented with a weakness in expressive language, requiring her to take additional time to formulate her responses (id. at p. 1).

Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) to the student yielded a full scale IQ (percentile rank) of 114 (82), a verbal IQ of 116 (86), and a performance IQ of 100 (59) (Dist. Ex. 7 at p. 2). Overall, the student exhibited high average verbal abilities and average nonverbal and visual-perceptual abilities (id. at p. 3). Her strengths in vocabulary, visual-perceptual organization, problem solving, and abstract reasoning were predictive of good classroom performance (id.).

Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to the student yielded standard scores of 112 in word reading, 100 in reading comprehension, 103 in numerical operations, and 103 in spelling (Dist. Ex. 7 at p. 3).³ Overall, the results indicated that the student demonstrated average skills in reading, math, and spelling (id. at p. 4). The report also indicated that sight word vocabulary was an area of strength for the student and that reading comprehension was an area of relative weakness (id.). With respect to math, the school

³ The psychoeducational evaluation report stated the incorrect percentile ranks correlating to the student's standard scores (Dist. Ex. 7 at p. 3). The correct percentile ranks were reflected in an individualized education program (IEP) form dated June 15, 2009, which further reflected the CSE's determination that the student was not eligible for special education programs and services (Parent Ex. K at p. 3).

psychologist noted that the student correctly answered the more difficult questions related to math calculation while making mistakes with more simple calculations due to a lack of attention to detail (id.). In the area of written expression, the student exhibited difficulty constructing a well written paragraph (id.). With respect to the projective testing results, the school psychologist indicated that the student was "somewhat guarded or defensive" which may have been due to her "low self-confidence or insecure feelings" (id.). The school psychologist indicated the student could benefit from reading comprehension activities such as reading grade appropriate literature that contained known facts to every new word to assist the student in the area of memory (id. at pp. 4-5).

On June 10, 2009, a district social worker conducted a social history of the student as part of an initial CSE evaluation, with the student's mother serving as informant (Dist. Ex. 9). The parent reported that the student injected herself with insulin approximately 10 times daily (id. at p. 2). The parent also reported that the student was responsible regarding monitoring her blood sugar levels and injecting herself with insulin (id.). If the student became tired or had difficulty focusing, she would take sugar tablets or drink a glass of orange juice (id.). The student was also prescribed medication for her hypothyroidism and followed a strict gluten free diet to address her celiac disease (id.). According to the parent, the student demonstrated "very good social skills" and maintained friendships with peers (id.). The parent also indicated that she believed the student required a small class setting (id. at p. 3).

As a result of a CSE meeting held June 15, 2009, the CSE determined that the student was not eligible for special education and related services as a student with a disability (Parent Ex. K). Accordingly, the district offered a general education placement with no related services (id. at p. 1).

By letter "To Whom it May Concern" dated July 16, 2009, the assistant principal from the student's private elementary school recommended that the student receive special education services to allow her to "flourish academically" (Parent Ex. G). The assistant principal indicated that the student was a "willing learner" within a small group setting when provided with individual attention, and that she could succeed only in "certain learning environments" (id.).

In a July 31, 2009 "Letter of medical necessity," the student's pediatric endocrinologist indicated that she required 8 to 10 insulin injections daily to manage her diabetes, but could experience "wide fluctuations in her blood glucose levels" that at times may create difficulties with her concentration, attention to detail, focus, and memory, which could interfere with her academic performance (Parent Ex. C).⁴ Therefore, the physician indicated that "it would be beneficial" for the student to receive special education services, including individualized attention in a "smaller classroom setting" (id.).

By letter dated August 17, 2009 to the CSE chairperson, the parents requested a CSE meeting for their daughter (Parent Ex. H). The letter indicated that the parents enclosed medical and academic documentation related to student's educational placement needs for September 2009 (id. at p. 1; see Tr. pp. 308-10).

⁴ At the time of the impartial hearing, the endocrinologist testified that the student required four to six injections of insulin daily (Tr. pp. 292-93).

On September 9, 2009, a private developmental psychologist conducted a diagnostic evaluation of the student (Dist. Ex. 6).⁵ According to the report, the student's short-term visual and verbal memory were impaired (21st and 13th percentiles) and below expectations relative to her overall average to above average cognitive abilities (id. at pp. 1-2, 4).⁶ The developmental psychologist indicated that the student's memory delays negatively affected her retention and overall academic performance (id. at p. 2). The developmental psychologist further reported that the student exhibited adequate expressive and receptive language skills (id. at p. 1).

The developmental psychologist administered the CNS Vital Signs, a neurocognitive screening instrument, to the student which overall yielded standard scores within the low average range in the areas of verbal memory and visual memory; within the average range in the areas of processing speed, executive functions, psychomotor speed, reaction time, and cognitive flexibility; and in the above average range in complex attention (Dist. Ex. 6 at pp. 1-2, 4-5). The developmental psychologist recommended that the student receive special education services including intensive cognitive remediation to promote her "full learning potential" (id. at p. 2). Recommendations also included engagement in memory tasks, use of a laptop, additional time for tests and assignments, and monitoring of the student for symptoms of depression (id. at pp. 1-2). The developmental psychologist also recommended providing the student with reading assignments of personal interest to prompt her to read despite her difficulties (id. at p. 3).

On April 14, 2010, the district's special education teacher conducted a classroom observation of the student in her P'TACH history class (Dist. Ex. 8). The observation report indicated that the students sat independently at their desks during a teacher led question and answer period (id. at p. 1). The student was observed to be ready to engage in the lesson and interacted with the teacher in an appropriate manner (id.). The district's special education teacher indicated that the student was attentive and followed teacher instructions demonstrating age appropriate vocabulary and comprehension (id. at p. 2). The district's special education teacher opined that the student functioned at grade level and did not require intervention strategies to learn (id.).

A vocational interview was conducted with the student resulting in a report dated April 14, 2010 (Dist. Ex. 11). The report indicated that the student attended special classes in history, Jewish studies, biology, and geometry; and general education classes for English and two other Jewish studies classes (id. at p. 2).⁷ The student reported that she did not enjoy school (id.). The student stated that she felt "more comfortable" in her small classes because the work was easier and was "not a heavy load" (id. at pp. 1-2). However, she also indicated that the classes she liked best were

⁵ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances in which both district and parent 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 (see 8 NYCRR 200.5[j][3][xii][c]).

⁶ Although not before the CSE, I note that a subsequent evaluation by the same developmental psychologist found the student's long and short term memory to be "intact," and the student achieved standard scores (percentile rank) of 106 (66) in verbal memory and 104 (61) in visual memory (Parent Ex. P at pp. 2, 4).

⁷ At the time of the impartial hearing, the student was attending general education classes in algebra, English, Jewish law, United States history, physiology, physical education, and studio art; and special education classes in Jewish history, Bible, and Hebrew language (Tr. pp. 241-50).

English, art, and physical education (id.). The student also reported that she experienced difficulty studying, and that "her brain shut[] down" if she was in all general education classes (id. at p. 2).

A vocational interview was also conducted with the student's father serving as informant, resulting in a report dated May 17, 2010 (Dist. Ex. 12). The student's father reported that the student's social intelligence was an area of strength (id.). According to the student's father, the student required instruction in the areas of meal preparation, financial management, time management, organization, household management, health/first aid, and consumer skills (id.). The student's father stated that the student needed to become more involved in reading and that she required tutoring in some subjects (id.).

An undated P'TACH teacher report was completed regarding the student's tenth grade year (Dist. Ex. 10). The teachers indicated that the student's reading skills were at a sixth grade level (id.). The student decoded words and answered simple comprehension questions, but demonstrated difficulty with inferential and analytical questions (id.). In the area of language, the student's receptive and expressive language skills were adequate, including her ability to follow directions in class (id.). With respect to writing, the student struggled with sentence structure and expressive language (id.). The teachers also indicated that the student's math skills fell at a ninth through tenth grade level, but she demonstrated difficulty regarding application of math concepts to different areas (id.). The report indicated that the student was hardworking, neat, organized, and prepared for class, completed her assignments in a timely manner, and worked well independently (id.). The teachers indicated that the student's memory skills were an area of strength (id.). The student's weaknesses were in the areas of vocabulary, comprehension, and writing (id.).

On May 17, 2010, the CSE convened for an initial review (Dist. Ex. 3). Meeting attendees included a school psychologist (who also acted as district representative), the student's father, a district special education teacher, a district regular education teacher, a district social worker, and an additional parent member (id. at p. 2). The student's P'TACH math teacher participated in the CSE meeting by telephone (id.). As a result of the review, the CSE determined that the student was not eligible for special education services and recommended a general education placement (id. at p. 1). The CSE noted that the student's grades were all "80s into the high 90s," and that she maintained a grade point average (GPA) of 90.10 (id. at p. 3). The CSE also noted that she had passed the algebra Regents exam in June 2009, attaining a score of 81 (id.). The student's father and the P'TACH math teacher indicated at the May 2010 CSE meeting that they disagreed with the CSE's determination that the student was not eligible for special education programs and services (Tr. pp. 64-65, 112-13).

In a notice to the parents dated May 17, 2010, the CSE chairperson reiterated that the CSE had determined that the student was not eligible for special education services (Dist. Ex. 4). In addition, the notice indicated that the student was parentally placed at P'TACH (id.). The district sent a second notice to the parents dated August 11, 2010, stating that the May 2010 CSE had determined that the student was not eligible for special education services and that the district was offering the student a general education public school placement (Dist. Ex. 5).

The parents rejected the general education placement by letter dated August 25, 2010 stating that the district failed to offer the student a free appropriate public education (FAPE) and notifying the district that they intended to place the student at P'TACH and request tuition

reimbursement for the 2010-11 school year (Dist. Ex. 23). The parents further stated in their August 2010 letter that "consistent with applicable due process procedures . . . a description of their specific reasons for their disagreement" with the CSE's recommendation and their "proposed solution" would be provided under separate cover (id.). The parents also sought transportation to P'TACH for the student (id.).

An undated P'TACH transcript from the student's eleventh grade year reported the student's GPA for ninth and tenth grades as well as for the first semester of eleventh grade (Dist. Ex. 19). The student's ninth grade first and second semester GPAs were 93 and 93.88, respectively (id.). The student's tenth grade first and second semester GPAs were 90.44 and 88.80, respectively (id.). The student's eleventh grade first semester GPA was 83.40 (id.).

Due Process Complaint Notice

By due process complaint notice dated January 4, 2011, the parents asserted that the CSE's determination that the student was ineligible for special education programs and services failed to provide the student with a FAPE (Dist. Ex. 1 at pp. 1-2). The parents also contended that they were denied meaningful participation at the May 2010 CSE meeting because the CSE had predetermined its recommendation and failed to consider input from the parents and the student's private school teachers (id. at pp. 2-3). Furthermore, the parents asserted that the district failed to ensure the attendance of all required CSE members (id. at p. 3). The parents alleged that their placement of the student at P'TACH was appropriate (id.). For relief, the parents requested reimbursement of the student's tuition or direct payment to P'TACH, related services to be provided at P'TACH or through a related services authorizations (RSAs), and transportation to P'TACH (id.).

In a response to the parents' due process complaint notice, the district asserted that it relied on the social history, psychoeducational evaluation, classroom observation, teacher progress reports, and diagnostic testing in determining that the student did not have a disability (Dist. Ex. 2).

Impartial Hearing and Decision

An impartial hearing was convened on March 18, 2011 and concluded on April 11, 2011, after three days of proceedings (Tr. pp. 1-340).^{8, 9} In a decision dated June 13, 2011, the impartial

⁸ I note that the transcript reflects numerous gaps in the testimony or the individual speaking is incorrectly identified (Tr. pp. 58, 61-62, 65, 78, 84-85, 97, 152, 170, 181, 186, 202, 305, 330, 335). I caution the district to ensure that the verbatim hearing record has been properly transcribed in order to ensure that the record of proceedings is adequate (see 8 NYCRR 200.5[j][3][v]; 279.9[a]; see also 34 C.F.R. §§ 300.512[a][4]; 300.514[b][2][i]).

⁹ The hearing record does not include any documentation showing that the impartial hearing officer complied with regulatory requirements regarding the granting of extensions (8 NYCRR 200.5[j][5]). The parties were directed to submit their posthearing memoranda by May 6, 2011, and the impartial hearing officer indicated that his decision would be rendered by June 10, 2011 (Tr. pp. 338-39). Recent guidance from the State Department of Education reminds impartial hearing officers that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to the hearing timelines . . . When a case has been properly extended, the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," Off. of Special Educ. [Aug. 2011], available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>). I urge the

hearing officer found that the CSE correctly determined that the student was not eligible for special education programs and related services (IHO Decision at p. 9).^{10, 11} The impartial hearing officer found that while the July 2009 letter from student's pediatric endocrinologist stated that wide fluctuations in the student's blood glucose levels might create problems with memory and concentration, it did not establish that the fluctuations actually affected the student's academic performance (*id.* at p. 11). Furthermore, he determined that although the pediatric endocrinologist testified that in general, extremes in blood sugar could potentially cause difficulty in school, this testimony failed to demonstrate an adverse effect on the student's educational performance (*id.*). Because of the documentation available to the CSE indicating that the student functioned well in school and that memory was one of her strengths, the impartial hearing officer found that testimony that the student was one year behind in reading comprehension did not support a finding that the student was eligible for special education programs and services as a student with an OHI (*id.* at pp. 11-12).

The impartial hearing officer also addressed the parents' procedural concerns regarding the participation of one of the student's P'TACH teachers at the May 2010 CSE meeting, finding credible the district psychologist's testimony that the P'TACH teacher participated for a "significant" portion of the meeting and that P'TACH, rather than the district, determined which of the student's teachers would participate at the CSE meeting and for how long (IHO Decision at p. 13). Finally, with regard to the May 2010 CSE's failure to have before it the letters from the assistant principal of the student's private elementary school and her pediatric endocrinologist, the impartial hearing officer found that those documents were sent to the district in relation to the student's placement for the prior school year, that the student's father discussed the contents of the pediatric endocrinologist's letter at the May 2010 meeting, and that the parent failed to indicate at the meeting that there were any documents missing which the CSE should consider (*id.*).

impartial hearing officer to ensure that a decision is issued within the 45-day timeline and that extensions are granted for appropriate purposes only and documented in the hearing record.

¹⁰ Although the impartial hearing officer's decision notes that the parties submitted written closing briefs (IHO Decision at pp. 2-3), those briefs were not included in the hearing record. Although oral statements and written briefs by attorneys or parties are not treated as evidence, State regulations nevertheless require the impartial hearing officer to identify (i.e. mark) and enter "all other items" he or she considers into the hearing record (8 NYCRR 200.5[j][5][v]).

¹¹ As noted by the district in its answer, the impartial hearing officer erred in placing the burden of proof regarding the student's eligibility on the parents (IHO Decision at p. 9-11). Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Accordingly, the burden of establishing the appropriateness of the CSE's recommendation that a student not be classified as a student with a disability in New York is placed on the district (Educ. Law § 4404[1][c]; Application of the Dep't of Educ., Appeal No. 08-042). In this instance, this error does not alter the outcome of the case since I have independently reviewed the hearing record and as further described below, find that the district has nevertheless sustained its burden.

Accordingly, the impartial hearing officer denied the parents' request for reimbursement (*id.* at p. 14).

Appeal for State-Level Review

The parents appeal, asserting that the CSE improperly failed to classify the student as a student with an OHI because her chronic health conditions adversely affected her educational performance such that she required special education. The parents argue that the student's success at P'TACH was a result of the supports she received there, without which she would not have been successful in her general education classes. The parents also assert that the district failed to consider a report from the student's pediatric endocrinologist, the contents of which the parents reported to the CSE. In addition to their substantive complaints, the parents assert that the CSE predetermined its recommendations and "rush[ed] to judgment" without hearing from the student's English teacher at P'TACH. Additionally, the parents assert that the student's P'TACH math teacher did not participate for the entire CSE meeting and was "not able to give her full input" regarding the student's abilities. The parents assert that the impartial hearing officer erred in determining that the private developmental psychologist's findings regarding the student's memory difficulties were not supported by academic data. Finally, the parents argue that P'TACH was an appropriate placement for the student, and that equitable considerations favor the parents' request for relief.

The district answers and argues that the impartial hearing officer properly upheld the CSE's determination of ineligibility because the student's medical conditions did not adversely affect her educational performance. Regarding the parents' procedural arguments, the district asserts that incomplete participation at the CSE meeting by the student's math teacher did not constitute a denial of a FAPE, nor did the CSE's failure to have the student's pediatric endocrinologist's report before it. The district further contends that the parents failed to meet their burden as to the appropriateness of the student's private program at P'TACH and that equitable considerations weigh against the parents.

Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (*Rowley*, 458 U.S. at 206-07; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (*A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 [2d Cir. 2009]; *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 [2d Cir. 2003]; *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive

a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 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

Special Education Eligibility—Other Health-Impairment

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]). OHI is defined, as relevant here, as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as . . . diabetes . . .; and
- (ii) Adversely affects a child's educational performance.

(34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]). Accordingly, a child with a disability having an OHI means "a child evaluated . . . as having . . . an other health impairment . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a][1]; see 20 U.S.C. § 1401[3][A]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA is an issue that has been left for each state to resolve (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although

some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D. Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003], aff'd 358 F.3d 150 [1st Cir. 2004], abrogated on other grounds by Forest Grove, 129 S. Ct. 2484). Cases addressing this issue in New York have followed the latter approach (Corchado v. Bd. of Educ., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that the effect of each child's particular impairment on his or her educational performance requires individual analysis as to whether the student's impairment necessitates special education]; Application of the Bd. of Educ., Appeal No. 10-005; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of the Bd. of Educ., Appeal No. 02-066; see N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535, at *1-*2 [2d Cir. Nov. 12 2008]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294 n.6 [S.D.N.Y. 2010]; see also A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 306-11 [E.D.N.Y. 2010]).

In this case, as further discussed below, I am not persuaded that the impartial hearing officer erred in concluding that the CSE properly determined that the student did not meet the requirements for classification as a student with an OHI, as the evidence presented does not establish either that she had limited alertness with respect to her educational environment or that her medical conditions adversely affected her educational performance.

At the May 2010 meeting, the CSE reviewed the September 2009 private diagnostic evaluation, the June 2009 district psychoeducational evaluation, the June 2009 social history, the April 2010 classroom observation, the undated P'TACH teacher report, the vocational interviews, and the January 2009 P'TACH report card and determined that the student was not eligible to receive special education programs and services (Tr. pp. 58-60, 94-108; Dist. Exs. 3 at p. 1; 6-13). According to the testimony of the school psychologist, the CSE determined that the student did not meet the criteria for classification as a student with an OHI because of her high grades, passing exam scores, and because she did not exhibit significant academic delays (Tr. pp. 60-64). The May 2010 CSE acknowledged that the student had received diagnoses of diabetes, celiac disease, and hypothyroidism; however, the CSE believed that the effects of such diagnoses did not negatively affect the student's performance within an educational setting (Tr. p. 77).

The P'TACH educational director testified that the student became overwhelmed easily and required a "great deal" of academic and emotional support to make progress in a general education environment (Tr. pp. 197-98, 220-22). He further testified that she had weaknesses in memory, reading, and writing, and opined that she would not be able to perform in a general education English class if not for the study skills and reading strategies P'TACH employed (Tr. pp. 197, 219). He also indicated that the amount of time the student spent in general education classes had increased every year she attended P'TACH (Tr. p. 217).

The April 2010 classroom observation of the student at P'TACH indicated that she maintained attention, followed directions, and organized her school materials (Dist. Ex. 8 at pp. 1-2). The observation report further indicated that the student appeared to function on grade level and demonstrated the ability to learn without the implementation of intervention strategies (*id.* at p. 2). The January 2009 report card indicated that the student attained grades that ranged from 83

through 98 (Dist. Ex. 13). The report card indicated that the student exhibited progress and effort in her classes as well as a good understanding of the instructional material (id.). The student's P'TACH teachers also indicated that the student exhibited well-developed decoding skills, organizational skills, and an ability to maintain friendships with peers (Dist. Ex. 7 at p. 2). In addition, with respect to the results from the WIAT-II and WASI, overall the student demonstrated average skills in reading, math, and spelling as well as average to high average cognitive skills (id. at pp. 3-4).

The district's school psychologist testified that the May 2010 CSE considered the private developmental psychologist's conclusion that the student's below average memory skills negatively affected her academic performance in all subject areas (Tr. pp. 80-81, 84-88; Dist. Ex. 6 at p. 2). However, the school psychologist testified that the private developmental psychologist did not conduct any standardized testing of the student in the area of academic achievement (Tr. p. 68; Dist. Ex. 6). The school psychologist also stated that the student's standard score of 104 in the area of working memory fell within the average range, indicating that the student would be able to complete tasks related to memory within a classroom setting (Tr. p. 95).¹² Furthermore, the CSE reviewed a P'TACH teacher report that indicated the student's memory was an area of strength (Tr. p. 87; Dist. Ex. 10). The school psychologist also testified that although the private developmental psychologist had determined the student's memory was below average, based on the teacher report and standardized testing results, the student's memory was determined not to be negatively affecting her performance in school (Tr. p. 87).

The hearing record also shows that the parents indicated that the student was responsible regarding monitoring her symptoms of diabetes and following her diet (Tr. p. 103; Dist. Ex. 9 at p. 2).¹³ The student's endocrinologist testified that generally, a student who experienced extreme blood sugar fluctuations would potentially experience difficulties in school (Tr. pp. 286-89). Furthermore, the endocrinologist testified that her "general knowledge indicate[d] that children or adults with diabetes who are not properly controlled for their blood sugars could have difficulty functioning not only on a mental basis, but on a physical basis as well" (Tr. pp. 289-90). With respect to the student, the endocrinologist testified that she was concerned that fluctuations in the student's blood glucose levels were related to her difficulties concentrating (Tr. pp. 285-86). However, the endocrinologist also testified that she had not conducted academic testing on the student at times when she was experiencing extreme blood sugar levels to determine the effects of the fluctuations and was not an "education specialist," nor had she observed the student in school or spoken with her teachers (Tr. pp. 288-89, 300-01).

¹² The school psychologist mistakenly indicated that the memory testing was conducted in June 2009, when in fact it was conducted in May 2006 (Tr. p. 95; compare Dist. Ex. 7 at p. 2, with Parent Ex. M at p. 3). However, I note that the student was 11 years old at the time of the May 2006 testing, and the testing results continue to be an accurate assessment of the student's memory skills. This conclusion is supported by testing conducted in February 2011 indicating that the student's memory fell within the average range (Parent Ex. P at p. 4).

¹³ Type 1 diabetes causes the pancreas to no longer be able to produce insulin, a hormone necessary to maintain a normal level of blood sugars, and "the key to energy utilization for the body" (Tr. p. 280).

I find that, based on the above evidence, the CSE properly determined that the student did not have "limited alertness with respect to the educational environment" as a result of her medical conditions (see Application of a Child Suspected of Having a Disability, Appeal No. 06-015).¹⁴

Educational Performance—Adverse Affect

I will also address the second portion of the OHI criteria, whether the student's educational performance was adversely affected by her diabetes, celiac disease, and hypothyroidism. This inquiry is conducted "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]). I agree with the impartial hearing officer that even assuming that the student had limited alertness with respect to her educational environment, the hearing record does not support a finding that the student's medical conditions adversely affected her educational performance (IHO Decision at p. 11).¹⁵

In the July 2009 letter, the student's pediatric endocrinologist indicated that the student could experience wide fluctuations in her blood glucose levels that could manifest as difficulties with concentration, attention to detail, focus, and memory, and could interfere with her academic performance (Parent Ex. C).¹⁶ A review of the July 2009 endocrinologist's letter shows that she provided general information as to what educational difficulties the student "might" experience and how these difficulties "could" negatively affect her academic performance, rather than affirmatively describing her view of how the student's academics were being adversely affected by her diabetes (see id.). Likewise, the endocrinologist's testimony lacked specificity regarding the actual adverse impact of the student's medical conditions on her educational performance (see Tr. pp. 285-290; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 637 [7th Cir. 2010] [holding "It is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does"] [emphasis in original]; Application of a Child Suspected of Having a Disability, Appeal No. 07-003).

The district's school psychologist testified that the documents reviewed by the May 2010 CSE indicated that the student exhibited certain delays, but the CSE concluded that the evidence did not support a classification of OHI for the student (Tr. pp. 104-113). Furthermore, the school psychologist acknowledged that the student's reading comprehension grade equivalent was delayed by one school year and that the student's P'TACH English teacher estimated in her written

¹⁴ I note that even had I found that the student had a limited alertness with respect to her educational environment, the evidence in the hearing record does not support the conclusion that her medical conditions would have affected her reading comprehension.

¹⁵ I note that the student's endocrinologist testified that hypothyroidism would not negatively affect the student "if it were well-controlled and the patient were compliant with the medication" (Tr. p. 284). She further testified that celiac disease could lead to gastrointestinal distress, which "might complicate [the student's] diabetes control" (Tr. pp. 284-85).

¹⁶ The hearing record indicates that the May 2010 CSE did not have either the July 2009 letter from the assistant principal at P'TACH or the July 2009 letter from the pediatric endocrinologist before it (Tr. pp. 144, 160-61; see Parent Exs. C, G). The school psychologist testified that the parent did not indicate at the CSE meeting that there were additional documents that he wanted the CSE to consider (Tr. pp. 183-84).

report that the student demonstrated a sixth grade reading level (Tr. pp. 123, 131; Dist. Ex. 10).¹⁷ However, the school psychologist stated that the CSE considered the information regarding the student's reading ability in light of a June 2009 administration of the WIAT-II wherein the student achieved a standard score of 112 in word reading (Tr. pp. 121-23, 131; Dist. Ex. 7 at p. 3). Therefore, based on all of the evaluative data, the CSE concluded the student was not eligible for special education programs and services as a student with a disability under the IDEA (Tr. p. 131; Dist. Ex. 7 at p. 3). With respect to this, I note that although the student's reading comprehension grade equivalent was approximately one year behind, she achieved a standard score of 100 in reading comprehension on the WIAT-II (Dist. Ex. 7 at p. 3), which has greater reliability as a measure of ability than grade equivalence.

With respect to standardized test results, the student demonstrated average academic skills and average to high average cognitive abilities (Dist. Ex. 7 at pp. 3-4). In addition, the student was able to function appropriately in school, as shown by her ability to independently work, maintain attention to task, and establish friendships (*id.* at p. 2; Dist. Ex. 10). The school psychologist testified that the student's medical diagnoses did not preclude her from performing in her educational environment, as they did not affect her educational performance (Tr. pp. 77-78, 178). The CSE found that the student's lack of academic delays indicated that she did not require a special education placement, as no academic testing supported her classification (Tr. pp. 66, 86). While the student's teachers indicated weaknesses in vocabulary, reading comprehension, and writing, academic testing reviewed by the May 2010 CSE conflicted with these reports (Tr. pp. 104-06, 112, 129-131; Dist. Exs. 7; 10). The school psychologist testified that while the student may require some degree of remediation in reading, the remediation was insufficient to require an eligibility determination (Tr. pp. 131-35). Indeed, the student performed at close to grade level on academic testing and performed at an above average level on cognitive testing (Tr. pp. 90-92). The school psychologist also testified that the CSE took into consideration that the student was in a small classroom at P'TACH and received tutoring from her English teacher when making its determination of ineligibility (Tr. p. 143).

The school psychologist testified that although the student scored in the low average range on some memory testing, the scores were "not significant" to the level that she should be classified, especially in light of the P'TACH teacher's report indicating that memory was one of the student's strengths (Tr. pp. 86-89). The school psychologist further testified that the CSE's review of the social history and P'TACH teacher reports indicated that the student was capable of managing her medical conditions without additional supports (Tr. pp. 78-79, 103). The student's father also reported at the CSE meeting that the student managed her diabetes well (Tr. p. 146).

Although it is understandable that the student's parents would seek out additional services for their daughter in order for her to have the best possible educational experience, based on the evidence above, I agree with the impartial hearing officer that the CSE correctly determined that the student was not a student with a disability under the IDEA (IHO Decision at p. 13). The evidence presented does not lead to the conclusion that the student's educational performance was adversely affected by her health conditions such that special education was required so as to warrant classification as a student with an OHI (see *C.B. v. Dep't of Educ.*, 2009 WL 928093, at *1-*2 [2d Cir. Apr. 7, 2009]; Application of a Child Suspected of Having a Disability, Appeal No.

¹⁷ The CSE's attempts for the student's P'TACH English teacher to participate in the May 2010 meeting were unsuccessful (Tr. pp. 138-39).

07-003; Application of the Dep't of Educ., Appeal No. 06-120; Application of the Bd. of Educ., Appeal No. 04-098; Application of a Child Suspected of Having a Disability, Appeal No. 01-009).

CSE Process

Because I find that the district correctly determined that the student was not eligible for special education programs and related services as a student with an OHI, the district established that it was under no obligation to provide her with a FAPE and any procedural irregularities will not overcome this conclusion (J.D., 224 F.3d at 69-70; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; N.C., 2008 WL 4874535, at *2; R.B., 496 F.3d at 942; Maus, 688 F. Supp. 2d at 299-300; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003). However, even if I addressed the parents' procedural contentions regarding the May 2010 CSE meeting, I would find their claims to be without merit.

Participation – P'TACH English Teacher

Initially, the parents contend on appeal that the May 2010 CSE should have adjourned until the student's P'TACH English teacher was available to attend the meeting and that the impartial hearing officer failed to consider that the student's P'TACH math teacher was not present for the duration of the CSE meeting.

The student was attending a general education English class at the time of the May 2010 CSE meeting (Dist. Ex. 11 at p. 2) and both a district general education and special education teacher were present at the CSE meeting (Dist. Ex. 3 at p. 4). State regulations require that a regular education and special education teacher of the student be members of the CSE (8 NYCRR 200.3[a][1][ii]-[iii]; 200.4[b]-[c]). The district's school psychologist who attended the CSE meeting testified that the P'TACH math teacher was present at the meeting for a "significant" portion of the time that the CSE discussed the student's educational performance (Tr. p. 57). The student's father testified that the math teacher did not attend the entire CSE meeting and was not provided with the reports relied on by the CSE (Tr. pp. 316-17). However, the student's father also testified that P'TACH was aware of the date of the CSE meeting (Tr. p. 322), and the school psychologist testified that the student's math teacher reported on the student's abilities (Tr. pp. 109-10). The school psychologist further testified that the district invited the student's teachers—through P'TACH's director—to participate in the CSE meeting, but that the P'TACH director determined which of the student's teachers would attend the meeting and for how long (Tr. pp. 140, 183). Furthermore, the hearing record shows that the CSE attempted to contact the P'TACH English teacher on the date of the CSE meeting, but she was unavailable to participate in the meeting (Tr. pp. 138-40, 143-44). Based on the above, I do not find the parents' arguments with regard to the P'TACH teachers' participation to be persuasive.

Consideration of Evaluative Data

The parents also assert that the CSE failed to consider a report from the student's pediatric endocrinologist, which indicated that the student's diabetes could affect her concentration and memory (see Parent Ex. C). The CSE is required to review all materials presented by the parents when making an eligibility determination (34 C.F.R. §§ 300.305[a][1][i]; 300.306[c][1]). As discussed above, although the May 2010 CSE did not have the pediatric endocrinologist's report, the student's father detailed to the CSE the concerns raised by the endocrinologist (Tr. p. 146),

such that the CSE's failure to have the report present for consideration did not deprive the student of a FAPE (see Application of a Student Suspected of Having a Disability, Appeal No. 11-021).

Conclusion

Having determined that the impartial hearing officer correctly concluded that the district appropriately found that the student was not eligible for special education programs and services as a student with an OHI for the 2010-11 school year, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' placement of the student at P'TACH or whether equitable considerations preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 26, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**