



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-152

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

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

The Law Offices of Neal Howard Rosenberg, attorneys for respondent, Nathaniel Kuzma, Esq., and Meredith Garfunkel, Esq., of counsels

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that the district failed to determine that the student was eligible for special education and related services and ordered it to reimburse respondent (the parent) for her son's tuition costs at the Dwight School (Dwight) for the 2010-11 school year.<sup>1</sup> The appeal must be sustained.

#### **Background**

During the 2010-11 school year, the student attended Dwight and participated in its Quest Program (Quest) (Tr. pp. 296, 385; Dist. Ex. 10 at p. 2; Parent Ex. H). The hearing record describes Dwight as an international baccalaureate (IB) school and Quest as a program that provides support for students who have learning differences, but are able to perform in a general education setting (Tr. pp. 279-80).<sup>2</sup> Dwight has not been approved by the Commissioner of Education as a school

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<sup>1</sup> Although both parents were named as parties to this proceeding, only the student's mother appeared at the impartial hearing, and verified the answer in this appeal. Under the circumstances, unless otherwise noted, the term "parent" refers to the student's mother in this decision.

<sup>2</sup> According to the director of special studies at Dwight, Dwight is composed of students whose families move "around the world," and as an IB school, the curriculum is the same wherever the students attend school in the world (Tr. p. 279).

with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The student has received diagnoses of anxiety, depression, and an attention deficit hyperactivity disorder (ADHD) (Tr. p. 244; see Tr. p. 449; Dist. Exs. 9 at p. 14; 10 at p. 3). He reportedly also exhibits deficits with respect to executive functioning, reading comprehension, and writing (Tr. p. 438). The student's eligibility for special education and related services as a student with an other health-impairment is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

For his ninth grade year (2006-07), the student attended a nonpublic school located in the district (Tr. p. 453; Dist. Exs. 9 at p. 3; 10 at p. 3).<sup>3</sup> At the end of that school year, the student moved out-of-State, where for the next two years, he attended a different nonpublic school and received extended time on tests and "learning support" (Tr. pp. 453-54; Dist. Exs. 9 at p. 3; 10 at p. 3).<sup>4</sup> The student subsequently returned to the district to reside with the parent and for the 2009-10 school year, Dwight permitted his enrollment on the condition that the student repeat his junior year and participate in Quest (Tr. pp. 455, 457-58, 462; Dist. Ex. 10 at p. 3).<sup>5, 6</sup>

On January 27, 2010, the student's father entered into an enrollment contract with Dwight for the 2010-11 school year (Tr. pp. 487-88; Parent Ex. F).

In April 2010, the parent obtained a private psychoeducational evaluation in order to obtain an understanding of the student's learning style and specific needs (Dist. Ex. 9). During the evaluation, the private psychologist characterized the student as "appropriately motivated and rather articulate;" however, the psychologist noted that the student indicated that he continued to "experience considerable difficulty meeting reading-related demands" in an efficient manner (*id.* at p. 4). According to the private psychologist, despite the student's "exceptionally positive attitude" and diligent work effort, the student expressed concerns regarding his inability to complete examinations within an allotted period of time (*id.*). The private psychologist concluded that although test results revealed that the student exhibited "at least [h]igh [a]verage intellectual potential," the presence of attentional and perceptual-organizational weakness markedly limited the student's ability to gain or maintain access to his cognitive strengths when he encountered a

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<sup>3</sup> During his ninth grade year, the student was deemed eligible for special education and related services as a student with an other health-impairment by the district; however, the parent indicated that the student did not receive any related services, and the hearing record does not offer any description regarding the extent or nature of the special education services that the student received at that time (Tr. p. 458).

<sup>4</sup> The "learning support" that the student received during his attendance at the out-of-State nonpublic school consisted of academic executive functioning support (Tr. p. 500).

<sup>5</sup> On October 22, 2009, the parent attended a Committee on Special Education (CSE) meeting at which time the district determined that for the 2009-10 school year, the student was not eligible for special education programs and related services (Tr. p. 459; Parent Ex. A).

<sup>6</sup> Although the parent testified that the student's acceptance into Dwight was conditioned upon the student's repeating his junior year, an August 2009 social history update conducted by the district reflected that the student was promoted to his senior year at that time; however, the parent requested that he repeat his junior year because she believed that he had not mastered his junior year and was not prepared to graduate (Dist. Ex. 20 at p. 1).

variety of demands (*id.* at pp. 6-7, 14). The psychologist offered the following diagnoses to the student: (1) an ADHD – inattentive type; (2) a Developmental Reading Disorder; and (3) a "significant" Developmental Coordination Disorder (*id.* at p. 14). According to the private psychologist, the student's attentional difficulties and resulting executive functioning weakness caused him to experience considerable difficulty meeting both working memory and perceptual-organizational demands (*id.*). He further noted that the student's weaknesses in each of these areas caused him to function well below expectancy, particularly when he attempted to meet reading comprehension expectations (*id.*). The psychologist further found that the student was only able to "enjoy expected success" when he was afforded extended time during the administration of the Nelson-Denny Reading Test (*id.*). Lastly, the private psychologist recommended that the student receive extended time (1.5) on all examinations and the use of a computer during all tests (*id.* at p. 15).

By letter dated June 22, 2010 to the district, the parent requested a CSE meeting to review the April 2010 private psychoeducational evaluation and to consider whether the student was eligible for special education programs and services (Dist. Ex. 11). In a letter dated July 7, 2010, the district advised the parent that an evaluation of the student was scheduled to take place on July 15, 2010 (Tr. p. 144; Dist. Ex. 12). The parent and the student did not appear for the appointment on the scheduled date (Tr. pp. 146, 464-65, 507; Dist. Ex. 14). When the parent missed the scheduled evaluation, the district advised her that it had been rescheduled for July 29, 2010 (Dist. Ex. 13). In a letter dated July 22, 2010, the parent informed the district that she had not been able to bring the student to evaluation scheduled for July 15, 2010, due to a personal matter (Tr. p. 465; Dist. Ex. 14). The parent further requested that the district provide her with "the next available date" to evaluate the student (Dist. Ex. 14). The student did not appear for the evaluation scheduled for July 29, 2010 and parent did not provide the district with an explanation regarding the student's absence (Tr. p. 148).

On September 8, 2010, the district advised the parent that evaluation was rescheduled to take place on September 24, 2010 (Dist. Ex. 15).<sup>7</sup> By letter dated September 13, 2010 to the district, the parent stated that because she had yet to receive a response regarding an evaluation date, the student did not have an appropriate individualized education program (IEP) and placement for the 2010-11 school year (Tr. p. 465; Parent Ex. B). Although she expressed a willingness to meet with the CSE, the parent explained that she planned to enroll the student in Dwight for the upcoming school year and to seek reimbursement for the cost of his tuition (Parent Ex. B).

By letter dated September 29, 2010 and by telephone, the district advised the parent that the student's evaluation had been rescheduled to take place on October 21, 2010 (Tr. p. 149; Dist. Ex. 16). On October 21, 2010, the day of the scheduled evaluation, the parent advised the district that the student could not come to the evaluation appointment because he had to take a math test, and consequently, the district rescheduled the student's evaluation to take place on November 23, 2010 (Tr. pp. 150-52, 508; Dist. Ex. 17). On November 4, 2010, the parent and student appeared at the district offices (Tr. p. 152). Although the student did not have an appointment to be

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<sup>7</sup> According to the parent, she never received this letter from the district and the student did not attend the evaluation (Tr. pp. 149, 510). The parent explained that in August 2010, they moved and she did not advise the district of her new address (Tr. pp. 509-10).

evaluated on that date, the district conducted a vocational assessment, social history update, and psychoeducational evaluation of the student (Tr. p. 152; Dist. Exs. 5-7; 10).

On December 2, 2010, the CSE convened (Dist. Exs. 3; 4). The parent, a district school psychologist who also acted as the district representative, a district special education teacher, and an additional parent member took part in the December 2010 CSE meeting (Tr. p. 27; Dist. Exs. 3 at p. 2; 4 at p. 1). The student's Quest teacher from Dwight participated in the CSE meeting by telephone and also functioned as the regular education teacher (Dist. Ex. 3 at p. 2). Although the parent related her concerns that the student experienced difficulty with attending, organization, remaining focused, and processing due to his anxiety, the December 2010 CSE determined that the student was not eligible for special education programs and related services (Dist. Exs. 3 at p. 2; 4 at pp. 2-3).

By letter dated December 3, 2010 to the district, the parent noted her disagreement with the CSE's determination that the student was not eligible for special education programs and related services (Parent Ex. C). According to the parent, the student could not make progress in a mainstream general education setting, and as a result of the CSE's decision, the student would continue to attend Dwight (id.). The parent further informed the district that she planned to seek reimbursement for the cost of his tuition there (id.).

### **Due Process Complaint Notice and District Response**

By due process complaint notice dated January 10, 2011, the parent commenced an impartial hearing (Dist. Ex. 1). The parent alleged, in pertinent part, that the CSE failed to convene prior to the beginning of the school year, which resulted in a denial of a free appropriate public education (FAPE) to the student (id.). Furthermore, the parent asserted that the December 2010 CSE inappropriately failed to classify the student and consequently denied him a FAPE (id.). The parent also raised the following allegations with respect to the December 2010 CSE meeting and resultant IEP: (1) the CSE was invalidly composed; (2) the CSE did not consider the "appropriate documentation" in making its recommendation; and (3) the CSE did not consider the student's teacher's statements during the meeting (id.). Additionally, the parent maintained that in order to make appropriate progress, the student required a program that provided "small, structured classes" where he could receive "consistent small group and individualized special education support" (id.). The parent alleged that Dwight provided the student with the appropriate support (id.). As relief, among other things, the parent requested tuition reimbursement for Dwight for the 2010-11 school year (id.).

On January 20, 2011, the district responded to the parent's due process complaint notice (Dist. Ex. 2). In its due process response, the district submitted that the student "had previously been classified with [n]on-handicapped and the team had no reason to change this classification" (id. at p. 1).

### **Impartial Hearing Officer Decision**

On April 6, 2011, an impartial hearing convened, which concluded on July 6, 2011, after four days of proceedings (Tr. pp. 1-529). By decision dated October 17, 2011, the impartial hearing officer awarded tuition reimbursement to the parent for Dwight and Quest (IHO Decision

at pp. 23-24).<sup>8</sup> Specifically, with regard to the provision of a FAPE to the student, although the impartial hearing officer found that the December 2010 CSE was duly constituted and there was no evidence that the district caused a delay in the CSE process, she ultimately concluded that the district's failure to classify the student as a student with a disability resulted in a denial of a FAPE (id. at p. 19). In particular, the impartial hearing officer determined that there was "substantial information" before the December 2010 CSE which indicated that the student's diagnoses of ADHD and anxiety, and his difficulties with attention and executive functioning adversely affected his educational performance and satisfied the criteria for classification of a student with an other health-impairment (id. at pp. 19-20). Similarly, the impartial hearing officer found that the deficits described in the psychoeducational evaluations "clearly impacted the student's performance in the classroom setting" (id. at p. 20). The impartial hearing officer also rejected the district's argument that the student was ineligible for special education because he received good grades and participated in an IB program; rather, she attributed his success to small classes and his participation in Quest (id.). Lastly, the impartial hearing officer deemed "disingenuous" the district's suggestion that the student apply for accommodations pursuant to a section 504 plan in accordance with Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[1]), because the parent would have to establish that the student had a disability and the district had already determined otherwise.

Next, the impartial hearing officer determined that the student's placement at Dwight with the Quest program was appropriate for the following reasons which included, among other things:

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<sup>8</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 January 10, 2011 and the record close date of October 3, 2011 (compare Dist. Ex. 1, with IHO Decision). Furthermore, there is no explanation why the record was not deemed closed by the impartial hearing officer until October 3, 2011, almost three months after the final hearing date (see IHO Decision). Additionally, no explanation appears in the hearing record why the impartial hearing was not convened for more than three months from the date of the due process complaint notice. The hearing record also shows that four times during the impartial hearing, the impartial hearing officer solicited requests for an extension of the compliance date from both parties (Tr. pp. 127-28, 350, 442, 528). Such solicitations on the part of the impartial hearing officer 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 a Student with a Disability, Appeal No. 11-162; Application of the Dep't of Educ., Appeal No. 11-112; 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/ChangesinIHRS-aug2011.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]).

(1) participation in small classes; (2) the student's program was constructed specifically for him; (3) he received extra time on tests; (4) the student had daily contact with typically developing peers; (5) the student's teachers maintained continuous contact with the parent; (6) the student's Quest teacher helped the student prioritize, create outlines for his essays, and worked on his reading comprehension; and (7) the student made progress while at Dwight (IHO Decision at pp. 22-23). Lastly, with regard to equitable considerations, although the impartial hearing officer acknowledged that the parent cancelled a number of appointments with the district and failed to promptly notify it of her new mailing address, she noted that the parent continued to contact the CSE to schedule the evaluation, request a CSE meeting, and that the parent ultimately produced the student for the evaluation (id. at p. 23). Under the circumstances, the impartial hearing officer did not find a basis in the hearing record to deny the parent's claim for tuition reimbursement (id.).

### **Appeal for State-level Review**

The district appeals, and requests, among other things, reversal of the impartial hearing officer's decision.<sup>9</sup> The district maintains that the December 2010 CSE properly determined that the student was not eligible for special education and related services. The district notes that the student tested in the average to high average range in ability and maintained good grades at Dwight. Next, the district submits that although Quest helped the student organize his assignments, provided him with tutoring, additional time for testing, and the use of a computer; any skill deficits did not adversely affect his educational performance to the extent that the student required special education programs and services. Moreover, the district argues that the hearing record did not demonstrate that the student's alleged social awkwardness adversely affected his academic functioning. Based on the foregoing, the district asserts that because the student was doing well in his classes, the December 2010 CSE properly determined that the student was ineligible for special education programs and related services. Additionally, regarding the impartial hearing officer's finding that its suggestion that the student apply for section 504 accommodations was "disingenuous," the district notes that the criteria for eligibility pursuant to section 504 differs from that of the Individuals with Disabilities Education Act (IDEA).

Regarding the appropriateness of Dwight, the district alleges that assuming *arguendo* that the student required special education services, Dwight did not provide the student with the individualized programs or special education services necessary to meet his special education needs. The district alleges that none of the services provided by Quest to the student were in the nature of special education programs or related services. The district notes that Dwight is a general education program, and the support provided to the student through Quest constituted the same support a public high school would have provided, rather than special education services. Lastly, the district contends that equitable considerations should preclude the parent's request for relief, because, in part, the parent had no intention of enrolling the student in a district school. Moreover, the district asserts that the parent repeatedly cancelled or missed a number of scheduled evaluation appointments for the student and did not produce the student for a district evaluation until November 2010, two months after the commencement of the school year at Dwight.

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<sup>9</sup> Alternatively, the district requests an order directing that it is only responsible for reimbursement for the cost of Quest.

The parent submitted an answer and requests that the petition be dismissed in its entirety. The parent maintains that the impartial hearing officer properly determined that the student's needs adversely affected his academic performance and as a result, he was eligible for special education programs and services. Regarding the district's argument that the student earned good grades at Dwight, the parent claims that this was the result of the small classes and supports that he received at Dwight and that the student's achievements only underscore the appropriateness of the school. In pertinent part, the parent alleges that the student performed significantly below grade level in a number of areas, despite the district's claim that the student exhibited average to high average abilities. Next, the parent argues that Dwight was appropriate and that the student received individual support from teachers, which in turn, enabled him to make progress. Additionally, the parent asserts that Dwight provided the student with the small classes that he needed to make progress. Lastly, the parent contends that the equities favor her claim for relief, and there is nothing in the hearing record to suggest that she failed to cooperate with the district or engaged in any conduct that precluded the development of an appropriate IEP.

### **Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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**

### **Scope of Review**

Before consideration of the merits of this appeal, I note that neither party appeals the following findings of the impartial hearing officer that: (1) the CSE was duly constituted; (2) the district did not "unduly" delay scheduling a CSE meeting for the student; and (3) neither of the above-referenced procedural claims impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (IHO Decision at p. 19; 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]). 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]). Accordingly, I will not address these matters further.

### **Special Education Eligibility — Other Health-Impairment**

I will now consider whether the district properly determined that the student was not eligible to receive special education programs and services. 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]; Educ. Law § 4401[1], [2][k]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Bd. of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

A child with a disability having an other health-impairment, pursuant to federal regulations, 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]). Other health-impairment, in turn, 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 asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

(34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

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. Pawlett 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, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010]; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see also Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 311 [E.D.N.Y. 2010]).

The parties do not dispute that the student has a diagnosis of an ADHD, in addition to reported difficulties with executive functioning, anxiety, and attention. However, as set forth in greater detail below, an independent review of the hearing record reveals that the student's reported deficits did not result in limited alertness with respect to the educational environment. The teacher reports from Dwight indicated that although the student was "bright and creative" with a "desire to succeed," he failed to put forth effort with respect to class assignments in a consistent manner (Dist. Ex. 19 at p. 10). However, the teacher reports further noted that although the student had previously only been motivated by subjects that were areas of strength, during his twelfth grade year he had begun to "motivate himself" to address areas that needed improvement (id.). Dwight

teacher reports also indicated that due to his effort, the student increased his performance in his weaker subject areas which served to reinforce his motivation (id.).

Teacher reports from Dwight during the student's eleventh grade year also reflected that the student "finally found a good place for himself during this third semester," including earning his highest grades of the year and he was characterized as "a positive member of the community" (Dist. Ex. 19 at p. 13). Additionally, the Dwight teacher reports from eleventh grade indicated that the student's "level of motivation continued to rise in the third semester" and he exhibited a "strong desire to succeed" (id.). Based on the foregoing, the hearing record fails to demonstrate that the student exhibited limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, which resulted in limited alertness with respect to the educational environment.

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

Even if I were to find that the student's deficits resulted in limited alertness with respect to the educational environment, I have considered the second portion of the other health-impairment criteria - whether the student's deficits, namely, whether his diagnosis of an ADHD and difficulties with executive functioning, anxiety, and attention – adversely affected his educational performance (Tr. pp. 11, 64; see Dist. Ex. 4 at p. 2). For the reasons set forth below, I find that they do not.

In making its determination that the student was not eligible for special education and related services, the December 2010 CSE reviewed the April 2010 private psychological evaluation, the November 2010 social history update, the November 2010 vocational assessment, the November 2010 district psychoeducational evaluation, and the November 2010 classroom observation (Tr. p. 31; Dist. Exs. 4-10). The December 2010 CSE also sought input from the parent and the student's Quest teacher in making its determination (Tr. pp. 30-31; Dist. Ex. 4 at p. 2).

Here, the evidence supports the December 2010 CSE's determination that the student was not eligible for special education and related services as a student with an other health-impairment, given the lack of evidence before the CSE that the student's reported deficits adversely affected his educational performance. According to the hearing record, while enrolled in a "challenging" IB program at Dwight, the student attained a cumulative grade point average (GPA) of 88.4 (Tr. pp. 72, 121-22; Dist. Ex. 19 at p. 4). Additionally, the hearing record contains teacher reports from Dwight that characterized the student as "well-rounded and intelligent," and as an individual who exhibited "strong problem-solving skills and [wa]s a quick thinker" (Dist. Ex. 21 at p. 16). The hearing record further reveals that the student earned a score of 1200 on the Scholastic Aptitude Test (SAT), without accommodations (Dist. Ex. 4 at p. 3).

Moreover, November 2010 psychoeducational testing conducted by the district revealed that the student exhibited high average cognitive abilities and during testing, he appeared to be motivated and persistent (Tr. p. 37; Dist. Ex. 7 at p. 8). The school psychologist reported that all of the respective scales within the metacognition domain met the clinical threshold indicating that the student exhibited difficulties with initiation of activity, working memory, the planning and organization of activity, problem solving strategies primarily in social situations, and monitoring

of self-behavior (Dist. Ex. 7 at pp. 4-5). However, the school psychologist explained that the validity of the data was "questionable" due to the inconsistency score of eight and therefore, the test scores needed to be interpreted with caution (*id.*).<sup>10</sup> Despite the student's reported difficulties with executive functioning, his reading comprehension, decoding, math reasoning and computation skills all fell within the high average range (Tr. pp. 41-42, 50; Dist. Ex. 7 at p. 8). The school psychologist also found that the student's written language skills were in the average range (Tr. p. 42; Dist. Ex. 7 at p. 8).

Although the student attained scores in the average range during the April 2010 private psychoeducational evaluation, the school psychologist who participated in the December 2010 CSE meeting attributed this discrepancy to the student's diagnosis of an ADHD, noting that students diagnosed as having an ADHD perform differently from one testing session to another depending on a variety of factors (Tr. p. 62). She further explained that while a lower score could result from a variety of other factors, the student could not "fake a strong score;" therefore, the psychologist "kn[e]w he [could] do these things" (Tr. p. 63).

Additionally, there is no evidence showing that the student's reported difficulties affected his functioning in the classroom. For example, the school psychologist testified that throughout her November 2010 classroom observation of the student at Dwight, during a "sophisticated" and fast-paced classroom discussion in his history class, the student was attentive and participated in the discussion (Tr. p. 22). According to the November 2010 classroom observation, during the student's history class, he listened, appeared to be focused, and took notes on his Ipad (Dist. Ex. 8 at p. 2). The school psychologist further noted that the student remained "engaged" during the period (*id.*). He also responded appropriately to the teacher's questions, and volunteered answers (Tr. p. 22; Dist. Ex. 8 at p. 2). Consistent with this observation, Dwight's dean of student and faculty life also described the student as an active participant in class discussions, and he noted that the student was "always conscientious about keeping up with his work" (Dist. Ex. 21 at p. 19).

Similarly, regarding the student's social/emotional functioning, the hearing record fails to support a finding that the student's reported difficulties with anxiety and the ability to relate to others socially had an adverse affect on his educational performance. To the contrary, the school psychologist testified that during the November 2010 classroom observation, the student seemed comfortable with other students and seemed to enjoy talking with them (Tr. p. 22; Dist. Ex. 8 at p. 1).<sup>11</sup> She further described the student as a "fairly typical teenager" who liked to be with other students, and noted that he left for lunch with a group of other students (Tr. pp. 47-48; Dist. Ex. 8 at p. 1). Additionally, the school psychologist noted that the student denied experiencing any academic difficulty, and the student added that he had a good relationship with his family (Tr. p. 48). The November 2010 vocational assessment of the student further supports the school psychologist's depiction of the student (*see* Dist. Ex. 6). The student informed the school psychologist that he preferred to work in a large group and liked to work with people (*id.* at p. 1).

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<sup>10</sup> The inconsistency score appears to refer to the inconsistency and negativity scales with respect to the response set of the parent (Dist. Ex. 7 at p. 4).

<sup>11</sup> The school psychologist also noted that the student has changed schools several times throughout his educational career, which she surmised made things more difficult for him in terms of relating socially (Tr. p. 48).

According to the student, sometimes he organized his time, so that he could complete his classwork, and he sometimes requested help when he had a problem or an assignment that he could not solve on his own (*id.*). The student proceeded to characterize himself as "ambitious, picky" and "passionate," and noted that his friends would describe him as "friendly and thoughtful" (*id.* at p. 2). He added that he enjoyed math, English, history and psychology, but experienced difficulty with Spanish and science (*id.*). The November 2010 vocational assessment further illustrated the student's goals and future ambitions; for example, he wrote for his school newspaper, and was interested in a career in sports broadcasting (Dist. Ex. 5 at p. 2). Additionally, the student served as manager for his school's basketball team, and since April 2010, had maintained an online sports blog (Tr. pp. 328-29, 432; Dist. Ex. 23).<sup>12</sup> The student also discussed his interest in sports and informed the school psychologist that he hoped to become a sports broadcaster by "doing well in English and [m]ath" (Dist. Ex. 6 at p. 2). The parent added that she planned to visit an out-of-State college with the student later that month (Dist. Ex. 5 at p. 2). Although the school psychologist also found that the student was "severely anxious but motivated" pursuant to the administration of the Rorschach Psychodiagnostic Test (Rorschach), the school psychologist noted that the Rorschach was difficult to interpret and the results were projective, such that "you really can't say from the inkblots for sure that these things [we]re happening" (Tr. p. 44; Dist. Ex. 7 at p. 8).

Based on the foregoing, the hearing record supports the district's contention that the impartial hearing officer incorrectly found that the student should have been classified as having an other health-impairment, because the hearing record does not reflect that the student's ADHD diagnosis, executive functioning difficulties or anxiety adversely affected his educational performance (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).

### **Need for Special Education**

Even if I had found otherwise that the student met the OHI criteria and that his ADHD diagnosis, executive functioning difficulties or anxiety adversely affected his educational performance, I nevertheless find that the student did not meet the final criterion for eligibility — whether he needs special education and related services with the meaning of the IDEA as a result of his alleged disability (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]; *J.D.*, 224 F.3d at 66; *P.C. v. Oceanside Union Free Sch. Dist.*, 2011 WL 2134049, at \*5 [E.D.N.Y. May 24, 2011]; *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). This 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]). As noted above, the hearing record establishes that the student earned good grades in a "challenging" general education program (Tr. pp. 23, 70, 72, 121-22; Dist. Ex. 19 at p. 4). The school psychologist testified that while the student exhibited some weaknesses, he did not demonstrate that level of need exhibited by a student in special education, and therefore, the December 2010 CSE found that the student was not eligible for special education services (Tr. p. 72). In particular, regarding the student's executive functioning

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<sup>12</sup> Examples from the blog submitted as evidence are very well written (Dist. Ex. 23). The student's Quest teacher testified that she did not help the student write the blog, nor did she know if he received help from anyone else (Tr. pp. 432-33).

weaknesses, the school psychologist noted that "building up those skills" was part of the general education curriculum, and if that was not enough, the district could offer the student academic intervention services (Tr. p. 106; see Tr. p. 73). According to the school psychologist, the student's organizational weaknesses could also be addressed in a general education setting (Tr. p. 70). Similarly, she characterized the student's difficulties with attention as "weaknesses," not deficits requiring special education services (Tr. pp. 114-15).

During the November 2010 evaluation, the school psychologist who conducted the evaluation recommended that the student would benefit from an ability appropriate, but challenging curriculum with a supportive classroom and counseling services, such as guidance counseling (Dist. Ex. 7 at p. 8). He further suggested that the continuation of group therapy would also be helpful to the student (id.). Lastly, despite testimony from the student's teachers at Dwight that he required small classes due to his difficulties with attention, and the parent's claim that the student was successful as a result of the support he received through Quest, the description of these services supports the conclusion that they are "are the kind of educational and environmental advantages and amenities that might be preferred by parents of any student, disabled or not" (Tr. pp. 359-60, 388, 481-82; Gagliardo, 489 F.3d at 115).

In light of the above, the student did not require and was not eligible for special education services (see Marshall Joint Sch. Dist. No. 2, 616 F.3d at 640-41).

### **Conclusion**

Having determined that the impartial hearing officer erred in finding that the district inappropriately found that the student was not eligible for special education programs and services as a student with an other health-impairment 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 Dwight 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 SUSTAINED**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated October 17, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parent for cost of the student's tuition for attendance at the Dwight School is hereby annulled.

**Dated:** Albany, New York  
January 23, 2012

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**