The University of the State of New York

The State Education Department
State Review Officer
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No. 12-097

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:
Law Offices of Melvyn W. Hoffman, attorneys for petitioner, Melvyn W. Hoffman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found that respondent (the district) properly determined that the student was ineligible for special education and related services and denied their request for tuition reimbursement for the Mary McDowell Friends School (MMFS) for the 2010-11 school year.[1, 2] The appeal must be dismissed.

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

[1] The hearing record interchangeably refers to the private school the student attended during the 2011-12 school year as both the Mary McDowell Center for Learning (MMCL) and the "Mary McDowell Friends School" (MMFS) (see, e.g., Tr. pp. 13-14, 58; Parent Exs. B at p. 1; F; I; J). In this decision, for ease of reference, the private school will be referred to as MMFS.

[2] MMFS has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 13-14; see 8 NYCRR 200.1[d], 200.7).

psychologist, and a 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 opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's eligibility for special education and related services as a student with a learning disability, speech or language impairment or an other health-impairment is in dispute in this proceeding (see 34 CFR 300.8[c][9], [10], [11]; 8 NYCRR 200.1[zz][6], [10], [11]).

For the 2006-07 school year (fifth grade), the district deemed the student eligible for special education services as a student with a speech or language impairment (Parent Ex. O). The student was enrolled in an inclusion class, as a general education student, and received two weekly sessions of speech-language therapy (Tr. pp. 138-39; Parent Ex. O at pp. 8, 10).[3] For the next two school years, the student continued to attend public school and received related services (Tr. pp. 138-39; Dist. Ex. 2 at p. 1). In fall 2008 (eighth grade), the district determined that the student was no longer eligible for special education services and declassified the student (Tr. pp. 132-34, 138-39; Dist. Ex. 2 at p. 1; Parent Ex. E. at p. 5). The parents did not dispute the district's determination to declassify the student at that time (Tr. p. 134).

The student began the 2009-10 school year in a district high school; however, in addition to somatic complaints, she began to experience difficulty in school; consequently, in April 2010, she left the district school (Tr. pp. 111-15, 121-22, 133; Dist. Ex. 3 at pp. 1-2). In spring 2010, a private neuropsychological evaluation of the student was conducted over a two-day period, and, as a result, the student received diagnoses of an attention deficit hyperactivity disorder (ADHD), predominantly inattentive type, a reading disorder, a generalized anxiety disorder, a depressive disorder, not otherwise specified (NOS), in addition to stress-related esophagitis and gastritis (Tr. pp. 42-43; Dist. Ex. 6 at p. 1; Parent Exs. A at p. 6; E at pp. 1, 6, 12). The student received home instruction for the remainder of the 2009-10 school year (Tr. pp. 69, 114-15; Dist. Ex. 3 at p. 2). In September 2010, for the 2010-11 school year, the student enrolled in MMFS as a ninth grade student because she did not complete her ninth grade year while attending the district public school (Tr. pp. 69, 59, 119, 130; Dist. Ex. 3 at p. 2). In October 2010, the CSE received an initial referral for the provision of special education services for the student from the parents (Dist. Exs. 1 at p. 1; 2 at p. 1).

On February 9, 2011, the parents effectuated an enrollment contract with MMFS for the 2011-12 school year (Parent Ex. F). On April 6, 2011, pursuant to an initial referral from the parent to obtain special education services for the student, the CSE convened (Tr. p. 19; Parent Ex. A at pp. 1-2). For the 2011-12 school year, the April 2011 CSE determined that the student was not eligible for special education and related services and did not recommend the provision of such services (see Tr. p. 37; Parent Ex. A at pp. 1-2). By final notice of recommendation (FNR) to the parents, dated April 11, 2011, the district summarized the April 2011 CSE's recommendations and notified the parents of the particular school to which the student was assigned for the upcoming school year (Parent Ex. B). In a letter to the district dated April 21, 2011, the parents advised the district that they disagreed with the April 2011 CSE's decision that the student was not eligible for special education services and that they rejected the assigned school (Parent Ex. C). In addition, the parents noted that they had already requested another meeting with a different team to reconsider the student's need for special education services (id.). By letter to the district dated August 22, 2011, the parents advised that the student needed a small class environment with an appropriate special education program to meet her needs and that the district did not offer the student a free appropriate public education (FAPE) during the 2011-12 school year (Parent Ex. K). The parents further indicated that they planned to unilaterally place the student in MMFS for the upcoming school year and seek tuition reimbursement at public expense (id.).

[3] The student's mother testified that, during the 2006-07 school year, she believed that the district also provided the student with testing accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l] [1998]) (Tr. p. 138).

A. Due Process Complaint Notice

In a due process complaint notice dated November 26, 2011, the parents asserted that the district failed to offer the student a FAPE (Parent Ex. M). Specifically, they contended that over the parents' objections, the district inappropriately failed to determine that the student was eligible for special education and related services and lacked an adequate rationale or explanation for its determination (id.). The parents further alleged that, in reaching its determination, the district ignored a letter and a private neuropsychological evaluation report that the parents provided to the CSE (id.). The parents maintained that the student required a "small nurturing school, small class environment, grouped with like functioning peers" (id.). The parents also argued that in order to receive an educational benefit, the student required full-time special education from two teachers, who utilized multi-sensory teaching techniques (id.).

As relief, the parents sought payment for the student's tuition at MMFS for the 2010-11 school year (Parent Ex. M).

B. Impartial Hearing Officer Decision

On January 20, 2012, an impartial hearing convened in this matter and concluded on March 16, 2012, after three days of testimony (Tr. pp. 1-199). By decision dated March 28, 2012, the IHO determined that the evidence did not demonstrate that the student was eligible for special education and related services pursuant to the IDEA and, accordingly, she denied the parents' request for tuition reimbursement for MMFS for the 2011-12 school year (IHO Decision at p. 15). Specifically, the IHO found that the student did not have a deficit in reading comprehension (id. at p. 12). Further, she found no evidence to demonstrate that the student exhibited "another psychological process disorder" (id. at p. 12). Under the circumstances, the IHO concluded that the student did not meet the eligibility criteria to be classified as a student with a learning disability (id.). Next, notwithstanding evidence that indicated that the student had received diagnoses of anxiety and depression, the IHO found that the student had the ability to learn (id. at pp. 12-13). She proceeded to describe the student as "generally happy," and noted that the student's occasional lack of self-confidence did not affect her educational performance (id. at p. 13). In addition, although the IHO noted that the student had exhibited "somatic" symptoms, the IHO determined that the student had not exhibited such symptoms for almost a two-year period and that such symptoms had ceased upon the student's enrollment in a new, smaller school (id.). Under the circumstances, the IHO concluded that the student did not meet the criteria to be classified as a student with an emotional disturbance (id.). Finally, the IHO concluded that the student did not meet the criteria to be deemed eligible for special education services as a student with an other health-impairment, despite evidence of the student's inattention in class (id. at pp. 14-15). Rather, the IHO noted that she could not discern how much of the student's lack of attention in class resulted from an alleged disability, and she added that the evidence indicated that the student's classroom teacher at MMFS easily guided the student back to the lesson (id.). Moreover, given evidence that the student was easily guided back to her lessons, the IHO determined that the evidence did not demonstrate whether the student's difficulties with inattention adversely affected the student's educational performance (id. at p. 15).[4]

[4] Although the IHO concluded that the student did not meet IDEA eligibility criteria, she noted that the student might fall under the protections of section 504 (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parents appeal and seek reversal of the IHO's decision. The parents request a finding that the IHO erred and that the student should have been deemed eligible for special education services as a student with a learning disability or as a student with an other health-impairment, that the district denied the student a FAPE during the 2011-12 school year, that MMFS constituted an appropriate unilateral placement for the student, and that equitable considerations favor their request for relief. Specifically, the parents allege that the evidence contained in the hearing record demonstrates that, in light of the student's diagnosis of an ADHD and other documented deficits, the district should have deemed the student eligible for special education services as a student with a learning disability or as a student with an other health-impairment. The parents submit that the student's diagnoses are intertwined with her disability, and that the April 2011 CSE failed to properly consider the student's history while she was enrolled in the general education setting and was unable to avail herself of an educational benefit. In addition, the parents contend that the IHO should have remanded the matter to the CSE or that she should have directed the district to conduct additional evaluations of the student. Next, the parents allege that the district's failure to assess the student's need for declassification support services also contributed to the alleged denial of a FAPE. Lastly, the parents submit the following documentation as additional evidence for consideration on appeal, related to their claim that the district denied the student a FAPE during the 2011-12 school year: (1) a June 2011 addendum to the spring 2010 private neuropsychological evaluation report; and (2) the student's March 2006 IEP, wherein the district deemed her eligible for special education and related services as a student with a speech or language impairment.

The parents also assert that MMFS was an appropriate unilateral placement for the student, in part, due to the small class setting. The parents further note that the student has progressed in areas of need, such as with respect to her self-esteem. Furthermore, the parents maintain that equitable considerations favor their request for relief, because they have cooperated with the CSE process. As a remedy, they seek an award of tuition reimbursement for MMFS for the 2011-12 school year.

In its answer, the district requests that the petition be dismissed in its entirety. The district requests a finding that the student was not eligible for special education services and, alternatively, that MMFS was not an appropriate unilateral placement for the student and that the equities weigh against the parents' claim for relief. Initially, although the district does not object to the March 2006 IEP as additional evidence, the district argues that the June 2011 addendum to the private neuropsychological evaluation should not be considered on appeal because, in part, it was available at the time of the impartial hearing and should have been offered at that time. Furthermore, despite the parents' attorney's claim that he was not aware that the parents had provided the district with a copy of the June 2011 report, the district was not obliged to offer the June 2011 report into evidence. Lastly, the district argues that the June 2011 report should not be entertained on appeal because the April 2011 CSE did not have a copy of the report at the time that it was developing program recommendations for the student.

The district also maintains that the CSE properly determined that the student was not eligible for special education pursuant to the IDEA. The district argues that the IHO did not err in failing to determine whether the CSE required additional evaluations to assess the student. Furthermore, the IHO did not err in failing to determine that the student required declassification support services because the CSE had not found her to be eligible as a student with a disability since September 2008. Next, although the district notes that it is unclear which category of

disabling conditions the parents seek for the student, the district argues that the student did not meet the criteria for eligibility as a student with a speech or language impairment, a learning disability, an emotional disturbance, or an other health-impairment. Furthermore, the district claims that the evidence contained in the hearing record does not establish that the student exhibited a need for special education services. Under the circumstances, the district alleges that it was not required to provide the student with a FAPE. Next, the district argues that MMFS was not an appropriate unilateral private placement for the student because it constituted an overly restrictive setting for the student. Finally, the district contends that equitable considerations weigh against the parents' request for relief because the parents never seriously considered enrolling the student in a public school.

V. 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., 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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 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 R.E., 694 F.3d at 184-85; 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. Preliminary Matters

1. Additional Evidence

The parents submit the following documents as additional evidence: (1) a June 2011 addendum to the spring 2010 private neuropsychological evaluation report; and (2) the student's March 2006 IEP. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Regarding the parents' offer of additional evidence, in this instance, I will accept the March 2006 IEP because I find that it is necessary to avoid a clear error and to complete the hearing record with respect to a critical issue in this proceeding. When questioned during the impartial hearing about the student's previous classification, the student's mother mistakenly answered that the student had been classified as a student with a language processing disorder but she then modified her response and indicated that the student had been classified as a student with a learning disability, and the March 2006 IEP clarifies that the student was eligible for special education and related services as a student with a speech or language impairment (Tr. pp. 143-44; Parent Ex. O). However, with regard to the June 2011 addendum to the spring 2010 private neuropsychological evaluation report, this evidence post-dated the challenged April 2011 CSE determination, was available at the time of the impartial hearing and it is not necessary to render my decision.[5] Therefore, I decline to accept the June 2011 addendum to the spring 2010 private neuropsychological evaluation report as additional evidence.

[5] Moreover, the assertion by counsel for the parents that he did not offer the June 2011 addendum to the spring

2. Finality of Unappealed Determinations

Initially, neither party has appealed from the IHO's decision that the student was not eligible for special education services as a student with an emotional disturbance (IHO Decision at p. 13). Therefore, that aspect of the IHO's decision is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*11 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013).

3. Scope of Impartial Hearing

Next, the parents contend that the IHO failed to make following determinations: (1) whether the CSE needed to obtain additional evaluations of the student prior to declassification; and (2) whether the student required declassification support services.

With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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]; see C.H., 2013 WL 1285387, at *9; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 611 [E.D.N.Y. 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 *11-*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8. Here, it is not surprising that the IHO did not discuss these matters in her decision, because a review of the evidence shows that they were not raised in the due process complaint

2010 neuropsychological evaluation report into evidence at the time of the impartial hearing because he was unaware that the parents had provided an updated copy to the district does not outweigh the reasons for excluding it.

notice (see Parent Ex. M).[6] Moreover, the hearing record does show that the district agreed to expand the scope of the impartial hearing to include these matters or that the IHO otherwise authorized an amendment to the due process complaint notice to include these issues (Application of the Bd. of Educ., Appeal No. 10-073).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, the IHO properly did not consider such matters and I decline to review them. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp.2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO, is limited to matters either raised in the impartial hearing request or agreed to by [the opposing party]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Nor can it be said that the district opened the door to such claims by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-50; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013).

Accordingly, these contentions are raised for the first time on appeal and are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105;

[6] The IHO made efforts during the hearing to clarify the particular issues in dispute, especially with regard to which disability categories were at issue, but the IHO was left in the unenviable position of having to guess which categories were potentially at issue. This is the type of question in which an IHO is well within his or her discretion to ask the parties for clarification prior to taking evidence, especially where as here, the due process complaint provides no guidance with regard to which disability categories are at issue—in other words, it would be unreasonable for parents in a case such as this to demand that a district make out a case with respect to all 13 disability categories no matter how far fetched some of them may be. This case demonstrates the value of holding a prehearing conference for purposes of "simplifying or clarifying the issues" to be decided at the hearing (8 NYCRR 200.5[j][3][xi][a]; see Application of the Bd. of Educ., Appeal No. 11-142; Application of the Bd. of Educ., Appeal No. 11-077; Application of a Student with a Disability, Appeal No. 11-062).

Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[7]

B. Eligibility for Special Education

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]).

1. Learning Disability

First, I will consider whether the hearing record reveals that the April 2011 CSE should have classified the student as a student with a learning disability. A learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia (id.). The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage (id.).[8]

In this case, the evidence shows that the student attended the April 2011 CSE meeting together with her parents (Tr. p. 36; Parent Ex. A at p. 2). An additional parent member, a regular education teacher, a district social worker, and a school psychologist, who also served as a district representative, participated in the April 2011 meeting (id.). The student's classroom teacher from MMFS also participated in the April 2011 CSE meeting by telephone (id.). The April 2011 CSE reviewed the spring 2010 private neuropsychological evaluation report in addition to the district's October 2010 psychoeducational assessment report (Tr. pp. 41-42, 117; see Dist. Ex. 2; Parent Ex. E). Although copies were not entered into the hearing record, it appears the district had also obtained a social history of the student and conducted a classroom observation (Tr. p. 21).

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[7] To the extent that the parents claim that the district inappropriately declassified the student in fall 2008, even if I were to assume that they had properly preserved this issue for appeal, such claims would likely be barred by the two-year statute of limitations prescribed by the IDEA (20 U.S.C. § 1415[f][3][C]; see 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; see also Application of the Dep't of Educ., Appeal No. 11-157). Moreover, to the extent that the parents argue that the district failed to provide the student with declassification support services, the district correctly asserts that such services are warranted only upon a determination by the CSE that a student, who has been receiving special education services, is no longer in need of such services and can be placed in a general education environment (8 NYCRR 200.1[ooo], 200.4[d][1][iii]).

[8] State regulations provide procedures to be employed in identifying whether a student suspected of having a disability meets the criteria for classification under the IDEA as a student with a learning disability (see 8 NYCRR 200.4[j]). On December 3, 2004, the reauthorized IDEA was signed into law, with most provisions of the new law taking effect on July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). The State amended its laws and regulations thereafter to conform to the IDEA and the implementing federal regulations by emergency measures and amendments, and 8 NYCRR 200.4[j]) was promulgated to conform State regulations to federal requirements relating to eligibility determinations effective as an emergency measure and thereafter as an amendment.

A review of the hearing record reflects that the April 2011 CSE properly determined that the student did not meet the criteria for eligibility for special education services as a student with a learning disability. The private neuropsychologist who evaluated the student in spring 2010 with cognitive testing concluded that based on administration of the Wechsler Intelligence Scale for Children (WISC-IV), the student's overall intellectual ability fell within the average range (Tr. p. 25; Parent Ex. E at p. 8). The student also attained scores within the average range in the areas of verbal comprehension, perceptual reasoning, working memory, and processing speed (Tr. pp. 26-27; Parent Ex. E at p. 7). The private neuropsychologist also administered the Wechsler Individual Achievement Test, Second Edition (WIAT-II), which revealed subtest scores within the average range with respect to word reading, pseudoword decoding, math reasoning, spelling, listening comprehension, and oral expression, with a high average subtest score noted in numerical operations (Tr. pp. 27-28; Parent Ex. E at pp. 7-8). The student attained a subtest score within the deficient range in the area of reading comprehension and a subtest score within the average/low average range with respect to written language (id.). According to the district school psychologist, although the spring 2010 administration of the WIAT-II yielded a low score in the area of reading comprehension, in light of the student's other test scores—namely, the comprehension and word reasoning subtests of the WISC-IV, where the student attained scores in the high average and superior ranges, respectively—it was "inexplicable" why the student obtained a low score in the area of reading comprehension; thus, the district school psychologist concluded that this particular score was not indicative of the student's ability to comprehend what she reads (Tr. pp. 31-32, 45-46, 48; Parent Ex. E at p. 7). The district school psychologist further opined that the low score on the reading comprehension could have resulted from the student's inattentiveness and testified that the student "should be able to read" (Tr. p. 32). Likewise, during the April 2011 CSE meeting, the student's classroom teacher reported that the student's comprehension skills improved when material was read to her (Tr. p. 56; Parent Ex. A at p. 3).

The district school psychologist also noted that her October 2010 psychoeducational evaluation of the student similarly revealed that the student's cognitive functioning was within the average range (Tr. p. 28; Dist. Ex. 2 at pp. 2, 4). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded composite scores in the average range with respect to broad reading and math (Tr. p. 28; Dist. Ex. 2 at p. 2). The district school psychologist noted that the student's sight word vocabulary was assessed to be above grade level and that the student achieved reading comprehension and fluency scores within the average range on tasks measuring her ability to comprehend short passages and rapidly comprehend short sentences (Dist. Ex. 2 at p. 3).

With regard to math, the October 2010 psychoeducational report reflected that the student demonstrated the ability to solve multi-digit addition, multiplication, and subtraction problems (Dist. Ex. 2 at p. 3). Moreover, although the student's math fluency skills fell within the borderline range, she exhibited the ability to subtract simple fractions with common denominators and solve for negative integers (Tr. p. 29; Dist. Ex. 2 at pp. 3-4). According to the October 2010 psychoeducational report, the student's performance on the math fluency subtest was "indicative of [the student's] inability to complete the task within the time limit rather than a lack of basic math knowledge" (Dist. Ex. 2 at p. 4). Likewise, while the student's classroom teacher described the student's math fluency as slow, the teacher also reported to the April 2011 CSE that the student exhibited "the ability to keep track of a great deal of information" in math (Parent Ex. A at p. 3). According to the student's teacher, the student needed to "take time to understand and ask questions before solving math problems" (id.). The district school psychologist also examined the student's

writing ability, which reflected that the student exhibited average ability with regard to spelling; however, the student's writing responses were scored within the high average range (Tr. p. 26; Dist. Ex. 2 at p. 3). Likewise, the student's classroom teacher reported, during the April 2011 CSE meeting, that writing was an area of academic strength for the student and characterized the student as an emergent strong writer, who was organized and responsive to teacher support (Parent Ex. A at p. 3). Acknowledging the student's diagnosis of an ADHD, which the district school psychologist opined might account for the student's lower test scores, she added that while the student was able to complete the work, the time required for the student to do so was not considered typical (Tr. pp. 29-30).

Based on the evidence contained in the hearing record, the information that was before the April 2011 CSE did not demonstrate that the student exhibited a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). Nor is there any evidence contained in the hearing record to show that the student exhibited perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, or developmental aphasia (id.). While the evidence described above shows that the student had relative strengths and weaknesses, she was functioning in the average range and did not require special education as a result of a learning disability. Accordingly, a review of the hearing record supports the IHO's conclusion that the student did not meet the criteria to be deemed eligible for special education services as a student with a learning disability (IHO Decision at p. 12).

2. Speech or Language Impairment

To the extent that the parties dispute whether the district should have deemed the student eligible for special education services as a student with a speech or language impairment, the hearing record shows that during the 2006-07 school year, the district classified the student as a student with a speech or language impairment (Parent Ex. O). A student with a disability having a speech or language impairment, pursuant to federal regulations, means "a [student] evaluated . . . as having . . . a speech or language impairment . . . and who, by reason thereof, needs special education and related services" (34 CFR 300.8[a]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [explaining that a student must meet a two-prong test to be considered a student with a disability]). A speech or language impairment, in turn, is defined as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance" (34 CFR 300.8[c][11]; see 8 NYCRR 200.1[zz][11]).

The March 2006 IEP indicated that the student was placed in a fifth grade general education setting and received two 30-minute sessions per week of speech-language therapy in a group of three (Parent Ex. O at pp. 1, 4a).[9] In March 2006, according to the IEP, the student exhibited difficulty following verbal directions involving various concepts, describing the relationships between words, and formulating complete, semantically and grammatically correct sentences using given words and constraints imposed by illustrations (id. at p. 2a). The hearing record indicated that in May 2008, the CSE determined that the student was no longer eligible for speech-

[9] Parent Exhibit O is double sided, but only contains handwritten pagination on the front side of each page of the exhibit. For clarity when referring to the unpaginated sides of the exhibit, I will use a letter designation (e.g. Parent Ex. O at pp. 1, 1a, 2, 2a etc.).

language therapy services and upon "declassification," she received declassification support services (Dist. Exs. 1 at p. 1; 2 at p. 1; Parent Ex. E at p. 3).

The hearing record contains a January 30, 2011 district speech-language evaluation report that was conducted with in a reasonable time prior to the April 2011 CSE meeting (Dist. Ex. 6).[10] Administration of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) to the student yielded expressive and receptive subtest and core language scores in the average to high average range (Dist. Ex. 6 at pp. 2-3). The evaluator reported that informal assessments of the student's language comprehension, conversation, and discourse abilities revealed adequate skills for communication purposes (id. at pp. 1, 3). According to the evaluator, the student also provided an age appropriate narrative about a book she enjoyed (id. at p. 3). The evaluation report indicated that the student's phonemic repertoire was age appropriate, her articulation skills were judged to be adequate in both known and unknown contexts, and all vocal parameters including pitch, quality and intensity were determined to be within normal limits for the student's age and gender (id. at p. 4). The evaluator concluded that as the student "achieved average to above average scores on all subtests administered," and because her "conversational language and narrative skills appeared age appropriate," speech-language services were not warranted at that time (id.). Additionally, a review of both the spring 2010 private neuropsychological evaluation report and the district's October 2010 psychoeducational assessment report do not indicate that the student was exhibiting speech-language deficits (see Dist. Ex. 2; Parent Ex. E).

Accordingly, although the student had exhibited needs related to expressive and receptive language skills in the past, at the time of the April 2011 CSE meeting it appeared that the student's language skills were in the average to high average range, and the evidence does not support the conclusion that the CSE should have determined that the student had a speech or language impairment requiring special education services.

3. Other Health-Impairment

Next, I will consider whether the evidence reflects that the student met the eligibility criteria for special education services as a student with an other health-impairment. 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 CFR 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

[10] The hearing record is unclear whether the April 2011 CSE reviewed the January 2011 district speech-language evaluation report at the time of the meeting.

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

(34 CFR 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

The parties do not dispute that the student has received diagnoses of an ADHD as well as stress-related esophagitis and gastritis, in addition to reported difficulties with anxiety and depression, (Tr. pp. 29, 42-43). However, as set forth in greater detail below, an independent review of the hearing record reveals that at the time of the April 2011 CSE meeting, the student's reported deficits did not result in limited alertness with respect to the educational environment. During the CSE meeting, the student's teacher from MMFS described the student as a "bright and hardworking student," and she added that "in terms of producing volume [the student did] very well" (Parent Ex. A at p. 3). Her teacher further reported that the student had strong writing and math skills, as the student had the "ability to keep track of a great deal of information" (id.). Similarly, the district school psychologist noted that during the October 2010 psychoeducational evaluation, the student answered all of the questions presented by the district school psychologist, and she quickly established a rapport with the school psychologist that was maintained throughout the examination (Dist. Ex. 2 at p. 1). According to the district school psychologist, during the evaluation, the student was "engaging … cooperative … [and] articulate" (Tr. p. 30). Consistent with the district school psychologist's depiction of the student, the private psychologist reported that, during the spring 2010 evaluation, the student was "readily friendly, warm, assertive, and engaged readily in a manner appropriate to age" (Parent Ex. E at p. 4). Although the private psychologist found that the student was "fidgety," the private psychologist did not find the student to be distractible during the evaluation (id.). According to the private psychologist, the student was alert during the evaluation, oriented to all spheres, and the student responded accurately to questions of general and personal information (id.). In addition, the private psychologist reported that the student's mood was positive and "broad," which appeared to be contrary to the student's self-characterization as "anxious" (id.). Lastly, despite reports that the student stopped attending school in the district in spring 2010 due to stress and anxiety, the parent advised the April 2011 CSE that, at that time, the student was getting up on her own for school, which the parent described as a "huge change" (Tr. pp. 114-15; Parent Exs. A at p. 5; E at p. 4).[11] The parent further testified that, prior to the student's admission to MMFS, the student dreaded going to school but that, upon enrollment, the student's spirits changed almost immediately, she could not wait to go to school, and her physical complaints disappeared (Tr. p. 122). Similarly, the student's classroom teacher advised the April 2011 CSE that the student's transition to MMFS went well (Parent Ex. A at p. 5). 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. While I can sympathize with the student in that she appeared to much prefer the environment and advantages she enjoyed at MMFS, it does not render her eligible for special education services.

[11] I acknowledge the parents have contended that the CSE failed to consider the student's history relative to her attendance at the district public school. However, a student cannot be found eligible as a student with a disability solely because he or she has a prior record of impairment; rather, it is the student's current need for special education and related services that are the relevant considerations in determining eligibility for special education (Letter to Brumbaugh, 50 IDELR 107 [OSEP 2008]).

4. Educational Performance — Adverse Affect

Even if I were to find that the student met the initial criteria to be deemed eligible as a student with an other health-impairment or speech or language impairment, I have considered the next portion of the criteria for these two particular classifications: whether the student's purported deficits adversely affected her educational performance (Tr. pp. 29, 42-43, 73). For the reasons set forth below, I find that they did not.

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., 224 F.3d at 66). 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] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; Application of the Dep't of Educ., Appeal No. 11-152; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of the Bd. of Educ., Appeal No. 09-087; 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; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; see also C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; 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]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y 2004]).

Here, the evidence supports the April 2011 CSE's determination that the student was not eligible for special education and related services as a student with a speech or language impairment or an other health-impairment, given the absence of evaluative information before the April 2011 CSE that the student's reported deficits adversely affected her educational performance. As noted above, the October 2010 district psychoeducational evaluation of the student reflected that her cognitive functioning and overall academic skills fell within the average range (Dist. Ex. 2 at pp. 2, 6). Moreover, during the April 2011 CSE meeting, the student's teacher reported that the student had earned an A- in algebra, as well as an A in another class (Parent Ex. A at p. 3). Although the classroom teacher noted that the student's lack of confidence could present an obstacle to the student's academic success, there is no evidence in the hearing record to suggest that the student's ADHD diagnosis adversely affected her educational performance (id.). I note that the during the spring 2010 neuropsychological evaluation, the student reported to the private

psychologist that she had difficulty sustaining attention in work-related tasks unless the activity was "very interesting" (Parent Ex. E at p. 5). Despite lapses in attention during the evaluation, which affected the student's performance, and the student's lack of awareness of her difficulties, the private psychologist found that she was responsive to redirection (id. at p. 8). The student's teacher further advised the April 2011 CSE that while, at times, the student required redirection, her need for teacher assistance resulted from the student socializing with peers (Parent Ex. A at p. 5). Furthermore, with regard to the student's social/emotional functioning, the student's teacher advised the April 2011 CSE that the student socialized with peers at MMFS and had friends (Parent Ex. E at p. 5). Likewise, the district school psychologist noted, during the October 2010 psychoeducational evaluation, that the student was an athlete, who played soccer and enjoyed watching television, social networking online, cooking with others, and spending time with her friends (Dist. Ex. 2 at p. 5).

Based on the foregoing, the hearing record supports a conclusion that the student should not have been classified as having an other health-impairment or speech or language impairment because the evidence does not reflect that the student's purported delays, ADHD diagnosis, depression, anxiety, or any perceived residual weaknesses related to the student's prior classification as a student with a speech or language impairment adversely affected her educational performance (see C.B., 2009 WL 928093, at *2; Mr. N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535, at *2 [2d Cir. Nov. 12, 2008]; 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).

5. Need for Special Education

Even if I had found otherwise that the student met the criteria to be deemed eligible for special education services as a student with either a learning disability, speech or language impairment, or an other health-impairment and that her diagnosis of an ADHD and difficulties with depression and anxiety adversely affected her educational performance, I nevertheless find that the student did not meet the final criterion for eligibility — whether she needs special education and related services with the meaning of the IDEA as a result of her 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., 818 F. Supp. 2d 516, 524 [E.D.N.Y. 2011]; Maus, 688 F. Supp. 2d at 295; A.J., 679 F. Supp. 2d at 306; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 639-40[7th Cir. 2010]). 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 CFR 300.101[c][1]; 8 NYCRR 200.4[c][5]).

In this case, the hearing record suggests that the student could receive educational benefit from the general education setting (Tr. pp. 26, 37-38; see also C.M. v. Dep't. of Educ., 2012 WL 662197, at * 2 [9th Cir. Mar. 1, 2012]). The student's mother stated that she did not disagree with the student's declassification at the beginning of eighth grade, and her testimony suggests that the student's school-based difficulties did not intensify until the student began attending the district's high school during the 2009-10 school year (see Tr. pp. 111-15, 121-22, 133-34, 138-39). Although the district school psychologist conceded that in her personal belief it was possible that the student may have a better experience in a different public high school based on her experience with her school prior to placement in MMFS, in her opinion this alone did not require that the student receive special education services (Tr. pp. 38-39). Furthermore, the district school psychologist also explained that regardless of the student's diagnosis of an ADHD, it would not be sufficient to conclude in this instance that the disorder impeded the student's progress in the

classroom or that the student required some level of service, and that it was consistent with her experience that there were some students with an ADHD capable of being instructed a regular classroom without being eligible for services (Tr. p. 44). The district school psychologist further testified that the April 2011 CSE relied on all of the information before it, in order to make a determination that the student was ineligible to receive special education services, including teacher reports, and the fact that the student had been declassified (Tr. pp. 55-56). Additionally, the hearing record establishes that the private neuropsychologist did not recommend the provision of special education services to the student; rather, she suggested that the student would benefit from school-based support services, such as tutoring, small classes, and extended time on tests (Parent Ex. E at pp. 11-12). Based on the evidence described 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).

VII. Conclusion

In summary, I find that the determination that the student was not eligible for special education programs and services as a student with a learning disability, speech or language impairment, or as a student with an other health-impairment for the 2011-12 school year is supported by the hearing record. Therefore, the necessary inquiry is at an end and it is not necessary to address the appropriateness of the parents' unilateral placement of the student at MMFS or whether equitable considerations should limit or preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 03, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER