



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 12-067

### **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 with a disability**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondent, Abbie Smith, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to pay the cost of her daughter's tuition at the Child School<sup>1</sup> for part of the 2010-11 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

---

<sup>1</sup> The Child School is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7).

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

A review of the student's educational history reflects that the student attended a district bilingual kindergarten program and, after moving at the end of her kindergarten year, began the 2010-11 school year attending a different district school in a bilingual first grade class (Tr. pp. 498-99; Dist. Exs. 4 at p. 1; 11 at p. 1). At the recommendation of her teacher, the student was transferred to a monolingual-English class with English as a second language (ESL) services, due to her preference for and proficiency in English (Dist. Ex. 4 at pp. 1-2). The student was reported to have deficient decoding and phonemic awareness skills, difficulty mastering and retaining

reading and math readiness skills, and received reading intervention, one period of ESL services, extended day services, and a modified curriculum (*id.* at p. 1).

In spring 2010, the parent referred the student to the CSE for an initial special education evaluation (Dist. Exs. 4 at p. 1; 11 at p. 1). The initial evaluation included a comprehensive bilingual psychoeducational evaluation conducted by a district bilingual school psychologist; a classroom observation and a social history of the student completed by a district bilingual social worker; and an occupational therapy (OT) school function evaluation that included an OT/physical therapy (PT) parent checklist of school function (Dist. Exs. 4; 8; 9; 10; 11).

The CSE convened on April 8, 2010 for an initial educational planning conference (Dist. Ex. 14 at pp. 1-2). The CSE determined that the student was eligible for special education programs and related services as a student with a learning disability and developed the student's initial individualized education program (IEP) (Dist. Ex. 14).<sup>2</sup> The CSE recommended that, for the remainder of the current 2009-10 school year, the student be placed in a general education setting and receive special education teacher support services (SETSS) of one 40-minute period per day in a separate location with a 6:1 student-to-teacher ratio to provide the student with assistance in reading and math (Tr. pp. 215-16; Dist. Ex. 14 at pp. 1, 12).<sup>3</sup> The April 2010 CSE also recommended that the student receive the related service of one 30-minute individual counseling session per week in a separate location (Dist. Ex. 14 at pp. 1, 2, 12, 14). The CSE developed academic goals in the areas of reading which focused on decoding, syllabication, and comprehension; and in mathematics which focused on addition and subtraction calculations; as well as a counseling goal which focused on increasing the student's ability to engage in new or challenging assignments (*id.* at pp. 9-11). The April 2010 IEP also reflected that the CSE considered and rejected a general education only setting because the student required more attention to address her significant deficits in reading and mathematics, and considered and rejected an integrated co-teaching (ICT)<sup>4</sup> setting because the CSE believed it "may be too restrictive at this time since less restrictive interventions have not been tried" (*id.* at p. 13). At the end of the meeting, the parent indicated that she would review the recommendation at home and advise the CSE as to whether she agreed with the recommendation (Tr. pp. 216, 219).

On May 26, 2010, a private clinical assessment was conducted because, among other reasons, the parent was seeking assistance regarding the student's emotional difficulties related to

---

<sup>2</sup> Testimony by the district's school psychologist who performed the student's initial March 2010 psychoeducational evaluation indicated that the discrepancy between the student's high average cognitive ability and her significantly lower academic achievement scores indicated that the student exhibited a learning disability (Tr. p. 224; Dist. Ex. 14 at p. 1). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (*see* 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>3</sup> The projected date of initiation of the IEP was April 15, 2010 (Dist. Ex. 14 at p. 2).

<sup>4</sup> State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In this case, the terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (*see, e.g.*, Tr. pp. 162, 295, 513; Dist. Exs. 1 at pp. 1, 12; 2; 13 at pp. 1, 12; 14 at p. 13). For consistency in this decision, the term ICT will be used.

her learning difficulties (Dist. Ex. 7 at pp. 1, 5). The report reflected that the student had received diagnoses of a depressive disorder-not otherwise specified (NOS), a reading disorder, and a mathematics disorder and indicated that the student was in need of psychotherapy to address her feelings of frustration and inadequacy regarding her learning disability (id. at p. 5).

The CSE reconvened on June 4, 2010 and developed an IEP for the 2010-11 school year (Dist. Ex. 15 at p. 1; see Tr. p. 222). A review of the June 2010 IEP reflects that in response to the parent's concerns, the CSE changed the student's program recommendation from SETSS to an ICT program in a community school with a 12:1 student-to-teacher ratio and continued its recommendation for one 30-minute individual counseling session per week (Dist. Exs. 13 at pp. 1, 11, 13; 15 at pp. 1, 2). The June 2010 CSE meeting minutes reflected that the student's progress continued to be "very slow in all academic areas" and that the parent strongly believed that the presence of an additional adult in the classroom who had training in working with children with disabilities would be most appropriate (Dist. Ex. 15 at p. 1). The June 2010 IEP also reflected that the projected initiation date was September 8, 2010 for the 2010-11 school year (Dist. Ex. 13 at p. 2).

Modifications made to the June 2010 IEP from the April 2010 IEP included updated information as to the present levels of academic performance and learning characteristics regarding the student's progress in reading, math, and writing skills based on a May 28, 2010 teacher report (Dist. Ex. 13 at p. 3). Also, at the request of the parent, the academic management needs were updated to include more strategies to assist the student (Dist. Exs. 13 at p. 4; 15 at p. 1). Additional strategies included that the student should sit near a motivated worker to facilitate on-task behavior; the student should sit away from distractions such as a loud hallway, window or talkative peers; larger tasks should be broken down into smaller, more manageable steps; visual aids such as illustrations, charts, and tables that can relay the same information as text or discussions should be provided; and the provision of activities to help improve the student's recall of correct motor sequences for forming letters and numbers such as tracing, drawing, and using verbal descriptions while forming letters and numbers (Dist. Ex. 13 at p. 4).

Additional social/emotional management needs were also added to the June 2010 IEP, including the provision of positive reinforcement and/or tangible rewards when classroom tasks are completed with minimal prompting (compare Dist. Ex. 13 at p. 6, with Dist. Ex. 14 at p. 7). Regarding the student's present levels of health and physical development, the June 2010 CSE added that the student had received a diagnosis of chronic hives and also added a health and physical management need indicating that the teacher should consult with the school nurse to work collaboratively in managing the student's health needs (compare Dist. Ex. 13 at p. 7, with Dist. Ex. 14 at p. 8).

The June 2010 CSE meeting minutes indicated that the parent also requested additional goals be added to the student's IEP (Dist. Ex. 15 at p. 1). The June 2010 CSE included an additional goal that addressed increasing the student's understanding of all sound symbol relationships and her ability to identify all consonant sounds, and also added a goal that addressed increasing the student's ability to use a clock and a calendar to track time and events (compare Dist. Ex. 13 at pp. 8, 9, with Dist. Ex. 14 at pp. 9-10). An additional counseling goal was added to the June 2010 IEP that addressed developing the student's coping strategies, including recognizing symptoms of tension and stress, identifying at least two strategies to cope with a recurrent stressor, and verbalizing how strategies did or did not help that would be measured in part by teacher checklists every four weeks (compare Dist. Ex. 13 at p. 10, with Dist. Ex. 14 at p. 11). While the remainder

of the goals in the June 2010 IEP were similar to those in the April 2010 IEP, at the parent's request, the June CSE modified the existing goals by including more detailed and specific criteria for mastery (Tr. pp. 224, 230, 251; compare Dist. Ex. 13 at pp. 8-10, with Dist. Ex. 14 at pp. 9-11).

The June 2010 IEP indicated that the CSE had reconvened in response to the parent's concern that its previous recommendation of SETSS would not address the student's academic delays and further noted that the CSE agreed that an ICT class would address the student's academic deficits (Dist. Ex. 13 at p. 12; see Tr. p. 222). The IEP further indicated that the June 2010 CSE also considered a special class in a community school, but deemed the program too restrictive at that time (Dist. Ex. 13 at p. 12).

The meeting minutes reflected that at the June 2010 CSE meeting, the parent submitted documents she had written that provided more details regarding the student's social history, her perspective as a parent, and her recommendations for the IEP, which she requested be attached to the IEP (Dist. Ex. 15 at p. 1). The meeting minutes indicated that the parent's reports were accepted and would be made "part of the package," but not be attached to the IEP (id.). At the end of the June 2010 CSE meeting, the parent indicated her desire to review the recommendations made in the IEP at home (Tr. p. 222).

In a letter dated June 28, 2010, the principal notified the parent that the student had not met the performance criteria required for promotion to second grade and would therefore repeat first grade (Tr. p. 504; Parent Ex. H at p. 1).<sup>5</sup>

In a letter to the CSE chairperson dated June 30, 2010, the parent indicated that she did not believe that the June 2010 IEP addressed the student's needs and requested, among other things, a CSE meeting to review the June 2010 IEP and to correct certain information (Tr. p. 504; Parent Ex. D).

The CSE reconvened on August 18, 2010 for a requested review (Dist. Ex. 1 at pp. 1-2). The August 2010 CSE continued its recommendation for the student's 2010-11 school year for an ICT program (12:1 student-to-teacher ratio) and increased the recommended related services from one to two individual counseling sessions per week (id. at pp. 1, 13).

In a notice to the parent dated September 2, 2010, the district summarized the recommendations made by the August 2010 CSE and identified the particular school to which the district assigned the student (Dist. Ex. 3). The notice listed an address for the assigned school, as well as the name, address, and telephone number of the individual to contact in order to arrange a visit of the assigned school (id.). On September 20, 2010, the parent visited the assigned school (Parent Ex. G at p. 1). In an e-mail to the district placement officer, the parent advised that "the options ... are grossly inadequate for [the student's] needs and will not offer both a safe environment for her (given her medical and psychological conditions) and an appropriate

---

<sup>5</sup> The hearing record reflects that during the 2009-10 school year, the student had been identified as a student at risk of retention (Tr. pp. 297-99, 511; Dist. Exs. 7 at p. 1; 8 at p. 2; 11 at p. 1).

education (given her diagnosed Dyslexia, Discalculia, Disgraphia and observed speech and [OT] delays and suspected Central Auditory Processing Disorder)" (id.).<sup>6</sup>

The student remained at home at the start of the 2010-11 school year during September and October 2010 (Tr. pp. 538-39).<sup>7</sup> The student began attending the Child School during November 2010 and continued there through the remainder of the 2010-11 school year (Tr. pp. 537-38; see Parent Exs. A; B).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated May 23, 2011, the parent sought payment for the student's tuition at the Child School for a portion of the 2010-11 school year and asserted that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Dist. Ex. 12 at p. 1). The parent specifically asserted that the ICT program that was proposed in the August 2010 IEP could not meet the student's academic needs and that the annual goals were "ambiguous, unquantifiable," and did not include short-term objectives (id. at pp. 3-5). In addition, the parent asserted that that the assigned schools recommended by the district were too large and the "populous mainstream buildings" would not afford the student an appropriate educational environment and would not offer the student a suitable and functional peer group for instructional and social/emotional purposes (id. at pp. 2-5). According the parent, the CSE was also improperly constituted (id. at pp. 3-4). The parent further asserted that the student's placement at the Child School was appropriate for the 2010-11 school year and that there were no equitable considerations barring her request for tuition payment (id. at p. 5).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on September 14, 2011, and concluded on January 20, 2012, after four days of proceedings (Tr. pp. 1-560). In a decision dated February 23, 2012, the IHO found that the district failed to offer the student a FAPE (IHO Decision at p. 25). The IHO found that the CSE did not view the student "as an individual with specific needs" and based its program recommendation on a "formula" rather than the student's individual needs; that the student's August 2010 IEP erroneously reflected progress based on a teacher report and had incorrect information as to whether the student was bilingual; and that the CSE changed the recommendation from general education with SETTS based upon the parent's wishes, not because the CSE believed the ICT program would be more appropriate for the student (id. at pp. 21, 23-25). Regarding the ICT program, the IHO found that it was not appropriate given the student's health and academic history; that the August 2010 IEP indicated that the student worked best in small groups, but an ICT class is not a small group; and that half of the time, the class would be taught by a regular education teacher, and a regular education teacher was not appropriate for the student based on her prior academic history (id. at pp. 22, 24). The IHO also based his decision on a finding that the annual goals included in the student's August 2010 IEP were inappropriate

---

<sup>6</sup> The hearing record reflects that the parent visited other district schools with the assistance of staff from the district's special education enrollment office, although she did not receive a notice from the district assigning the student to any of these additional school sites that she visited (Tr. pp. 518-19, 525; Parent Ex. G at pp. 1-2).

<sup>7</sup> The parent testified that she had initiated the process for home instruction because she believed the student should not attend the district school due to anxiety attacks, continual hive outbreaks, and depression and because the student was resistant to attending school (Tr. pp. 538-39).

for the student because they were the same goals that were reflected in the student's April 2010 IEP, and the August 2010 CSE did not take into consideration that: (1) the student presented with dyslexia; (2) the student was going to repeat first grade; and (3) the goals were written for a student going into a general education program with SETTTS, not an ICT class (id. at p. 22). In addition, the IHO found that the Child School was appropriate and that the equities favored the parents (id. at pp. 24-25). Based on the foregoing, the IHO ordered the district to pay for the tuition for the student at the Child School from November 9, 2010 through the last day of June 2011 (id. at p. 25).

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

The district appeals, asserting that the district offered the student a FAPE. The district asserts that the ICT program with counseling as a related service recommended in the August 2010 IEP was appropriate to meet the student's needs in the least restrictive environment (LRE); that the student's August 2010 IEP addressed her needs including her dyslexia and social/emotional needs; and that the CSE based its program recommendation on appropriate evaluative documentation and the input of all the team members (including the parent) during the course of three CSE meetings. Regarding the August 2010 IEP goals, the district first asserts that the IHO should not have examined whether the goals were inappropriate for the specific reason that they were the same goals as those contained in the April 2010 IEP because the parent did not raise that allegation in her due process complaint notice. The district further asserts that the goals properly addressed the student's academic and social/emotional needs. Moreover, the district asserts that the fact that the goals in the August 2010 IEP were the same as those contained in the April 2010 IEP did not render them improper because the goals adequately addressed the student's needs despite the change in program recommendation; the goals were revised in June 2010 based on the parent's concerns about measurability; and pursuant to State regulations, short-term objectives are not required where the student is mandated to participate in State and local assessments. In addition, the district asserts that the Child School was not an appropriate placement and that equitable considerations preclude relief for the parent.

In an answer, the parent asserts among other things, that the IHO's decision should be upheld in its entirety because the district did not offer the student a FAPE, the Child School was an appropriate placement, and the equities favor the parent. The parent also asserts the IHO made credibility determinations that must be afforded due deference.

#### **V. Applicable Standards**

Two purposes of the IDEA 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., 557 U.S. 230, 239 [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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of



Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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]).

## **VI. Discussion**

### **A. Scope of Impartial Hearing and Review**

I will initially address two threshold issues regarding the scope of the appeal. First, although the parent makes assertions in her answer regarding the provision of a FAPE that were not ruled on by the IHO, the parent does not cross-appeal the IHO's failure to rule on any claims. State regulations provide that "[a] respondent who wishes to seek review of an IHO's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Although the parent asserts in her answer reasons, in addition to those delineated in the IHO's February 2012 decision, to support her claim that the student was denied a FAPE, a review of the parent's verified answer indicates that the parent did not cross-appeal from the IHO's decision (see Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an IHO is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal. Accordingly, the parent's assertions in her answer regarding the provision of a FAPE that were not ruled on by the IHO will not be considered (see 8 NYCRR 279.4[b]).

Next, I will consider the district's assertion that the IHO erroneously decided an issue not raised in the parent's May 23, 2011 due process complaint notice, specifically, the IHO's finding that the goals in the August 2010 IEP were inappropriate because they were the same goals as those contained in the April 2010 IEP (see IHO Decision at p. 24). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [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). Upon review of the parent's due process complaint notice, I find that the parent's assertion that the annual goals were ambiguous and unquantifiable (see Dist. Ex. 12 at pp. 4-5) may be reasonably read to raise the issue decided by the IHO (see 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

## **B. August 18, 2010 IEP**

### **1. Evaluative Information and Present Levels of Performance**

While, an appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), initially, I note that the parent did not allege in her due process complaint notice any specific challenges to the information contained in the student's August 2010 IEP, such as the student's present levels of academic achievement, social development, physical development, and management needs; and the recommended frequency and duration of counseling (see Dist Ex. 12). Nevertheless, I have reviewed the August 2010 IEP, and as discussed below, I find that the hearing record demonstrates that the August 2010 CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs and that the description is consistent with the evaluative information that was available to the CSE.

As noted above, the hearing record reflects that at the request of the parent, the CSE reconvened in August 2010 because of concerns she expressed in a letter to the CSE chairperson dated June 30, 2010 (see Parent Ex. D). The parent requested, among other things, a CSE meeting to review the June 2010 IEP to correct the student's medical information and errors in the social history, and to provide documentation that the student had been seeing the district guidance counselor for her anxiety (Tr. p. 504; Parent Ex. D). The parent's letter also indicated that she did not believe the current IEP addressed the student's dyslexia or provided the student with the services and support she required in order to successfully complete first grade and noted that the student would be commencing first grade for the second time (Tr. pp. 504-05; Dist. Exs. 1; 2; Parent Ex. D).

Meeting attendees at the August 2010 CSE meeting included the district representative who also acted as the district school psychologist, a regular education teacher, a special education teacher, the parent, the parent's advocate, and an additional parent member (Dist. Ex. 1 at p. 2). The hearing record reflects that the August 2010 CSE reviewed and considered the student's June 2010 IEP, the March 2010 OT evaluation, the March 2010 OT/PT parent checklist of school function, the March 2010 psychoeducational evaluation, the March 2010 classroom observation, and the February 2010 social history, as well as new information provided by the parent including a letter from the student's allergist dated June 10, 2010 and a private initial clinical assessment dated May 26, 2010 (Tr. pp. 58-59, 509; see Dist. Exs. 4; 5; 7-11; 13).

Upon review of the hearing record, the present levels of academic performance and learning characteristics included in the August 2010 IEP reflected information provided in the March 18, 2010 psychoeducational evaluation regarding the student's cognitive ability and achievement (see Dist. Exs. 1 at pp. 3-4; 4 at pp. 2-6). The IEP indicated, as reflected in the March 2010 psychoeducational evaluation, that the student's performance on the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-3) yielded a full scale IQ within the high average range of intellectual ability (see Dist. Exs. 1 at p. 3; 4 at pp. 2, 3, 6). Regarding academic achievement, the August 2010 IEP indicated that the student's performance on various subtests of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) ranged from severely delayed in letter-word identification and passage comprehension to moderately delayed in word attack, spelling, and math calculation ability, to mildly delayed in picture vocabulary and applied math problems (Dist. Exs. 1 at pp. 3-4; 4 at p. 9). In addition, the academic management needs included

in the August 2010 IEP reflected needs similar and consistent with those identified in the March 2010 psychoeducational evaluation, including the need for provision of a multisensory approach to instruction, frequent opportunities to practice newly taught skills, use of manipulatives to learn new math skills, and verbal cues and prompts to complete assignments (Dist. Exs. 1 at p. 4; 4 at p. 7).

The student's present levels of social emotional performance included in the August 2010 IEP also reflected information provided in the March 2010 psychoeducational evaluation (Dist. Exs. 1 at pp. 5-6; 4 at p. 4). The August 2010 IEP included evaluative information indicating that the student's struggle with learning the basic pre-primer skills was affecting her emotional self worth (Dist. Exs. 1 at p. 5; 4 at p. 4). The IEP also reflected input from her then-current teacher that the student respected authority and generally followed all rules; that the student got along well with peers although some classmates indicated that she frequently asked them what to do; that the student often cried or made faces when frustrated; and that the student often stated she was unable to do whatever the class was working on (Dist. Ex. 1 at p. 6; see District Ex. 4 at p. 4). The IEP also indicated that during testing, the student tended to give up quickly and required encouragement and support to complete many academic test items (id.). Social/emotional management needs reflected in the IEP included that the student required seating close to the teacher, verbal cues to maintain on task behavior, and positive reinforcement and/or tangible rewards when class tasks were completed with minimal prompting (Dist. Ex. 1 at p. 6).

Regarding the student's present levels of health and physical development, the August 2010 IEP indicated that the student was in good health and presented with no limitations to physical activities in school, but noted that the student has chronic autoimmune urticaria and angioedema (hives and swelling), that stress, anxiety and infections can exacerbate the condition, and that treatment for an outbreak is with antihistamines (Dist. Ex. 1 at p. 7).<sup>8</sup> The student's August 2010 IEP also indicated that the student presented with dyslexia (id.). The hearing record reflects that the March 26, 2010 OT evaluation of the student indicated that the student presented with no difficulties in the area of hand skills that impeded her ability to write and demonstrated no difficulties in the areas of sensation or movement that impeded her independent participation in the school setting, and as such were not reflected as an area of need in the present levels of health and physical development and OT services were not recommended in the August 2010 IEP (see Dist. Exs. 1 at p. 7; 8 at p. 7; see also Tr. p. 232).

A review of the student's August 2010 IEP shows that the student's present levels of performance were accurately identified and reflected based upon the evaluative information available to the CSE prior to the August 2010 CSE meeting, and also that the August 2010 CSE considered new information provided by the parent and that such information was also accurately identified in the IEP. I note that the parent had presented an allergist's letter to the August 2010 CSE indicating that the student had received a diagnosis of chronic autoimmune urticaria and angioedema with no known trigger which can result in sudden episodes of hives and swelling and which can be exacerbated by stress, anxiety, and infections, and that such information was reflected in the student's IEP (Dist. Exs. 1 at p. 7; 5). I further note that the letter indicated that the condition is not life threatening, is not associated with anaphylaxis, and does not require the use

---

<sup>8</sup> The hearing record reflects that a plan pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794 [1998]) was previously implemented to address the student's needs related to her history of allergic reactions (Dist. Ex. 4 at p. 1).

of an Epi-Pen (Dist. Ex. 5). The letter also outlined appropriate treatment at home and school as well as indicated that the student should "never be excluded from any school programs" including field trips and extracurricular activities because of this condition (*id.*). Consistent with this information, the CSE revised the student's present levels of health and physical development section of the August 2010 IEP to reflect the student's medical diagnosis, and also revised the instructions for treatment and further removed comments previously included regarding participation in school activities (compare Dist. Ex. 1 at pp. 7, 13, with Dist. Ex. 13 at pp. 7, 13; see also Dist. Ex. 2).

The parent also provided the August 2010 CSE with a May 26, 2010 private initial clinical assessment, which reflected diagnoses of a depressive disorder-NOS, a reading disorder and a mathematics disorder (Dist. Ex. 7 at p. 5). The assessment report reflected that the student displayed clear indications of severe learning disabilities including symptoms of dyslexia, such as letter reversals, severely deficient word attack skills and reading dysfluency which warranted specialized instruction geared to the needs of children with reading disabilities (Dist. Exs. 1 at pp. 1, 3, 4; 7 at p. 4). The report further reflected that the student's feelings of frustration and inadequacy regarding her learning disabilities needed to be addressed with psychotherapy (Dist. Ex. 7 at p. 5). In response to the new information provided in this report, I note that the August 2010 CSE recommended that the student's counseling services be increased from one to two 30-minute individual sessions per week and the IEP also noted that the student presents with dyslexia (Tr. p. 517; Dist. Ex. 1 at pp. 7, 13).

Accordingly, upon review of the hearing record, I find that the August 2010 IEP accurately described the student's present levels of academic achievement, social development, physical development, and management needs; that the August 2010 IEP accurately reflected the available evaluative information resulting from the district's initial evaluation of the student; and that August 2010 CSE was responsive to new information provided by the parent as well as the parent's concerns.<sup>9</sup>

## **2. Annual Goals**

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

---

<sup>9</sup> Minutes of the August 2010 CSE meeting further reflected that the CSE responded to the parent's request for bussing and referred her to the head of the CSE to make a request for additional evaluations that she sought (Tr. pp. 141, 507; Dist. Exs. 1 at p. 1; 2). The meeting minutes also reflected a change from "monolingual services with ESL" to "monolingual services without ESL" on the student's IEP, which the district representative who participated in the August 2010 CSE testified was made at the parent's request (Tr. pp. 140-41, 498).

Initially I note that, under the IDEA and State and federal regulations discussed above, a determination of the appropriateness of a particular set of annual goals for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether the goals are consistent with and relate to the needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). In this case, a review of the annual goals on the student's August 2010 IEP indicates that the CSE continued the goals from the June 2010 IEP and that the goals are consistent with and relate to the needs and abilities of the student (see Dist. Exs. 1 at pp. 8-10; 13 at pp. 8-10). As noted above, in response to the parent's concerns, the June 2010 CSE modified the goals from the student's initial April 2010 IEP to ensure that they were measurable and also added additional goals (Tr. pp. 224, 230, 251; compare Dist. Exs. 13 at pp. 8-10, with Dist. Ex. 14 at pp. 9-11; 15 at p. 1). In this case, the August 2010 IEP contained annual goals targeting the student's needs in the areas of reading, decoding, sound-symbol relationships, reading comprehension, writing, addition and subtraction calculations, clock and calendar skills, and her ability to cope with anxiety related to her academic challenges, as they were reflected in the evaluative material available to the CSE initially at the April 2010 CSE meeting, which were then modified at the June 2010 CSE meeting, and then carried over in the August 2010 IEP (see Dist. Exs. 4; 8-11; see also Dist. Exs. 1 at pp. 8-10; 13 at pp. 8-10; 14 at pp. 9-11).

Also as discussed above, although the parent provided additional information at the August 2010 CSE meeting, this information did not indicate that the student's needs had changed but rather was consistent with information that the CSE had previously received (compare Dist. Exs. 1 at pp. 1, 3, 4, with Dist. Ex. 7 at pp. 1-5). Although the initial clinical assessment indicated that the student exhibited symptoms of dyslexia, the CSE had already noted the student's letter reversal, deficient word attack skills and reading dysfluency, which the report indicated were symptoms of her dyslexia (Dist. Exs. 1 at pp. 3-4; 7 at p. 4). Testimony by the district's psychologist who participated in the April and June 2010 CSE meetings indicated that neither the student's program nor the goals would change as a result of her dyslexia (Tr. pp. 270-71). She further testified that the CSE did not change the student's goals when the program recommendation was changed at the June 2010 CSE meeting because the student had not received special education services under the April 2010 IEP and was not yet addressing the goals in that IEP, and because the student continued to demonstrate the same difficulties (Tr. pp. 252-53). I further note that a review of the hearing record does not include evidence that the student's needs changed from the time of the April 2010 CSE meeting to the time of the August 2010 CSE meeting, and although the IHO found that the goals were not appropriate, the hearing record does not include evidence as to what additional specific goals should have been included in the student's August 2010 IEP.

Based on the above, I find that the annual goals included in the August 2010 IEP were designed to meet the student's needs that result from the student's disability to enable her to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).

### **3. Integrated Co-Teaching Program**

The IHO found that the ICT program recommended by the August 2010 CSE would not be appropriate for the student (see IHO Decision at pp. 21-25). For the reasons set forth below, I find that the ICT class with the related service of counseling recommended in the August 2010 IEP was reasonably calculated to enable the student to receive educational benefits.

The district school psychologist who attended the April and June 2010 CSE meetings described an ICT classroom as staffed with one regular education teacher and one teacher licensed in special education (Tr. p. 223). She indicated that 60 percent of the students in the class are special education students and 40 percent are general education students and that the special education population of the class will not exceed 12 students (Tr. pp. 223, 249). Testimony by the teacher of the assigned class indicated that a typical day in an ICT class includes instruction in reading, writing, math, and phonics and that science and social studies are also taught, although fewer periods per week (Tr. pp. 317, 333, 355).<sup>10</sup>

Testimony by the teacher of the assigned class indicated that in an ICT class, during a 45-minute academic period, for the first 10 to 15 minutes, either the special education or regular education teacher presents a mini lesson to the entire class while the other teacher assists, followed by an independent work time lasting 15 to 20 minutes where both teachers work individually and in small groups of four to five students, and ending with a short period for interactive sharing where students discuss and reflect on what they have worked on (Tr. pp. 319-20, 338, 343). The teacher indicated that an ICT class utilizes reading groups, where students are grouped together based on their reading levels and math groups where students may be grouped with students who have higher skills (Tr. p. 339). He further indicated that an ICT class provides for small group guided reading instruction, writer's workshop, and addresses comprehension skills using among other things, sequencing sentence strips, retelling, and by checking students' understanding during reading by asking "wh" questions (Tr. pp. 332-35). Sound-symbol relationships are addressed daily during phonics instruction (Tr. p. 333). The ICT class also utilizes math and reading centers where a specific skill is focused on through an activity such as finding words that have the same sound (Tr. p. 339). In addition to the regular math instruction period, math is incorporated into the morning meeting and math games are utilized to provide students with opportunities to reinforce the skills that they learn during the week in regular math instruction (Tr. pp. 335-36).

Regarding academic management needs, the teacher further testified that similar to the student's academic management needs, the ICT class provides for a lot of small group instruction; the preferential seating needs of students including a quiet work area away from distractions; break down of bigger tasks into smaller steps; use of manipulatives such as counters for practicing math skills; directions presented in multiple ways; visual aides such as the SMART board, charts, photographs, and pictures of vocabulary words on a word wall; shortened assignments; slow pacing; and individual attention (Tr. pp. 323-28). The teacher indicated that social/emotional management strategies similar to those required by the student were used, including positive reinforcement such as verbal reinforcement, encouragement, and tangible reinforcers (Tr. p. 328). He further indicated that opportunity for repeated practice is provided during the daily phonetics instruction and daily drill in a variety of modalities such as tapping out sounds, practice in writing words, and practice in spelling words using a SMART board so students can become "familiar, not only with how it sounds, but what the letters look like" and the correct spelling (Tr. pp. 331, 333). He also indicated that students who are in first grade for a second time receive a lot of attention and supervision to ensure that they are productive, focused, and attend school every day (Tr. pp. 340-41).

---

<sup>10</sup> ICT students also have a period each day where they participate in either gym, art, computer, library, drama, or music (Tr. p. 317).

In light of the description of the student's present levels of performance in the August 2010 IEP, and a review of the evaluative information available to the CSE, which the parent does not contest the accuracy thereof, the responsiveness of the June and August CSEs to the concerns of the parent evidenced through revisions to the student's IEPs, and a finding that the revisions were responsive to additional information presented to the CSE by the student's mother, in conjunction with information available in the hearing record regarding the ICT program, I find that the IHO's finding that the ICT class was inappropriate for the student to be unsupported by the hearing record and that the district's recommended placement could have addressed the student's instructional needs and was reasonably calculated to confer educational benefits (Rowley, 458 U.S. at 206-07).

### **C. Least Restrictive Environment**

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

The hearing record shows that the decision of the August 2010 CSE to recommend an ICT program was made with consideration of the IDEA's requirement that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining the LRE for the student, I note testimony by the district psychologist who conducted the student's 2010 psychoeducational evaluation that there was no evidence to support a more restrictive environment than the ICT program (see Tr. p. 231). In addition, the hearing record reflects that at the August 2010 CSE meeting, the parent had requested a 12:1 program, and that the CSE considered the

program but rejected it as too restrictive "at this time" (Dist. Ex. 1 at p. 12).<sup>11</sup> I have reviewed the hearing record and considered the student's deficits, including the student's math and reading needs as well as social/emotional needs, and the discrepancy between the student's cognitive ability and her significantly lower academic achievement scores (see Tr. p. 224; Dist. Ex. 14 at p. 1). I note that the hearing record describes the student as "incredibly intelligent" and such is evidenced by the student's full scale IQ, which is within the high average range of intellectual ability, indicating that she scored higher than 90% of students her age (Tr. pp. 493-94; Dist. Ex. 4 at p. 2). Upon an independent review of the hearing record, I find that the hearing record supports a finding that the student is capable of being educated with general education students and that the ICT placement recommended by the August 2010 CSE is the LRE for the student.

## **VII. Conclusion**

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. The hearing record contains evidence showing that the August 2010 IEP recommending placement in an ICT class with the related service of counseling was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether the Child School was appropriate for the student or whether equitable considerations support the parent's claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at \*12; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038). I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated February 23, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year school year, and directed the district to pay for the student's tuition costs at the Child School.

**Dated:**           **Albany, New York**  
                          **May 29, 2012**

\_\_\_\_\_  
**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**

---

<sup>11</sup> The hearing record reflects that at the August 2010 CSE meeting, in addition to an ICT placement, there was discussion of SETSS, a 1:1 tutor, and a 12:1 self contained classroom (Tr. pp. 513, 515; Dist. Ex. 2). Testimony by the parent indicated that the CSE explained to her that it followed a continuum of services in order of restrictiveness (Tr. p. 516).