



# The University of the State of New York

## The State Education Department State Review Officer

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No. 11-115

### **Application of a STUDENT WITH A DISABILITY, by his parent, 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:**

Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

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

#### **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request that respondent (the district) reimburse her for the student's tuition costs at the Winston Preparatory School (Winston Prep) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Winston Prep in a twelfth grade classroom (Tr. p. 48). Winston Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Parent Ex. H; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs 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]).

#### **Background**

The student's educational history was set forth in a prior State Review Officer decision (see Application of the Dep't of Educ., Appeal No. 10-001), and will not be related at length here.

The student received a diagnosis of an attention deficit disorder (ADD) or an attention deficit hyperactivity disorder (ADHD) in the third grade (Tr. p. 118)<sup>1</sup> and has attended Winston Prep since the 2006-07 school year (Dist. Ex. 12).<sup>2</sup> In addition to his attentional difficulties, the student has been reported as having difficulties with reading comprehension, executive functioning skills such as organization and time management, academic problem solving, and written and oral expressive language (Dist. Exs. 8 at p. 2; 13 at pp. 1, 4, 6; 14 at pp. 1, 4-8).

The Committee on Special Education (CSE) convened on January 15, 2010 for the student's annual review and to develop an individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 3). At that meeting, the student's Winston Prep "Focus" teacher, who participated by telephone, indicated that the student was performing at grade level in all areas; accordingly, the CSE decided to reevaluate the student to determine his level of academic functioning (Tr. pp. 88, 106-08; Dist. Ex. 3).<sup>3</sup> After conducting a social history update, a speech-language evaluation, and an educational evaluation (Dist. Exs. 7-9), the CSE reconvened on May 26, 2010 (Dist. Exs. 2; 5).<sup>4</sup> Participants at the May 2010 CSE meeting included the parent, an educational advocate, a district special education teacher who also acted as the district representative, a district school psychologist, and the student's Focus teacher from Winston Prep participated by telephone (Dist. Ex. 2 at p. 2). The student's Focus teacher informed the CSE that the student's decoding, reading fluency, reading comprehension, writing mechanics, math reasoning, listening comprehension, and oral expression were all at grade level, and that he could produce grade level written work product with support (*id.* at p. 3). The Focus teacher reported that the student required assistance with expanding on his ideas, organizing his ideas, and editing his own work (*id.*). The Focus teacher also related that while the student had evidenced attentional difficulties throughout the day (*id.*), the student was well-behaved in class and would answer questions put to him (*id.* at p. 6). The CSE noted the student's academic management needs, indicating that the student benefited from visual representation, graphic organizers and outlines, proofreading and editing checklists, having a dictionary and thesaurus available for reference, the use of a planner or organizer to prioritize assignments and projects, extra time to complete his work, teacher prompts to refocus, and encouragement asking for clarification when necessary (*id.* at p. 4). The CSE determined the student to be ineligible for special education programs and related services and recommended that

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<sup>1</sup> The diagnosis the student has received is referred to variously in the hearing record as ADD and ADHD, often by the same speaker (*compare* Tr. pp. 79, 118, 231, *and* Dist. Exs. 6 at p. 2; 10 at p. 2, *with* Tr. pp. 96, 118, 226, 230). There is no diagnostic evaluation report contained in the hearing record; for the purposes of this decision I have referred to the student's disorder as ADHD.

<sup>2</sup> Winston Prep is described in the hearing record as a school for students with learning disorders and average to above average intelligence (Tr. p. 29).

<sup>3</sup> The "Focus" class is required for all students at Winston Prep (Tr. p. 40) and is described in the hearing record as "a one-on-one class . . . focusing on a particular or particular kinds of difficulties that [the student] might be having" and is taught by a teacher who acted as the student's "liaison" to the rest of the school (Tr. p. 33).

<sup>4</sup> 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. It is the impartial hearing officer's responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (*see* 8 NYCRR 200.5[j][3][xii][c]), rather than note that there "are some duplications" among the exhibits offered by the district and the parent and admit them regardless (Tr. pp. 15, 17, 21).

he be placed in a general education classroom with declassification support services<sup>5</sup> including one period daily of "SETSS"<sup>6</sup> and individual counseling once weekly for 40 minutes (*id.* at pp. 1-2; *see* Tr. pp. 80, 109). The parent, her advocate, and the student's Focus teacher all disagreed with the CSE's recommendation (Dist. Ex. 6 at p. 2).<sup>7</sup>

By a final notice of recommendation sent to the parent dated June 1, 2010, the district summarized the CSE's determination the student be classified as "non-handicapped" and placed in a general education class, and informed her of the school to which the student had been assigned (Parent Ex. D at p. 1). By letter dated June 22, 2010, the parent indicated that she had visited the assigned school and found it to be inappropriate for the student (*id.* at p. 2). The parent also stated that she disagreed with the CSE's determination that the student was not eligible for special education and notified the district of her intention to enroll him at Winston Prep and initiate an impartial hearing to seek reimbursement for the cost of the student's tuition (*id.*). Thereafter, on August 18, 2010, the parent sent the district a "10 day notice letter," informing the district that she disagreed with the recommended placement and assigned school and would enroll the student at Winston Prep (Parent Ex. C at p. 1). The parent indicated that if the district did not offer the student an appropriate "program placement," she would request an impartial hearing seeking reimbursement of the costs of the student's tuition at Winston Prep (*id.*). On August 30, 2010, the parent entered into an enrollment agreement with Winston Prep (Parent Ex. E at p. 1; *see* Tr. p. 18).<sup>8</sup>

### **Due Process Complaint Notice**

By due process complaint notice dated September 3, 2010, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Dist. Ex. 1 at p. 1). Procedurally, the parent alleged that the May 2010 CSE was improperly composed due to the absence of a speech-language pathologist (*id.* at p. 2). In addition, the CSE did not consider concerns raised by the parent and the student's Winston Prep

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<sup>5</sup> Declassification support services are defined by State regulation as "those services provided . . . to a student or such student's teacher(s) to aid in such student's transition from special education to full-time regular education" (8 NYCRR 200.1[ooo]; *see* 8 NYCRR 200.4[d][1][iii]).

<sup>6</sup> "SETSS" typically refers to special education teacher support services (*see* Application of the Dep't of Educ., Appeal No. 10-115). The hearing record indicates that, in this case, the "SETSS" was recommended to provide the student with academic support as necessary to ease his transition from Winston Prep to a district general education class (Tr. pp. 80, 93, 110).

<sup>7</sup> Although no prior IEP appears in the hearing record, the May 2010 IEP indicates that the student had previously been recommended to receive counseling and speech-language services and testing accommodations (Dist. Ex. 2 at pp. 2, 6). Other exhibits indicate that a February 2009 IEP classified the student with an OHI and recommended placement in an integrated co-teaching class with speech-language and counseling services (Dist. Exs. 8 at p. 1; 9 at p. 2).

<sup>8</sup> I note that Parent Exhibits E and I were submitted to the Office of State Review as one page documents, despite notation in the impartial hearing officer's decision and the hearing transcript reflecting that they consist of two pages (IHO Decision at p. 20; Tr. p. 18) and three pages (IHO Decision at p. 20), respectively. Although the discrepancy does not affect the outcome in this case, I remind the district and the impartial hearing officer of their obligation to ensure the accuracy of the hearing record.

teacher (*id.* at pp. 2-3). Substantively, the parent argued that the decision to declassify the student was based on inadequate evaluations and incorrect statements of the student's present levels of social and academic performance (*id.*). Specifically, the parent challenged the administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) to the student for not measuring the student's pragmatic speech, organization of speech, and social cues in speech (*id.* at p. 2). She further contended that the CSE ignored the student's attending, self-regulation, and organization difficulties (*id.* at pp. 2-3). The parent also asserted that the CSE failed to recommend a transition plan for the student, develop counseling goals for the student, or discuss programs other than general education (*id.* at p. 3). Furthermore, the parent asserted that the assigned school was inappropriate because the assistant principal of the school informed her that the student would be required to repeat classes he had already taken in order to take Regents exams, and might not be able to graduate by the age of 21 (*id.* at pp. 3-4). The parent requested reimbursement of the student's tuition or direct payment to Winston Prep, related services to be provided in accordance with the student's last agreed on IEP, and transportation to Winston Prep (*id.* at p. 4).

### **Impartial Hearing and Decision**

An impartial hearing was convened on January 12, 2011 and concluded on May 31, 2011, after three days of testimony.<sup>9</sup> In a decision dated August 1, 2011, the impartial hearing officer found that the district properly determined that the student was no longer a student with a disability (IHO Decision). The impartial hearing officer determined that the parent had waived her allegations regarding the sufficiency of the CELF-4 evaluation administered to the student or the

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<sup>9</sup> I note that there is nothing in the hearing record that indicates a reason for the inordinate delay between the filing of the due process complaint notice on September 3, 2010 and the record close date of July 25, 2011. Furthermore, no explanation appears in the hearing record why the impartial hearing was not convened for more than four months from the date of the due process complaint notice, why there was a three month gap between the second and third hearing dates, and why the impartial hearing officer granted on the last hearing date two consecutive extensions at once. The hearing record also shows that twice during the impartial hearing, the impartial hearing officer solicited requests for an extension of the compliance date from both parties (Tr. pp. 50, 174-75). Such solicitations on the part of the impartial hearing officer in this case violate federal and State regulations governing impartial hearings, which provide that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][5]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in federal and State regulations (*see* 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]). Moreover, regulatory provisions dictate that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5]). The impartial hearing officer is reminded that it is her obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (*see Application of the Dep't of Educ.*, Appeal No. 11-037; *Application of the Dep't of Educ.*, Appeal No. 08-061; *Application of a Student with a Disability*, Appeal No. 08-064). Additionally, State regulations require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; *see* Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System" available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRSAug2011.pdf>). Finally, I remind the impartial hearing officer that State regulations set forth that each party shall have up to one day to present its case and that additional hearing dates, if required, should be scheduled on consecutive days, when practicable (8 NYCRR 200.5[j][3][xiii]).

failure of the CSE to recommend a transition plan, develop counseling goals, or discuss programs other than general education by not pursuing them at the impartial hearing (id. at pp. 17-18).

With respect to those matters properly before her, the impartial hearing officer found that the May 2010 CSE was properly composed, as districts are not required to include all of a student's related service providers in a CSE meeting, and the parent was informed that she could invite other persons to the meeting if she wished (IHO Decision at pp. 10-11). She also found that the parent was able to meaningfully participate at the CSE meeting and that the CSE properly considered input from the parent and the student's Winston Prep teacher (id. at p. 12). With regard to the sufficiency of the evaluative information before the CSE, the impartial hearing officer noted that the CSE initially convened in January 2010 and determined to reconvene after conducting additional evaluations, indicating compliance with applicable procedural requirements (id. at pp. 13-14). The impartial hearing officer found that the CSE relied on "recent objective evaluative criteria and updated information" in making an "educated and reasoned" determination that the student was ineligible for special education programs and related services (id. at pp. 11-12, 14). Specifically, the impartial hearing officer found that the IEP developed at the May 2010 CSE meeting "contained valid performance sections that described the student[']s current academic, social/emotional, and cognitive functioning" (id. at p. 13). The impartial hearing officer found that the CSE correctly determined the student to be ineligible for special education programs and related services as a student with an OHI, as there was no indication that the student's alleged ADHD adversely affected his academic performance (id. at pp. 14-16). The impartial hearing officer also found that the CSE properly determined the student not to be eligible for special education as a student with autism, as the evidence before the CSE was insufficient to determine that the student's alleged symptoms of Asperger's syndrome adversely affected his educational performance (id. at pp. 15-16). The impartial hearing officer further found that the declassification support services recommended by the CSE were appropriate to meet the student's needs (id. at p. 17).

Finally, addressing the parent's arguments relating to the appropriateness of the assigned school, the impartial hearing officer noted that the argument was both speculative and that the parent had referenced no authority for her position that the placement was inappropriate because the student might not graduate at the same time he would at Winston Prep (IHO Decision at p. 18). The impartial hearing officer found that the parent had implied that the student could not be properly placed in a public school program due to a lack of State testing available at Winston Prep, which argument the impartial hearing officer rejected as contrary to the IDEA (id.). The impartial hearing officer accordingly denied the parent's request for reimbursement of the student's Winston Prep tuition (id. at pp. 18-19).<sup>10</sup>

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<sup>10</sup> I note that the parties' closing memoranda were not included in the hearing record. While 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]; see 8 NYCRR 200.5[j][3][xii]). I caution the impartial hearing officer to comply with this regulation in future proceedings.

## **Appeal for State-Level Review**

The parent appeals the impartial hearing officer's decision, arguing that the impartial hearing officer erred in finding that the CSE properly determined that student was not eligible for special education and related services and did not meet the criteria to be classified as a student with an OHI. Procedurally, the parent asserts that the CSE failed to provide notice to her that the primary purpose of the May 2010 CSE meeting was to declassify the student. The parent further asserts that the district deprived her of her right to meaningfully participate in the development of the student's IEP by failing to inform her of her right to request additional assessments.

With regard to the determination that the student was not eligible for special education programs and related services, the parent asserts that the student was performing below average in multiple academic areas and that the CSE failed to take into account the student's classroom difficulties and ADHD. Specifically, the parent asserts that testimony at the impartial hearing established that the student's ADHD and symptoms of Asperger's syndrome adversely affected his academic functioning. Furthermore, the parent contends that the student's social/emotional and processing speed deficits hindered him both in his relationships with peers and academically, and that the CSE erred in determining the student not to be eligible for special education solely on the basis of his academic achievement. The parent also alleges that the assigned school was inappropriate because it would have required the student to take Regents exams in order to graduate, delaying his graduation for several years.

The parent contends that Winston Prep was an appropriate unilateral placement because the student was functionally grouped with students having similar needs in a small class which gave the student the 1:1 interaction he required, the student was enrolled in a 1:1 class that concentrated on his specific needs, the student received weekly counseling services, the student made progress in his ability to receive construction criticism, and the student was on track to graduate from Winston Prep and attend college. The parent asserts that equitable considerations support her tuition reimbursement request. For relief, the parent requests reimbursement for the student's tuition at Winston Prep.

The district answers and denies the parent's material allegations. The district contends that the parent's allegations that she was not provided sufficient notice of the May 2010 CSE meeting and was unable to meaningfully participate were not raised in the due process complaint notice and are therefore not properly before a State Review Officer. In any event, the district asserts that it gave proper notice and the parent was able to meaningfully participate at the CSE meeting. Regarding its eligibility determination, the district asserts that the student did not have a disability which adversely affected his educational performance. Accordingly, the district asserts that it properly determined the student not to be eligible for special education because of his academic performance, which is the principal factor in determining eligibility. The district further contends that even considering other factors, the CSE's determination was proper, as the hearing record reflects that the student socialized well, was well-behaved in school, and had friends. With regard to the parent's allegations that the student demonstrated symptoms of Asperger's syndrome, the district responds that the only evidence in support thereof was testimony from a social worker unqualified to make a diagnosis. With respect to the possibility that the student may not have been able to earn a diploma by the end of the 2010-11 school year at the assigned school, the district asserts that this argument is speculative, because the student never enrolled at the assigned school,

and there is no authority requiring a district to enable a general education student to achieve a diploma at any particular time.<sup>11</sup>

The district further asserts that even if the student was eligible for special education, the parent failed to establish the appropriateness of Winston Prep. The district contends that the testimony regarding the individualization of the student's program at Winston Prep was vague and that Winston Prep was not the least restrictive environment (LRE) for the student. Finally, the district contends that the parent has not "overcome the presumption that equitable considerations favor school districts in tuition reimbursement cases." Specifically, the district notes that the student has never attended public school, providing "strong circumstantial evidence" that the parent never intended to enroll him in a district program.

### **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, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and

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<sup>11</sup> The district responds to additional matters which were raised in the parent's due process complaint notice but do not appear in her petition for review. Insofar as the district is not aggrieved, I need not address these matters.

equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 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**

### **Scope of Review**

Initially, I note that the parent has not appealed the impartial hearing officer's determinations (1) that she waived certain allegations raised in her due process complaint notice by failing to pursue them at the impartial hearing, (2) that the May 2010 CSE was properly composed, and (3) that the CSE properly considered input from the parent and the student's Winston Prep teacher in making its eligibility determination. As an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]), these issues are not properly before me and I do not address them. Additionally, although the parent contends on appeal that the district failed to provide her with "specific notice that the primary purpose of [the] CSE meeting [was] to declassify" the student and denied her a "meaningfully opportunity to prepare" for the CSE meeting by failing to inform her of her right to request additional assessments of the student, neither argument was raised in the parent's due process complaint notice or at the impartial hearing and the impartial hearing officer did not address them. Furthermore, the hearing record does not indicate that the parent amended her due process complaint notice or that the district agreed to expand the scope of the impartial hearing to include these issues (20 U.S.C. §§ 1415[c][2][E][i][II]; 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3]; 300.511[d]; 8 NYCRR 200.5[i][7][b]; 200.5[j][1][ii]; see C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8; see also Snyder v. Montgomery County. Pub. Sch.,



2009 WL 3246579, at \*6-7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii Apr. 30, 2008]). Accordingly, I decline to consider them.<sup>12</sup>

### **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:

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 . . . attention deficit disorder or attention deficit hyperactivity disorder . . . ; 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

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<sup>12</sup> Even if I were to consider these arguments, I would find them to be without merit. The district informed the parent of the meeting in compliance with applicable regulations requiring that notice be given of the "purpose . . . of the meeting" (34 C.F.R. § 300.322[b][1][i]; 8 NYCRR 200.5[c][2][1]) by notice of meeting dated May 6, 2010, which indicated that the meeting was "scheduled to discuss the educational needs of your child [and that the CSE would] be determining whether your child has an educational disability which requires special education services" (Dist. Ex. 5). With regard to the allegation that the district failed to inform the parent of her right to request additional assessments, the hearing record indicates that the CSE initially convened in January 2011, determined that it required further data to assess the student's continuing eligibility, received consent from the parent to evaluate the student, and adjourned until such data could be collected (Tr. pp. 88, 106-08; Dist. Exs. 3-4; 7-9), thereby complying with the IDEA and applicable regulations (20 U.S.C. § 1414[c][1], [4], [5]; 34 C.F.R. § 300.305[a]; [d][1]; [e][1]; 8 NYCRR 200.4[b][4], [5]; [c][3]). Furthermore, the hearing record indicates that the parent's right to obtain an independent educational evaluation was explained to the parent and that she was given a procedural safeguards notice at the May 2010 CSE meeting (Dist. Ex. 6).

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; see C.B. v. Dep't of Educ., 2009 WL 928093, at \*2 [2d Cir. April 7, 2009]; 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]).

### **Educational Performance—Adverse Affect**

As the parties do not dispute that the student has been diagnosed with an ADHD and that ADHD may qualify as a disabling condition, I now turn to the second portion of the OHI criteria, whether the student's educational performance was adversely affected by his ADHD.<sup>13</sup>

The May 2010 CSE considered Winston Prep reports, a social history update, a speech evaluation report, an educational evaluation report, and two classroom observation reports in determining the student to be ineligible for special education (Tr. pp. 70-72; Dist. Exs. 7-15).

At the first classroom observation, conducted in January 2009, the student was observed to be both inattentive and exhibit inappropriate behaviors such as calling out and texting during instruction, and putting his head on his desk (Dist. Ex. 10 at pp. 1-2).<sup>14</sup> The student's writing teacher informed the district representative that the student's writing had improved, but that he still had problems with the mechanics of writing, including capitalization and punctuation (*id.* at p. 2). Additionally, the writing teacher reported that the student was unaware of how he was perceived socially and had difficulties understanding social nuances (*id.*). The second observation, conducted in December 2009, found the student to be well-behaved and focused, and to contribute appropriately to classroom discussions (Dist. Ex. 15).

In a Winston Prep teacher report for fall of the 2009-10 school year, the student's Focus teacher indicated that the student's strengths were "visual and verbal analytical skills, decoding, spelling, math, and written and oral expression" (Dist. Ex. 14 at p. 1). She reported weaknesses "in reading comprehension, executive functioning skills, attention, and academic problem solving"

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<sup>13</sup> To the extent that the parent argues that the student's educational performance was adversely affected by his personality characteristics indicative of Asperger's syndrome, specifically rigidity of thought and difficulty with social interactions, I have addressed them in the context of whether the student's overall educational presentation indicates that there is an adverse affect on his educational performance. I note that a diagnosis of an autism spectrum disorder, standing alone, does not entitle a student to special education; rather, the disability must "adversely affect[ the student's] educational performance" (34 C.F.R. § 300.8[c][1][i]; see 8 NYCRR 200.1[zz][1]). Furthermore, despite the testimony from a Winston Prep social worker that he was qualified to make a diagnosis of Asperger's syndrome based on his training as a clinical and psychiatric social worker (Tr. pp. 248-54), there is no evidence in the hearing record that either he or any other professional had previously given the student such a diagnosis, nor is there any indication that either the parent or the district ever considered the possibility. Additionally, the Winston Prep social worker acknowledged that no psychological evaluator had offered the student a diagnosis of Asperger's syndrome (Tr. p. 251).

<sup>14</sup> The evaluation was conducted by the district representative who attended the May 2010 CSE (Dist. Exs. 2 at p. 2; 10 at p. 1).

(id.). However, the student's science teacher reported that the student had weaknesses in the areas of executive functioning and expressive language, but had "generally good reading comprehension" (id. at p. 7). The student's science teacher also reported that the student needed to improve his written expression and organization, and that the student's reluctance to ask questions and participate in classroom discussions required regular refocusing (id.). The student's literature teacher indicated that the student's "greatest areas of need are improving and expanding written and oral expression, time management, study skills, and engaging in literary analysis" (id. at p. 4). The literature teacher also reported that the student demonstrated knowledge of vocabulary words and textual information, but did not take sufficient care in completing assignments and was often reticent with regard to classroom participation (id. at p. 5). The student's math teacher stated that the student exhibited a slow processing speed and weak executive functioning, leading to lapses in focus and poor organization (id. at pp. 5-6). Additionally, the student was socially distractible, but usually accepting of redirection (id. at p. 6). The student's history teacher reported the student's main weaknesses as being in the areas of "executive functioning, maintaining focus on a specific assignment or task, and written organization and expression" (id. at p. 8).

The Winston Prep teacher report for winter of the 2009-10 school year provides similar assessments of the student's strengths and weaknesses (Dist. Ex. 13). The student's Focus teacher reported that the student's reading comprehension, vocabulary, and written expression had improved during the fall semester (id. at pp. 1-4). She indicated, however, that the student had made inconsistent progress in academic problem solving, including organization and time management (id. at p. 1). The student's literature teacher noted that the student completed most of his assignments on time, but required assistance editing and expanding his otherwise well-written and organized essays (id. at p. 5). The student's math teacher reported that the student was making "slow but fair progress . . . limited by lapses of task focus in class and intermittent homework completion (~50%)" (id.). The student's science teacher indicated that the student had made "moderate progress" in terms of improving his note taking and developing reading comprehension and test-taking strategies, but that the student did not put sufficient effort into understanding the subject and evidenced an erratic level of focus in class (id. at p. 6). The student's history teacher reported that the student "improved his written organization, reading comprehension, and academic organization skills" (id.). However, while the student was an active classroom participant, he often needed to be reminded to stay focused (id. at p. 7).

A social history update conducted in March 2010, with the parent serving as informant, indicated that the student was "an easy going student who behaves well. However, he is disorganized and always had to be reminded to submit his homework" (Dist. Ex. 8 at p. 2). The parent also reported that the student struggled with reading comprehension, had a weak vocabulary, and was overly literal (id.).

During a speech-language evaluation conducted in March 2010, the student was administered the CELF-4 (Dist. Ex. 7 at p. 2). The student scored in the average range on each index, except the language content index, on which he scored in the above average range (id. at pp. 2-6). Because of his scores on the CELF-4, the evaluator did not recommend speech-language therapy as a related service; however, she noted that the student "showed difficulty making eye contact" and needed "to improve this visual presentation" (id. at p. 7).

On academic testing conducted by Winston Prep in May 2009, including administration of the Gray Oral Reading Test (GORT), the Gates MacGinitie Reading Test (GMRT), and the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the student achieved scores in the average range or above in all areas tested, including reading comprehension, reading fluency, vocabulary, spelling, written expression, listening comprehension, oral expression, numerical operations, and math reasoning (Dist. Ex. 9 at p. 8; see Dist. Ex. 14 at p. 1).

An educational evaluation, conducted in April 2010 by a district school psychologist, included administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. 9 at p. 2). The evaluator noted that the student "was exceptionally cooperative[,] appeared at ease, comfortable, and attentive to the task[,] responded promptly but carefully[,] and] generally persisted with difficult tasks and put forth great effort" (id.). The student's overall achievement standard score (percentile rank) was 107 (67) (id. at p. 3). Although the parent correctly notes that the student's results on the WJ-III ACH indicated that he had grade equivalencies of 8.8 in reading fluency, 10.2 in math fluency, 9.9 in writing fluency, 9.4 in academic fluency (a cluster comprised of the preceding three subtests), and 7.9 in passage comprehension (id. at pp. 4-5), I concur with the district school psychologist's testimony that grade equivalencies can be "very misleading" and imprecise when contrasted with standard scores and percentile rankings (Tr. pp. 85-86, 100-01). The student achieved the following standard scores (percentile ranks) on the WJ-III ACH subtests: letter-word identification, 103 (57); reading fluency, 91 (28); calculation, 107 (68); math fluency, 97 (41); spelling, 111 (77); writing fluency 98 (46); passage comprehension, 93 (33); and applied problems, 104 (62) (Dist. Ex. 9 at pp. 4-6). The student achieved the following cluster standard scores (percentile ranks) broad reading, 96 (40); broad math, 105 (62); math calculation, 104 (60), academic skills, 108 (70), and academic fluency, 94 (34) (id. at pp. 2, 4-6). The only subtest on which the student achieved a score below the average range was reading fluency, which fell in the limited to average range (id. at p. 6). The student's scores on the brief achievement and academic skills composites, and on the calculation, spelling, and applied problems subtests all fell in the average to advanced range (id.).

Also considered by the CSE was the student's Winston Prep transcript, which provided the student's grades from ninth grade, tenth grade, and the fall semester of eleventh grade (Dist. Ex. 12). In the fall semester of the 2009-10 school year, the student achieved grades of A+ in physical education, A- in history and art, B in literature, writing, and Focus, C in science, and C- in math (id.). These grades were generally consistent with the student's prior performances, although slightly lower in science and math than previously (id.).

Based on the student's average and above-average test results and his performance in school, as evidenced by the Winston Prep reports, I find that the student's educational performance was not adversely affected by his ADHD (see C.B., 2009 WL 928093, at \*2; N.C., 2008 WL 4874535, at \*2; Maus, 688 F. Supp. 2d at 294, 298; A.J., 679 F. Supp. 2d at 308-11; see also R.B.,

496 F.3d at 946).<sup>15</sup> Rather, it appears that the student's difficulties were often the result of inconsistent homework completion and lack of interest in the subject matter (Dist. Ex. 13 at pp. 1, 5-6). The student's grades support this inference, as the classes in which the student's teachers reported a lack of effort were those in which he achieved the lowest grades, while grades in classes for which teacher reports indicated better presentation were more closely commensurate with the results of academic achievement assessments (Dist. Exs. 12; 13 at pp. 1-7). Furthermore, despite the parent's contention that the student's social weaknesses often caused him conflict with other students and teachers, I note that there was testimony at the impartial hearing demonstrating that the student was subject to the emotional turmoil common to most teenagers, but that he also had friends and a girlfriend (Tr. pp. 118-19, 139, 142-43, 145-46, 229). I cannot find on this hearing record that the student's sensitivity to criticism and good-natured teasing (Tr. pp. 142, 190-91, 227-28, 230-31, 243) created an adverse affect on his educational performance. Indeed, the Winston Prep social worker opined that most of the student's attentional and focusing difficulties were based in the student perseverating on instances where he felt "misunderstood or victimized," rather than in his ADHD (Tr. p. 231). While the social worker also testified that the student's ADHD "could" impact on his ability to focus (Tr. p. 247), "[i]t is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does" (Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 637 [7th Cir. 2010]). Accordingly, I find that the impartial hearing officer correctly found the district to have properly determined the student to be ineligible for special education services.<sup>16</sup>

### **Need for Special Education**

I now turn to the final criterion for eligibility, whether the student needs special education as a result of his alleged disability, which inquiry must be made by a CSE "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]). Even assuming that the student met the criteria for OHI because his educational performance was adversely affected by his ADHD, the hearing record does not show that "by reason thereof" he needed special education and related services within the meaning of the IDEA (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]; J.D., 224 F.3d at 66; Maus, 688 F. Supp. 2d at 295; A.J., 679 F. Supp. 2d at 306; see also Marshall Joint Sch. Dist. No. 2, 616 F.3d at 639-40). As previously discussed, at the time of the

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<sup>15</sup> Although not necessary to my decision, I note that the hearing record indicates that the student took medication for ADHD from fourth grade until December 2008, while the student was in tenth grade (Dist. Exs. 8 at p. 2; 10 at p. 2). The student was not taking medication for ADHD at the time of the May 2010 CSE meeting (Tr. pp. 79, 96; Dist. Ex. 6 at p. 2). The student's Winston Prep transcript does not indicate that the student's grades were adversely affected by the cessation of pharmaceutical treatment; in fact, the student's language skills, science, math, and literature grades all improved in the second semester of the 2008-09 (tenth grade) school year (Dist. Ex. 12).

<sup>16</sup> Although not available to or considered by the May 2010 CSE, the student's final report from Winston Prep for the 2009-10 school year and end of year standardized testing further support this result. The final report indicates that the student's difficulties were often self-caused by his failing to write down assignments he believed would be difficult (Parent Ex. K at pp. 1-2). Additionally, the student was often reluctant to participate in class (id. at p. 6), but demonstrated an improved level of focus (id. at p. 8). In end of year standardized testing, the student achieved scores within the average range or above on all subtests administered, including percentile ranks of 37, 58, and 66 on the GORT, GMRT, and WIAT-II reading comprehension subtests, respectively (id. at p. 12).

2010 CSE meeting the student achieved scores on standardized testing within the average range of academic functioning and demonstrated the ability to utilize strategies to improve his academic success (see Tr. pp. 77-80, 82-83, 85-87, 89-90, 96; Dist. Exs. 9 at pp. 2, 4-6; 13 at pp. 1-7). With regard to his social/emotional functioning, the hearing record demonstrates that the student made friends and had a girlfriend; participated in Winston Prep social activities including working on the yearbook, playing softball, running for the cross-country team, and participating in a school play; was improving in his ability to interpret social cues and control his reaction to perceived slights; was proactive about seeking support from the Winston Prep social worker or dean when necessary; had less need of the Winston Prep social worker than previously; and had improved his ability to focus and maintain attention to task by not becoming preoccupied with resentments (Tr. pp. 82-83, 89-90, 118-19, 142-43, 217-18, 230-31, 234-35, 240-41).<sup>17</sup> The CSE determined that based on the student's academic performance, the student's needs could be met in a general education setting by providing him with counseling once weekly and offering him SETSS services one period a day, to assist him in transitioning to the general education environment from Winston Prep (Tr. pp. 79-80, 92-96, 110). The district school psychologist also noted at the impartial hearing that the student was capable of sitting quietly and participating in class, and that while he may require occasional prompting to focus and had difficulties with organization, "there are very many students who are in the general education setting who need prompting [and] who have difficulty with organizing" (Tr. p. 96). Accordingly, I find that the student did not require and was not eligible for special education (see Marshall Joint Sch. Dist. No. 2, 616 F.3d at 640-41).

### **Assigned School**

Turning to the parent's allegations that the assigned school would be inappropriate for the student because it was uncertain that the student would be able to fulfill the necessary requirements to graduate with a Regents diploma prior to turning 21, I find that the impartial hearing officer correctly determined this issue to be speculative (IHO Decision at p. 18), as the parent did not accept the recommendations of the CSE or the program offered by the district and, furthermore, the parent has cited to no authority for the proposition that school districts have an obligation to ensure that general education students graduate within a specific timeframe.

During the impartial hearing, Winston Prep staff and the parent indicated that the student was expected to graduate at the end of the 2010-11 school year (Tr. pp. 48, 132, 197). The parent testified that she visited the assigned school in June 2010 and the principal informed her that the student would be required to enter the school in ninth grade because he had not taken Regents classes, preventing him from graduating before he turned 21 years old (Tr. pp. 122-25). The educational advocate who attended the May 2010 CSE meeting accompanied the parent on her visit to the assigned school (Tr. pp. 149-50, 152). The advocate testified that the principal of the assigned school informed them that to be considered a twelfth grade student, the student would be required to take Regents exams; as such, the student would enter the assigned school as a ninth grade student and be required to take classes to prepare him for Regents exams (Tr. pp. 153-54,

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<sup>17</sup> The Winston Prep social worker indicated that the student often presented with a "dismissive . . . or know it all attitude," and often felt "victimized or misunderstood" by others, and that these difficulties were caused by the student's difficulties in viewing matters from another's perspective and understanding his role in creating conflicts (Tr. pp. 227-29, 243).

169-70). As a result, the student would have graduated from high school after his 21st birthday (Tr. p. 154). When the advocate asked if the student could take the Regents exams without having taken the related classes, the principal replied that it was unlikely that the student would be able to pass the exams without having taken the classes (Tr. pp. 156-57).

The principal of the assigned school testified that it was "very problematic" to have a twelfth grade student enter a district school from a private school without having previously taken any Regents exams, as it would be difficult to fulfill the graduation requirements in one year (Tr. pp. 264-66).<sup>18</sup> The principal testified that a general education student entering the public school system in twelfth grade would be required to take Regents exams in English, United States history, math, and science (Tr. pp. 266, 277-78). Had the student attended the assigned school, the principal testified that she would have had to "look at each course, looked at what [Winston Prep] offered him, what they gave him, see if it aligned with [the district] and New York State [standards], and then go from there, both in terms of a program and a plan of action for Regents" exams (Tr. pp. 266-67). Specifically, the principal would have assessed the student, reviewed his transcript, and created a program designed to prepare the student to take Regents exams in January and June of the 2010-11 school year (Tr. pp. 268, 274-75). In addition to the option of receiving a Regents diploma, the student could have attempted to earn a local diploma, which would have had slightly different requirements (Tr. pp. 271-74). However, there was still no guarantee that the student would have been able to graduate in June 2011 (Tr. pp. 265-66, 275).

While I can fully appreciate the concern of a parent who is told that her 17-year-old son may be required to enter public school in the ninth grade and thereby delay his graduation for three years, that concern is not sufficient to find fault with the district's actions in this case as there is no requirement that the district guarantee that a student will graduate in any specific school year. Rather, State law provides that any person under 21 years of age who has not yet received a high school diploma may attend the public schools in their district of residence without paying tuition (Educ. Law § 3202[1]). Even if the student was eligible for special education, the district would not have been obliged to ensure that he receive a high school diploma (Application of the Bd. of Educ., Appeal No. 05-037; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205-06 [2d Cir. 2007] [opining that students do not have a right under the IDEA "to graduate on a date certain or from a particular educational institution"]). Furthermore, while parents are not required to send their children to public schools, parents may not "insist that a school district award a particular grade for work done in the private program" (Appeal of Bensky, 18 Ed. Dep't Rep. 204, 206, Decision No. 9,806; see Appeals of Stokes, 29 Ed. Dep't Rep. 409, Decision No. 12,337; Appeal of Eckhardt, 24 Ed. Dep't Rep. 266, Decision No. 11,389; see also Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

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<sup>18</sup> I express no opinion with regard to the accuracy of the information regarding the graduation requirements testified to by the principal at the impartial hearing.

**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 parent's placement of the student at Winston Prep 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  
November 4, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**