The University of the State of New York

The State Education Department
State Review Officer
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No. 14-144

**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:**
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Law Offices of George Zelma, attorney for respondents, George Zelma, 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 respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Winston Preparatory School (Winston Prep) for the 2013-14 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 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

During the 2012-13 school year, the student attended a nonpublic school in a classroom with approximately seven students, one teacher, and two adults (see Dist. Exs. 2 at pp. 2-3; 3 at pp. 1-2; see also Tr. pp. 129-30, 293-94).

On June 3, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (sixth grade) (see Dist. Ex. 1 at pp. 1, 11).[1] Finding that the student remained eligible for special education and related services as a student with a speech or

[1] The student repeated both first grade and third grade (see Dist. Exs. 2 at p. 2).

language impairment, the June 2013 CSE recommended a 12:1+1 special class placement at a community school with related services consisting of one 40-minute session per week of individual counseling, two 40-minute sessions per week of counseling in a small group, two 40-minute sessions per week of individual speech-language therapy, and two 40-minute sessions per week of speech-language therapy in a small group (id. at pp. 1, 8-9, 11-12).[2] In addition, the June 2013 CSE created annual goals and recommended strategies to address the student's management needs (id. at pp. 2-8).

By final notice of recommendation (FNR) dated August 2, 2013 , the district summarized the special education and related services recommended in the June 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 10).

On September 1, 2013 the parents executed an enrollment contract with Winston Prep for the student's attendance during the 2013-14 school year (see Parent Ex. C at pp. 1, 4).

**A. Due Process Complaint Notice**

By due process complaint notice dated December 9, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A at pp. 1, 7-8). More specifically, the parents alleged that the annual goals in the June 2013 IEP were not appropriate and could not be "implemented in its [recommended] program and placement" (id. at pp. 4, 7). The parents also alleged that the June 2013 CSE's "program and placement recommendation" with related services of speech-language therapy and counseling was not appropriate to address the student's "learning, academic, social and emotional needs" (id. at pp. 3-4, 7-8). The parents asserted that the June 2013 CSE's "program and placement recommendation" at a "community school" was neither appropriate nor the student's least restrictive environment (LRE) (id. at pp. 3-4). In addition, the parents asserted that the June 2013 CSE impermissibly "pre-determined" the "program and placement recommendations," the June 2013 CSE failed to provide a "timely program and placement" for the student, and the June 2013 CSE failed to give the parents "sufficient notice to visit the placement site" (id. at pp. 5, 7).

With respect to the unilateral placement, the parents generally alleged that Winston Prep was appropriate because it provided the student with the "educational, social and emotional benefits to meet [the student's] learnings needs for the 2013-14 school year without regression in the student's [LRE]" (Parent Ex. A at pp. 6, 8). In regard to equitable considerations, the parents noted that they fully cooperated with the June 2013 CSE (id. at p. 8). As relief, the parents requested reimbursement or direct funding of the costs of the student's tuition, related services, and transportation at Winston Prep for the 2013-14 school year (id. at p. 9).

**B. Impartial Hearing Officer Decision**

On January 10, 2014 the IHO conducted a prehearing conference, and on March 19, 2014, the parties proceeded to an impartial hearing, which concluded on July 10, 2014 after three days

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

of proceedings (see Tr. pp. 1-371; IHO Ex. I). In a decision dated August 15, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, Winston Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 5-14). As such, the IHO ordered the district to reimburse the parents and to directly pay Winston Prep for the costs of the student's tuition for the 2013-14 school year (id. at p. 14).

Initially, the IHO noted that the sole issue for resolution was whether the 12:1+1 special class placement at a community school with related services was "not reasonably calculated to enable this student to make meaningful educational gains" (id. at p. 6). After reviewing the evaluative information reviewed and considered by the June 2013 CSE, the IHO concluded that given the student's continued "academic and language difficulties in [a] much more intense staffing ratio" during the 2012-13 school year, the June 2013 CSE's recommended 12:1+1 special class placement—which the IHO described as a "large class"—was not supported (id. at pp. 6-8). The IHO also found that the student's awareness of his "very serious deficits" resulted in "depression and withdrawal" (id. at p. 8). Next, the IHO found that the student's "repeated pullouts" for related services would "likely exacerbate his embarrassment and result in increased withdrawal" (id. at pp. 8-9). Based upon the evidence, the IHO determined that the student's "social difficulties" resulted from his "limitations academically and in speech," which if left unaddressed, would increase the student's "social emotional difficulties and withdrawal would increase regardless of the size of the peer group" (id. at p. 9). Consequently, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year.

With regard to the unilateral placement, the IHO concluded that Winston Prep's program was "very integrated" and organized classes to "ensure that all students were at the same functioning levels with the same types of difficulties which would reduce the student's embarrassment" (IHO Decision at p. 9). Based upon the evidence in the hearing record, the IHO concluded that Winston Prep was an appropriate unilateral placement notwithstanding that the student did not receive related services (id. at pp. 9-12). Finally, given that the parents cooperated with the CSE process, informed the district of concerns, and provided timely notice of their intention to unilaterally place the student, the IHO found that equitable considerations weighed in favor of the parents' requested relief (id. at p. 13).

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

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2013-14 school year. Specifically, the district asserts that the IHO erred in finding that the June 2013 CSE's recommended 12:1+1 special class placement at a community school with related services was not appropriate for the student. The district asserts that the IHO also erred in finding that the pull-out related services were not appropriate, and alternatively, that

the parents did not raise any issues with regard to the related services recommendations in the due process complaint notice.[3]

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO decision in its entirety.

## 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 Sch. Dist. 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

[3] The district does not appeal the IHO's findings that Winston Prep was an appropriate unilateral placement or that equitable considerations weighed in favor of the parents' requested relief; accordingly, the IHO's determinations are final and binding on both parties and will not be further addressed in this decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; IHO Decision at pp. 9-13).

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 least restrictive environment (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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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. New York City Bd. 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 and enable 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).

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, 489 F.3d at 111; 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. June 2013 IEP—12:1+1 Special Class Placement

Turning to the parties' dispute regarding the 12:1+1 special class placement at a community school, a review of the evidence in the hearing record does not support the IHO's finding that the district failed to offer the student a FAPE for the 2013-14 school year.

Although the student's present levels of performance and individual needs are not directly in dispute, a discussion thereof provides context for the discussion of the ultimate issue to be resolved—namely, whether the 12:1+1 special class placement with related services at a community school was appropriate. In this case, the evidence in the hearing record reflects that the June 2013 CSE considered a March 2013 psychoeducational evaluation, a May 2013 social history, March/May 2013 progress reports, and input from both the parents and the nonpublic school staff attending the June 2013 CSE meeting in order to develop the June 2013 IEP (see Tr. pp. 29-38, 40-50; Dist. Ex. 1 at p. 14; Parent Ex. J at pp. 1-2).

Consistent with the March 2013 psychoeducational evaluation report, the June 2013 IEP described the student's overall intellectual functioning as within the borderline range; the June 2013 IEP also described the student as exhibiting a "considerable degree of delay in all areas of intellectual functioning" (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at pp. 5-6). More specifically, the June 2013 IEP indicated that an administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) to the student yielded a full-scale IQ of 77 (borderline range), a verbal comprehension index of 77 (borderline range), a perceptual reasoning index of 88 (low average range), and a working memory index of 77 (borderline range) (see Dist. Exs. 1 at p. 1; 2 at p. 5). The June 2013 IEP also indicated that the student's overall performance on an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) fell within the borderline range and was "significantly below" the performance of his same-age peers (Dist. Exs. 1 at p. 1; 2 at pp. 6-7). The June 2013 IEP further described the student's performance as "variable" on the WIAT-III mathematics subtests—ranging from the low average range to the average range—while noting that the student could "add, subtract, multiply and divide single digit numbers, but not double digit numbers" (id.). The June 2013 IEP denoted that with structure and

support, the student demonstrated reading and mathematics skills at a fourth grade level (see Dist. Ex. 1 at p. 1).

As detailed in the June 2013 IEP, the student required clarification of directions, and assistance with identifying the main idea of paragraphs, organizing his thoughts on paper, and applying grammar rules (see Dist. Ex. 1 at p. 1). In addition, the June 2013 IEP characterized the student as "careful and meticulous with his efforts" (id.). Consistent with the March 2013 psychoeducational evaluation report and the March/May2013 progress reports, the June 2013 IEP described the student as cooperative, respectful, and responsive to support from peers and adults, and further noted the parents' concerns regarding the student's language difficulties (compare Dist. Ex. 1 at pp. 1-2, with Dist. 2 at pp. 3-4, and Dist. Ex. 4 at p. 2; see also Parent Ex. J at pp. 1-2). For example, the June 2013 IEP reflected the student's difficulty with expressive language skills and how it interfered with his ability to express his needs (see Dist. Exs. 1 at p. 2; 4 at p. 2). However, the June 2013 IEP also detailed the student's responsiveness to support (see Dist. Exs. 1 at pp. 1-2; 4 at pp. 2).

Based upon the review and consideration of the evaluative information, the June 2013 CSE recommended a 12:1+1 special class placement with related services at a community school for the 2013-14 school year. Additionally, the June 2013 CSE recommended the following strategies to address the student's management needs: visual prompts and schedules, structured presentation of tasks, instruction presented in "segmented chunks," concise directions with accompanying visual supports, and "skeleton notes" to address the student's slower processing speed (see Dist. Exs. 1 at p. 2). The June 2013 CSE also created approximately 13 annual goals to address the student's needs in reading, writing, mathematics, expressive and receptive language, organization, and counseling (id. at pp. 3-8).

State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In reaching the decision to recommend a 12:1+1 special class placement at a community school, the June 2013 IEP initially noted that the effect of the student's "[l]anguage and academic delays preclude[d] placement in a general education setting at this time" (Dist. Ex. 1 at p. 2). Furthermore, the June 2013 CSE considered but rejected integrated co-teaching services (ICT) because it would not provide the student with "sufficient academic support;" the June 2013 CSE also considered but rejected a 12:1+1 special class placement at a specialized school as "overly restrictive"—and the evidence in the hearing record reveals that neither the parents nor the nonpublic school staff attending the CSE meeting "wanted" the student at a specialized school (id. at p. 12; see Tr. pp. 96-97, 107-09). At the impartial hearing, the district school psychologist testimony confirmed that the June 2013 CSE discussed other program options with the parents (see Tr. pp. 58-60, 96-97, 107-09).

In addition, the district school psychologist testified that the June 2013 CSE recommended a 12:1+1 special class placement because—given the student's "challenges in a variety of academic areas"—the CSE "wanted to provide enough special education support, [and] enough adult attention throughout the day," and therefore, recommended a "full time, small, special class for that purpose" (Tr. pp. 50-51). He further testified that the student's annual goals "could be properly addressed" in such a setting (id.). Next, the district school psychologist explained that the June

2013 CSE recommended a 12:1+1 special class placement because the CSE wanted a "paraprofessional in the class" to assist the student in "accessing [] the lesson being taught, [and] the activities in the classroom" (id.). In addition, the district school psychologist also testified that a paraprofessional could provide the student with some of the strategies listed within the student's management needs section of the June 2013 IEP (see Tr. pp. 50-51, 53). However, the June 2013 CSE did not want the student placed with "too few children" because the student did not present with "significant interfering behaviors" (Tr. p. 51).

According to the district school psychologist, the 12:1+1 special class placement would provide the student with a "supervised and coached and semi structured social situation" where he could "experiment socially and conversationally, [and] interpersonally" (Tr. pp. 52-53). When asked why the June 2013 CSE did not think that the student required more "attention" or "support" than the recommended 12:1+1 special class placement, the district school psychologist testified that the June 2013 CSE wanted to offer the student a balanced program that would provide both structure and opportunities for "group academics and also group socializing" (Tr. pp. 52-54). The district school psychologist also testified that with the further support of the recommended "pull out related services," the June 2013 IEP provided the student with sufficient support and "fortif[ied]" the recommended 12:1+1 special class placement (Tr. p. 54).[4]

Based upon the foregoing, the evidence in the hearing record demonstrates that in light of the student's academic and social/emotional needs, the June 2013 CSE's decision to recommend a 12:1+1 special class placement at a community school—together with the related services and management needs—was reasonably calculated to enable the student to receive educational benefits in the LRE for the 2013-14 school year. Therefore, the IHO's finding must be reversed.

## VII. Conclusion

In summary, an independent review of the evidence in the hearing record demonstrates that contrary to the IHO's finding, the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year.

[4] Addressing the IHO's sua sponte determination that the "repeated pullouts" for related services would "likely exacerbate his embarrassment and result in increased withdrawal," the hearing record lacks evidence to support this finding (IHO Decision at pp. 8-9). Initially, as argued by the district, the parents did not raise this as an issue for resolution in the due process complaint notice, and therefore, the IHO exceeded his jurisdiction by addressing the issue (compare IHO Decision at pp. 8-9, with Parent Ex. A at pp. 1-8). Regardless, the district school psychologist testified that the nonpublic school staff members attending the June 2013 CSE meeting agreed with the related services recommendations in the IEP (see Tr. p. 60). According to the June 2013 IEP, the student would receive his group counseling and all of his speech-language therapy sessions as pull-out services (i.e., "[s]eparate [l]ocation [o]utside of the classroom), but would receive his individual counseling sessions as a push-in service (i.e., "[s]pecial [e]ducation [c]lassroom") (see Dist. Ex. 1 at pp. 8-9). Moreover, the district school psychologist testified that the June 2013 CSE recommended individual counseling sessions to address the student's "sadness, [and] lowered self-esteem" and the group counseling sessions to provide the student with an "opportunity for structured, monitored, interpersonal skills building;" with respect to the recommended speech-language therapy, he testified that the June 2013 CSE recommended individual sessions to provide the student with "intensive instruction" to address his "specific delays in receptive and expressive language" and "reading" (Tr. pp. 54-56).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated August 15, 2014, is hereby modified by reversing that portion which found that the district failed to offer the student a FAPE in the LRE for the 2013-14 school year; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated August 15, 2014, is hereby modified by reversing that portion which directed the district to reimburse the parents and to directly pay Winston Prep for the costs of the student's tuition for the 2013-14 school year.

**Dated:** **Albany, New York**
**October 23, 2014**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**