



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-001

### **Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Arlington Central School District**

#### **Appearances:**

Law Offices of Neal H. Rosenberg, Esq., attorneys for petitioners, Lakshmi Singh Mergeche, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, 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 denied their request to be reimbursed for their daughter's tuition costs at the Forman School (Forman) for the 2013-14 and 2014-15 school years. 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 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 has a history of an attention deficit hyperactivity disorder (ADHD), bilateral hearing loss, and Ehlers-Danlos syndrome,<sup>1</sup> and at the time of the impartial hearing had received diagnoses including a disorder of written expression, a phonological disorder, a dysthymic disorder, and an anxiety disorder not otherwise specified (NOS) (Dist. Exs. 19 at p. 3, 11; 22 at p.

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<sup>1</sup> The hearing record reflects that Ehlers-Danlos syndrome is a connective tissue disorder (Tr. pp. 29, 221; Dist. Exs. 19 at p. 4; 22 at p. 4).

15; Parent Ex. I at 7; see Tr. p. 1226).<sup>2</sup> The district developed accommodations plans for the student pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for the 2009-10, 2010-11, and 2011-12 school years, during which time the student attended a district public school (Dist. Exs. 3; 4; 5; 19 at pp. 2-3). The parents referred the student to the CSE in June 2012; the CSE determined the student was eligible for special education programs and related services as a student with an other health-impairment and developed an IEP for the 2012-13 school year recommending daily resource room services along with program modifications and accommodations to address the student's management needs (Dist. Ex. 6 at pp. 1, 9-10; see Dist. Ex. 24).

On April 15, 2013, the CSE convened for an annual review and to develop the student's IEP for the 2013-14 school year (Dist. Ex. 7 at p. 1). Finding the student eligible for special education and related services as a student with an other health-impairment, the CSE recommended daily 45-minute resource room services in a home public school district with modifications and accommodations to address the student's management needs (id. at pp. 10-11).<sup>3</sup> The CSE also recommended nine annual goals in the areas of study skills, mathematics, and career/vocational needs (id. at pp. 9-10). In a prior written notice dated April 15, 2013, the district summarized the student's performance in her special education program during the 2012-13 school year and provided explanation for the resource room services recommendation (Dist. Ex. 33 at p. 1).

In May 2013, the parents obtained a private psychological evaluation of the student (Dist. Ex. 22). The evaluator reviewed prior evaluations, conducted standardized testing, offered a number of diagnoses including ADHD, and made program recommendations (id. at pp. 1-19). On August 30, 2013, the CSE reconvened for a requested review after it received the May 2013 private psychological evaluation (Dist. Ex. 8 at p. 2; Tr. pp. 250-251). The CSE recommended a general education program with integrated co-teaching (ICT) services in global studies and English, along with a daily 45-minute resource room program and bimonthly individual counseling (Dist. Ex. 8 at pp. 1, 14). The CSE also recommended modifications and accommodations to address the student's management needs and 10 annual goals in the areas of study skills, mathematics and career/vocational needs (id. at pp. 13-14). In a prior written notice dated August 30, 2013, the district summarized the private psychological report and the CSE's program recommendation (Dist. Ex. 37 at pp. 1-2).

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<sup>2</sup> Although a number of the district's exhibits are paginated with Bates numbers, some of the exhibits are not and citations in this decision are to the number of pages in each exhibit. Although district exhibit 19 was identified as consisting of 11 pages, no page 9 was submitted to the Office of State Review as part of the exhibit. However, the Bates numbers run consecutively throughout the exhibit, indicating that page 9 was either omitted from submission at the hearing or from the original draft. In either case, no party has requested to submit this page as additional evidence. Citation to this exhibit is to the pages as numbered.

<sup>3</sup> The student's eligibility for special education services and classification as a student with an other health-impairment during all school years at issue is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In a letter dated September 10, 2013, the parents advised the district that they had placed their daughter in Forman (Dist. Ex. 38 at p. 1). By letter dated September 14, 2013, the parents rejected the August 2013 IEP and sought tuition reimbursement for Forman (Dist. Ex. 39 at p. 1).

In July 2014, the same private evaluator who conducted the May 2013 private psychological evaluation conducted an updated psychological evaluation (Parent Ex. I). The evaluator conducted updated standardized testing, offered additional diagnoses including anxiety and dysthymic disorders, and offered recommendations (*id.* at pp. 1-8). On August 6, 2014, the CSE convened for a requested review after the district received updated grades and progress reports from Forman and the July 2014 updated private psychological report (Dist. Ex. 64 at p. 1).<sup>4</sup> The CSE developed an IEP for the 2014-15 school year recommending a general education program with ICT services in global studies and English, daily resource room services, and counseling (*id.* at p. 13). The CSE also recommended nine annual goals, a coordinated set of transition activities and testing accommodations (*id.* at pp. 12-17).

In a prior written notice dated August 6, 2014, the district summarized the evaluative information and the program recommendation and stated that that the student should continue to receive special education services (Dist. Ex. 66 at pp. 1-2).

By letter dated August 18, 2014, the parents advised the district that they had objections to the recommended program and had not received a finalized IEP for the 2014-15 school year (Parent Ex. F at p. 1). The parents further advised that they intended to enroll the student at Forman and seek tuition reimbursement (*id.* at p. 2).

The student attended Forman for the 2013-14 and 2014-15 school years (*see* Parent Ex. L).

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

By due process complaint notice dated January 30, 2015, the parents requested an impartial hearing, alleging that the district denied their daughter a free appropriate public education (FAPE) for the 2013-2014 school year. The parents claimed the August 2013 IEP was both procedurally defective and substantively inadequate (Dist. Ex. 1 at p. 5). The parents specifically asserted the August 2013 IEP did not reflect the available evaluative information or adequately identify the student's needs, contained inadequate goals, and set forth an inappropriate educational placement that would not provide the student with sufficient support (*id.* at pp. 5-6).<sup>5</sup> With respect to IEP implementation, the parents claimed that the district: did not provide information regarding the qualifications of the resource room teacher; could not implement the IEP due to the unavailability of a certain class the student required; assigned the student to a school site that was too large of an

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<sup>4</sup> By prior written notice dated June 11, 2014, the district indicated that the parents cancelled the scheduled annual review, summarized the parents' report on the student's 2013-14 school year at Forman, and indicated that it still awaited parental consent to obtain the Forman records in order to convene a CSE meeting (Dist. Ex. 65 at pp. 1-2).

<sup>5</sup> The parents raised similar and additional claims relating to the April 2013 IEP (Dist. Ex. 1 at pp. 3-4). Because the CSE modified the recommended program prior to the beginning of the 2013-14 school year, the August 2013 IEP is the relevant IEP for purposes of determining whether the district offered the student an appropriate program.

environment; and would assign the student to a class with an inappropriate functional grouping (*id.* at pp. 6-7). The parents alleged that Forman was an appropriate placement and equitable considerations favored reimbursement (*id.* at pp. 8-9).

By due process complaint notice dated April 29, 2015, the parents sought tuition reimbursement for the Forman School, alleging that the district denied the student a FAPE for the 2014-15 school year (IHO Ex. II at p. 1).<sup>6</sup> The parents asserted that the August 2014 IEP was procedurally inappropriate and the CSE failed to consider a certain private evaluator's recommendations, denied the parents meaningful participation, and predetermined the program recommendation (*id.* at p. 6). The parents asserted that the IEP did not reflect the available evaluative information, identify the student's needs, contain goals that met the student's needs, or contain an appropriate educational placement recommendation (*id.* at pp. 5-6). The parents also asserted that the August 2014 IEP did not set forth an appropriate methodology for implementation of the annual goals and the goals could not be implemented in a larger school setting (*id.*). The parents contended that Forman was an appropriate placement and equitable considerations favored reimbursement (*id.* at p. 7).

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

The parties convened for an impartial hearing which commenced on April 10, 2015 and concluded on September 24, 2015, after nine days of proceedings (Tr. pp. 1-1677). By decision dated November 24, 2015, the IHO determined that the district offered the student a FAPE for the 2013-14 and 2014-15 school years and denied the parents' request for relief (IHO Decision at pp. 18-26). Initially, the IHO determined that the private evaluator's recommendation for a residential school placement was entitled to little weight and his testimony explaining that recommendation was entitled to little credibility (*id.* at pp. 13-14). The IHO noted that the private school recommendation set forth in the evaluator's final May 2013 evaluation report was not contained in previous drafts of the report and the evaluator testified that the family had an interest in placing the student in a boarding school (*id.*). The IHO next found that the August 2013 CSE relied on consistent evaluative information, that the August 2013 IEP offered an appropriate program that was reasonably calculated to provide the student with educational benefits based in part on her success in a similar program during the 2012-13 school year, and that no procedural defects in the development of the IEP rose to the level of a denial of a FAPE (*id.* at pp. 18-20). With regard to the August 2014 IEP, the IHO found that the August 2014 CSE reviewed a privately-obtained updated psychological evaluation report, the IEP afforded the student an opportunity to make meaningful educational progress and receive educational benefit, and that no procedural deficits in the development of the August 2014 IEP rose to the level of a denial of a FAPE (*id.* at pp. 22-25). Having found that the district offered the student a FAPE for the 2013-14 and 2014-15 school years, the IHO did not reach the issues of the appropriateness of the unilateral placement or the equitable considerations (*id.* at pp. 20, 25-26).

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<sup>6</sup> By order of consolidation dated May 17, 2015, the IHO consolidated the hearings concerning the January 30, 2015 and April 29, 2015 due process complaint notices (IHO Ex. VI at p. 4).

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

The parents appeal, asserting the IHO erred in determining that the district offered the student a FAPE for the 2013-14 and 2014-15 school years and in failing to address the appropriateness of the unilateral placement and equitable considerations.<sup>7</sup> The parents assert that the IHO demonstrated bias by not crediting the testimony of the private evaluator and by being condescending to him, and by disregarding the testimony of a private therapist who treated the student at Forman. The parents argue that the IEPs for both school years were procedurally and substantively inappropriate. The parents do not set forth in their petition in what respect the August 2013 and August 2014 IEPs were deficient, other than the assertions that the recommended programs did not offer the student sufficient support and were not consistent with the recommendations made by the private evaluator. The parents also contend that the unilateral placement was appropriate and equitable considerations favor reimbursement.

The district answers the parents' petition, admitting and denying the parents' assertions and generally requesting that the IHO's decision be upheld and the petition dismissed. The district argues that the IHO was not biased and asserts the private evaluator's testimony was entitled to little weight, and that the IHO's credibility determination is well-supported by the record and entitled to substantial weight. The district further argues that the record establishes that the educational program recommendations for both school years were appropriate. The district also contends that the unilateral placement was inappropriate and that equitable considerations do not favor the parents' request for reimbursement.

#### **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

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<sup>7</sup> The parents make a number of arguments in their memorandum of law which are not raised in their petition. It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to clearly set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.4[a]; 279.8[a][3], [b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer . . . , except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; see 8 NYCRR 279.8). Thus, any argument included solely within the memorandum of law has not been properly asserted. Specifically, the parents' arguments relating to predetermination of the student's program, the adequacy of the present levels of performance, the sufficiency of the annual goals, the district's ability to implement the student's IEPs, and the environment at the district public school were not referenced in any fashion in their petition for review and will not be considered.

(Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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]). 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).

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]). 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).

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]).

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. Preliminary Matters—IHO Conduct/Bias**

The parents argue on appeal that the IHO demonstrated bias in his determination of the private evaluator's credibility and the manner in which he interacted with the private evaluator. The parents allege that the IHO was condescending to the private evaluator and predetermined his credibility finding. The parents further claim that the IHO discredited the private evaluator's testimony in an effort to credit the testimony of the district's witnesses and did not consider all of the testimonial and documentary evidence. The parents contend that the IHO also disregarded the testimony of a private therapist who provided the student services at the private school.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064).



To the extent the parents argue that the IHO did not treat the private evaluator with the due respect and courtesy expected during an administrative hearing, a review of his testimony reveals that the IHO acted professionally in his dealings with the witness and allowed counsel full and fair inquiry of the witness (see generally Tr. pp. 1000-1163). Although the IHO may have interjected questions during counsel's examination of the witness, the IHO is permitted to inquire of the witness for the purposes of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]; see Tr. pp. 1010-1011, 1012-1014, 1021-1024, 1065-1067). Additionally, counsel for the parents made no objection with respect to the IHO's conduct or tone toward the witness. With respect to the parents' claim that the private evaluator was treated differently from district witnesses, the record reveals the IHO also interjected questions during the testimony of district witnesses and even admonished a district witness for editorializing, which falls under his discretion to manage and maintain control of the hearing (Tr. pp. 42, 71, 146, 259, 301, 322, 1255, 1260). In sum, there is no evidence in the record that the IHO acted with bias or treated any witness differently at the hearing.

Turning to the parents' argument that the IHO demonstrated bias in his credibility determinations, the IHO was present during the examination of the witness and was in the best position to make a credibility determination (see Scott v. New York City Dep't of Educ. 6 F. Supp. 3d 424, 444 [S.D.N.Y. Mar. 25, 2014]). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

In this case, the IHO determined that the private evaluator lacked credibility with respect to his recommendation for a boarding school program (IHO Decision at pp. 13-14; see Dist. Ex. 22 at p. 16). In making this determination, the IHO indicated that the private evaluator's explanation for the boarding school recommendation was not credible in light of evidence that the parents sought information regarding a private school admissions test and letters of recommendation from district staff, two draft reports that did not include a boarding school recommendation, and the witness's testimony that the parents had interest in a boarding school (Tr. pp. 418-20, 1082-83; Dist. Exs. 60; 61). The IHO's determination here was not based solely on his observations of the demeanor of the witness but also the witness's testimony in light of other evidence in the record. To the extent that the IHO was not convinced after hearing the private evaluator's testimony that his recommendation for a boarding school was based on professional judgment rather than the parents' desire for such a recommendation, the IHO's credibility determination is entitled to deference. To the extent that the parents disagreed with the conclusions reached by the IHO—or with the weight afforded to evidence presented at the impartial hearing—such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see, e.g., Application of a Student with a Disability, Appeal No. 15-101; Application of a Student with a Disability, Appeal No. 15-033; Application of a Student with a Disability, Appeal No. 13-083).

Moreover, the IHO did not demonstrate bias by declining to discuss in his decision the testimony of a private therapist who provided services to the student at Forman. As the IHO did not reach an analysis of the appropriateness of Forman, a discussion of this witness's testimony would not be necessary for the IHO to reach his conclusions. The private therapist testified

regarding the student's transition to Forman, the treatment provided to the student, the student's feeling on her interaction with other students at Forman, her therapeutic progress during the two school years at issue, and the appropriateness of Forman (Tr. pp. 1536-38, 1541, 1546-49, 1570). However, the private therapist did not start treating the student until fall 2013, after the student had left the public school, and had no knowledge of the student's presentation at the public school aside from information from reports and from the student's mother (Tr. pp. 1536, 1570). The parents argue that the private therapist substantiated the clinical components of the student's profile which were central to their rejection of the IEPs without explaining what the clinical components were or how the private therapist's testimony impacted the analysis of the appropriateness of the August 2013 or August 2014 IEPs. Considering the above, the mere fact that the IHO did not discuss this witness' testimony in his decision is no evidence of bias.

Overall, an independent review of the hearing record demonstrates that the parents had the opportunity to present their case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Thus, the parents' assertions of IHO bias are dismissed.

## **B. Program Recommendation**

The parents allege that the IHO improperly determined that the student was provided with a FAPE for the 2013-14 and 2014-15 school years and that the IEPs were substantively and procedurally inappropriate, inadequate and were not reasonably calculated to offer the student an opportunity to make academic, social and emotional progress. Generally, the parents contend that the IEPs failed to provide sufficient support to meet the student's needs and did not comport with the recommendations of the private evaluator. As set forth below, the program recommendations in both the August 2013 and August 2014 IEP addressed the student's needs and were reasonably calculated to provide the student with educational benefits.

State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). State regulation defines resource room program as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

### **1. August 2013 IEP—Integrated Co-Teaching Services, Resource Room Program, and Related Services**

In this instance, although the student's needs are not directly in dispute, a brief discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the placement recommended by the August 2013 CSE was appropriate and reasonably calculated

to provide the student with educational benefits for the 2013-14 school year. The August 2013 CSE considered then-current evaluations and reports including: a July 2012 psychological evaluation and a May 2013 private psychological evaluation obtained by the parents, as well as the student's report cards and attendance records from the 2012-13 school year (see Dist. Exs. 8 at pp. 4-8; 13; 16-19; 22; 48 at pp. 13-14; 51; 67). The August 2013 IEP reflected the student's educational needs, consistent with the information available to the CSE.

Both the July 2012 psychological evaluation and the May 2013 private psychological evaluation noted that the student met the criteria for the following diagnoses: ADHD: combined type, Ehlers-Danlos syndrome, and bilateral hearing loss (compare Dist. Ex. 19 at p. 11, with Dist. Ex. 22 at p. 15). Additionally, the May 2013 evaluation indicated that the student was diagnosed with a disorder of written expression as well as a phonological disorder (Dist. Ex. 22 at p. 15).

With respect to cognitive functioning, administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in July 2012 and May 2013 yielded a full scale IQ of 109 and 102, respectively; both of which fell in the average range of general cognitive ability (compare Dist. Ex. 19 at p. 5, with Dist. Ex. 22 at pp. 4-5). According to both evaluation reports, the student performed in the average range on WISC-IV indices of perceptual reasoning and working memory (Dist. Exs. 19 at p. 5; 22 at pp. 4-5). While the June 2012 evaluation indicated that the student performed in the high average range in verbal comprehension, and superior range in processing speed, the May 2013 evaluation indicated that the student performed in the average range in verbal comprehension and high average range in processing speed (id.). The July 2012 evaluation indicated that the student's overall cognitive ability could not be easily summarized because the student's "verbal reasoning abilities [were] much better developed than her nonverbal reasoning abilities" while the May 2013 evaluation indicated that the student's performance within any given task, whether verbal or visual, was "highly variable (Dist. Exs. 19 at p. 11; 22 at pp. 4-5).

With respect to academic functioning, administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to the student in July 2012 yielded an overall composite score in the average range (Dist. Ex. 19 at p. 10). However, the July 2012 psychological evaluation stated that, compared to the student's predicted ability, her performance on the WIAT-III indicated significant relative weaknesses in the areas of math fluency and basic reading (id.). A subsequent administration of the WIAT-III by the student's private psychologist in May 2013 yielded the following selected subtest standard scores: word reading 100, pseudo decoding 95, and numerical operations 92; math problem solving 83 and spelling 83 (Dist. Ex. 22 at p. 11). According to the private psychological evaluation, the May 2013 administration of the WIAT-III revealed a relative discrepancy between the student's ability and achievement in both math and spelling (id.). The private psychological evaluation indicated that there was significant variability in the student's math performance (id.). It noted that on the numerical operation subtest, in two instances the student miscalculated based on insufficient attention to the operational sign and another occasion she made a simple mistake in addition, most likely due to insufficient attention (id.). The private psychological evaluation further stated that the student made other errors that were more reflective of gaps in her base of knowledge, for example failing to attempt a long division problem and lacking the procedural knowledge to perform calculations involving fractions (id.). The private psychological evaluation also highlighted gaps in the student's general math problem solving, noting her failure to recall placement values, inability to calculate and average

and difficulty translating a word problem into mathematical procedures (id.). The private psychological evaluation attributed the latter to executive dysfunction (id. at p. 12).

The May 2013 psychological evaluation contained additional information regarding the student's academic functioning. According to the May 2013 private psychological evaluation, the student's reading remained commensurate with her cognitive ability; however, the evaluation noted some weaknesses in the student's phonetic analysis and processing, both in her decoding and spelling (Dist. Ex. 22 at pp. 11-12). According to the private psychological evaluation, as measured by the Gray Oral Reading Test-5 (GORT-5) the student performed in the average range with respect to rate, accuracy, and fluency when reading narrative text, (id. at p. 12). The private psychological evaluation stated that the student showed a relative weakness in her ability to comprehend what she read and the report showed that with respect to comprehension and her overall oral reading quotient, the student performed below average on the GORT-5 (id.). Lastly, based on the administration of the Test of Written Language-Third Edition (TOWL-3) the private psychological evaluation reported that the student's writing mechanics, specifically her use of punctuation, were relatively weak (id.). However, with respect to the contextual language and story construction subtests of the TOWL-3, the student performed in the high average range (id. at p. 13).

With respect to executive function, the district psychological evaluation completed in July 2012 reported that the student's ability to sustain attention, concentrate, and exert mental control were relative weaknesses compared to her ability to process visual material quickly (Dist. Ex. 19 at p. 11). However, the results of targeted assessments administered in May 2013 as part of the private psychological evaluation showed that the student was performing in the "high average range on tasks that demand[ed] focused attention, a capacity to inhibit automatic or previously learned responses, cognitive flexibility and strategic thinking" (Dist. Ex. 22 at p. 6).<sup>8</sup> The private psychological evaluation reported some mild variability in the student's performance, notably that she did not always identify the most effective strategy for solving a problem (id. at pp. 6, 8). The private psychological evaluation explained that despite the benefits of medication on the student's ability to attend and inhibit extraneous impulses, the student continued to demonstrate significant limitations in her capacity to apply her skills as needed (id. at p. 7). According to the private evaluation, the student's English teacher reported that the student had difficulty initiating and staying on task, planning and organizing her work and monitoring her performance (id.; see Dist. Ex. 23). The private psychological evaluation concluded that although qualitative measure of the student's attentional and inhibitory capacities reflected significant improvement, they did not alter the fact that the student continued to have difficulty applying the skills in a school setting "in a manner that would allow her to be as productive as she is capable" (Dist. Ex. 22 at p. 8). The private evaluation noted that there was a significant impairment in the student's planning abilities (id.).

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<sup>8</sup> The school psychologist's finding was based on her administration of the WISC-IV, while the private psychologist's findings were based on his administration of the Cognitive Assessment System, Wisconsin Card Sorting Test, Behavior Rating Inventory of Executive Function (BRIEF), and Delis-Kaplan Executive Function System (D-KEFS) (Dist. Ex. 22 at pp. 1, 6-8).

With respect to memory functioning, the May 2013 psychoeducational evaluation report indicated that the student demonstrated significant variability in memory and learning, primarily evident within the verbal realm (Dist. Ex. 22 at p. 9).

With respect to language functioning, the private psychological evaluation reported that the student showed some "vulnerabilities" consistent with a student who experienced reading and spelling difficulties (Dist. Ex. 22 at p. 10). According to the private psychological evaluation, although the student was in the eighth grade at the time of testing, on the Lindamood Auditory Conceptualization Test, she performed at a level consistent with a student in the fifth grade (*id.*). The student exhibited two to three errors when segmenting nonsense words into their discrete phonemes, and rearranging them as needed, especially when constructing nonsense words (*id.*). The psychological evaluation noted however, that "these difficulties with the phonological and morphological structure of words" were not evident on a different measure of phonological processing (*id.*).

With respect to social/emotional functioning and behavior, the July 2012 psychological evaluation indicated that based on then-current teacher reports, student interview, and a social history, the student's "social, behavioral and emotional functioning [was] adequate" (Dist. Ex. 19 at p. 11). With respect to personality functioning, the May 2013 private psychological evaluation noted that the student's "emotional profile evidence[d] many of the features of a child with an executive impairment," she struggled with tasks that were "ambiguous in nature," and responded to her environment in a routinized fashion (Dist. Ex. 22 at p. 13). The evaluator remarked that the student "maintain[ed] a strong identification with her mother, and the caretaking functions she represents"; and that the student's "anxiety lies in her fear that her wish for security and stability, her comfort with 'staying home,' may become too limiting and potentially depressing" (*id.* at p. 14). Further, while the evaluator remarked that the student was "experiencing a significant amount of anxiety," he also noted that the student "sees herself as more capable of applying her skills and abilities in a manner that will lead to her greater accomplishment and success, rather than fall prey to her anxiety and defeatism" (*id.*). Additionally, the evaluator opined that the student's ability to overcome her anxiety was "likely a consequence of her on-going psychotherapy and her improved executive functioning associated with the psychopharmacological interventions" (*id.*).

The present levels of performance of the August 2013 IEP provided additional information regarding the student's needs. With respect to academics, the IEP indicated that the student found school work boring and often rushed to get assignments done, resulting in poor grades and incomplete understanding of the material (Dist. Ex. 8 at p. 9). The IEP further noted that the student exhibited "gaps in learning" as a result of "excessive" absences at the beginning of the school year and despite efforts to make up missed work, missing teacher-directed instruction had been detrimental to the student (*id.*). The IEP chronicled the student's difficulty initiating and completing schoolwork and her reluctance to implement strategies that had been presented to her (*id.*).

According to the student's report card for the 2012-13 school year, she received course grades in the 70s and 80s, with the exception of algebra for which she received a grade of 67 (Dist. Ex. 50). The report also showed that the student was absent for 26 days during the 2012-13 school year (Dist. Ex. 50; *see* Dist. Ex. 51).

As indicated above, the disputed issue to be resolved is whether the educational placement recommended by the August 2013 CSE was appropriate and reasonably calculated to provide the student with educational benefits for the 2013-14 school year. As discussed above, the student's overall performance on both the WIAT-III and WISC-IV were in the average range as reported in both the July 2012 and May 2013 psychological evaluations (Dist. Exs. 19 at p. 11; 22 at pp. 4-5, 11-12). The August 2013 IEP reflected the student's needs as identified in the testing, including weak performances relative to full-scale IQ scores in block design and matrix reasoning on the WISC-IV; math fluency, word reading, math problem solving, spelling, and basic reading on the WIAT-III; initiation, planning, and organization on the D-KEFS; reading comprehension on the GORT-5; contextual conventions on the TOWL-3; and "learning" on the CMS (Dist. Exs. 8 at pp. 8-11; 19 at pp. 8-11; 22 at pp. 5, 8-9, 11). Additionally, the August 2013 IEP noted that the student learned best when studying with others, when materials were presented visually and when assignments were broken down (Dist. Ex. 8 at p. 10). The IEP also noted that the student's ADHD affected her ability to focus in class and attend to new learning and that she struggled to complete assignments and turn them in in a timely manner (*id.* at pp. 10-11). Moreover, the IEP indicated that the student required support to consistently employ strategies and access assistance (*id.* at p. 11). According to the August 2013 IEP, the parents "report[ed] concern with [the student's] executive function, the impact of her ADHD on learning, and her ability to use strategies to study, remain organized, and learn new facts"; and the student needed to "learn how to learn" (*id.* at p. 10). Additionally, with respect to social skills needs, the parents reported "concern with social skills, and anxiety. They feel that [the student] exhibit[ed] signs of depression" (*id.*). With respect to physical development, the IEP indicated the student required medication to address her attention issues, preferential seating to address her bilateral hearing loss and attention, and restrictions on the activities the student could participate in due to her connective tissue disorder (*id.* at p. 11).

In order to address the student's needs, the August 2013 CSE recommended one 45-minute period per day in a resource room program in a group of five; one 45-minute period per day of ICT services in global studies; one 45-minute period per day of ICT services in English; two 45-minute individual counseling sessions per month; and accommodations, as needed, including checking for understanding, special seating arrangements, refocusing and redirection (Dist. Ex. 8 at pp. 14-15). Additionally, the August 2013 CSE recommended measurable post-secondary goals, ten annual goals to address study skills, mathematics, organization, social/ emotional, and career/vocational needs, a coordinated set of transition activities, and testing accommodations (*id.* at pp. 12-13, 15-16). Specifically, the hearing record shows that the student demonstrated weaknesses with respect to initiation, working memory, planning/organization, and organization of materials (Dist. Ex. 22 at p. 7). To address these needs, the August 2013 CSE recommended a daily resource room program with five students and one special education teacher which was "meant to address the goals that are outlined on the IEP" and to assist the student in developing study skills, test

strategies, and strategies "to become more successful in academic areas" (Tr. pp. 47-48).<sup>9</sup> Further, to address these needs, the August 2013 CSE recommended five study skills goals which included use of a planner, self-checking school work, seeking out appropriate assistance, using flash cards and visual aids, and constructing study guides, and three math goals targeting the student's use of graphic organizers or check lists, identification of operation necessary to solve word problems, as well as semantic maps and graphic organizers to categorize information in word problems (Dist. Ex. 8 at p. 13). Additionally, to address the student's needs in English and social studies, the August 2013 CSE recommended daily ICT services in English and global studies (*id.* at p. 14). According to the district director of special education, who served as co-chairperson for the August 2013 IEP meeting, the student was in English and global studies classes with students receiving ICT services in the 2012-13 school year when she was not herself receiving ICT services, and the student benefitted from the "ingredients of that program," including the support of regular and special education teachers and additional support provided to the student regarding class notes and contact with the parents (Tr. pp. 82-85). Additionally, the director testified that the CSE recommended the ICT services as a "better way to keep tabs on [the student] in terms of her initiative or ability to get course work done to have a teacher there to guide her through that. It was primarily around the ADHD issues" (Tr. p. 123). The district's supervisor of special education, who served as co-chairperson at the August 2013 IEP meeting, testified that the parents expressed concern regarding the student's anxiety, prompting the August 2013 CSE to recommend counseling services and to add a counseling goal to the student's IEP (Tr. pp. 157-58). Likewise, the district psychologist who attended the August 2013 IEP meeting testified that although no school staff members reported that the student was experiencing anxiety, the August 2013 CSE made the recommendation for counseling after reviewing the May 2013 private evaluation report and with the parents "endorsing" what the evaluator had "mentioned" regarding the student's anxiety (Tr. pp. 253-55). The student's resource room teacher for the 2012-13 school year testified that she did not observe any evidence of anxiety in the student, nor did any other district staff members report that they had concerns about the student being anxious (Tr. p. 316). The district psychologist opined that the CSE's recommendations were "more than appropriate" for the student as they included "a heavily supported special ed[ucation] program for a minimally disabled student" (Tr. pp. 261-62). Further, the director and resource room teacher testified that the student

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<sup>9</sup> To the extent the parents assert that the student's resource room teacher for the 2012-13 school year was not qualified to provide content area instruction to the student, federal regulations require that special education teachers providing instruction other than in core academic subjects be State certified or licensed, but do not require content area competency (34 CFR 300.18; see 34 CFR 200.55[b][2]; [c]; 200.56; see also "New No Child Left Behind Flexibility: Highly Qualified Teachers," United States Dep't of Educ. Fact Sheet [Mar. 2004], available at <http://www2.ed.gov/nclb/methods/teachers/hqtflexibility.pdf>; "Updated Fact Sheet with Highlights of the NCLB's and IDEA's Requirements for Teachers and Title I Paraprofessionals in New York State," Field Memo #03-2008, Office of Accountability [June 13, 2008], available at <http://www.p12.nysed.gov/accountability/documents/03-2008.html>). State regulations similarly require that special education instruction be provided by "appropriately certified or licensed" personnel, and the parents do not assert that the resource room teacher for subsequent school years would not have been appropriately certified or licensed (8 NYCRR 200.6[b][4]; see 8 NYCRR 80-2.6). Furthermore, the hearing record reflects that the student would not necessarily have had the same teacher in the recommended resource room program for the 2013-14 school year (Tr. p. 128), making this claim impermissibly speculative in any event (R.E., 694 F.3d at 187; J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at \*16 [S.D.N.Y. Nov. 17, 2015]).

had been successful in ninth grade, passing all of her classes and two Regents examinations (Tr. pp. 90-91, 320-21).

Although the student's private psychologist recommended that the student be placed in a boarding school or residential school environment for the 2013-14 school year, the hearing record does not support such a recommendation (Dist. Ex. 22 at p. 16). Here, as noted above, the student passed all of her classes and two Regents examinations in ninth grade when she received a resource room program for 45 minutes per day during the 2012-13 school year (Tr. pp. 90-91; see Dist. Exs. 6 at p. 9; 48 at p. 14). As the student's needs remained largely the same for the 2013-14 school year, it was reasonable for the August 2013 CSE to recommend that for the 2013-14 school year the student receive a resource room program, along with ICT services in English and global studies, and counseling as a related service, and that such a recommendation would confer educational benefits upon the student (see Dist. Ex. 8 at p. 14). Moreover, there is no evidence in the hearing record to suggest that the student required one of the most restrictive placements on the continuum of services, that being a residential placement.

## **2. August 2014 IEP—Integrated Co-Teaching Services, Resource Room Program, and Related Services**

As with the 2013-14 school year discussed above, although the student's needs are not directly in dispute, a brief discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the placement recommended by the August 2014 CSE was appropriate and reasonably calculated to provide the student with educational benefits for the 2014-15 school year. The August 2014 CSE considered the same evaluations as the August 2013 CSE, and in addition considered an updated July 2014 psychological report completed by the parents' private evaluator and the student's Forman report cards from the 2013-14 school year (Dist. Ex. 64 at pp. 3-7; see Dist. Exs. 13; 16-19; 22; 48 at pp. 13-14; 67; Parent Exs. I; L). The August 2014 IEP reflected the student's needs, consistent with the information available to the CSE.

According to the July 2014 updated psychological evaluation, the student's diagnoses no longer included a disorder of written expression or a phonological disorder; however, she was found to have two new diagnoses: a dysthymic disorder and an anxiety disorder NOS (compare Dist. Ex. 22 at p. 15; with Parent Ex. I at p. 7). With respect to "cognitive findings," the July 2014 psychological evaluation indicated that the BRIEF was administered to the student to ascertain her current level of executive functioning (Parent Ex. I at p. 2). The private evaluator noted that the student's parents "[saw] very little executive dysfunction"; however, "[the student], herself, report[ed] a significant amount" (id.). More specifically, while the student's parents rated only her working memory as a clinically significant concern, the student's own ratings suggested that in addition, shifting, monitoring, planning/organizing, organization of materials, and task completion were also clinically significant concerns (id. at pp. 2-3). According to the updated psychological evaluation, administration of the Behavior Assessment System for Children-Second Edition (BASC-2) yielded similar results (id. at p. 3). According to the psychological evaluation, the student's responses to the self-report inventory of the BASC-2 yielded scores in the clinically significant range for attention problems and hyperactivity (id.). The psychological evaluation concluded that the student continued to evidence, via self-report, an executive disorder, affecting the student's regulatory capacities and "metacognitive abilities" (her capacity to use her skills to



be productive) (id. at p. 7). According to the evaluation, the student continued to view her capacity to regulate her emotion and behavior, along with her capacity to use her cognitive abilities to be maximally productive, as significantly impaired (id. at p. 2).

With respect to "achievement functioning," the July 2014 psychological evaluation noted that based on the administration of the WIAT-III, the student had "made significant progress in both general math problem solving and her knowledge of numerical operations," with both scores falling in the average range (Parent Ex. I at pp. 3-4). Specifically, the evaluation stated that the student's rate of progress in these areas surpassed that of her peers and was a crucial indicator for determining whether the student was making the kind of progress necessary to catch up with her peers (id. at p. 4). With respect to reading comprehension, the July 2014 psychological evaluation indicated that the student's scores fell in the average range as measured by the GORT-5 and that the previous discrepancy between the student's reading fluency and reading comprehension were no longer apparent (id. at pp. 4-5). The psychological evaluation concluded that the student demonstrated significant progress in her reading comprehension, and both aspects of her math achievement (id. at p. 7). According to the student's Forman report card for the 2013-14 school year, the student received course grades in the 70s and 80s (Parent Ex. L at p. 1). The student's GPA for the 2013-14 school year was 79.94 which was similar to her GPA the previous school year (74.85) while attending the public school (compare Parent Ex. L at p. 1, with Dist. Ex. 48 at p. 15). Consistent with the private evaluation, and according to the 2013-14 Forman progress report, the student needed "most of the first semester to fully transition" to Forman; and initially struggled with homework completion, past memorization, and completing tasks; and did not always take advantage of opportunities to correct quizzes or tests (Parent Ex. A). However, according to the Forman progress report, the student demonstrated improved effort across the marking periods for the 2013-14 school year (id. at p. 1).

With respect to personality functioning, the July 2014 psychological evaluation indicated that, based on the student's self-report on both the personality adjustment profile of the BASC-2 and Beck Youth Inventory Self-Concept Inventory, the student performed within the typical range for a girl her age (Parent Ex. I at p. 5). The psychological evaluation noted that although the student's anxiety level, as evaluated by the Beck Youth Inventory Anxiety Inventory, was not abnormally elevated, the student exhibited feelings that were consistent with some of the images portrayed in projective testing, specifically that she sometimes thought about scary things, felt afraid that she might get hurt, and was afraid that something bad might happen to her (id. at pp. 5-6). The psychological evaluation also noted that, consistent with her "troubled school history" the student reported that she worried when she was at school, was afraid that she would make mistakes, and feared that she might get sick (id. at p. 6). According to the evaluation report, the student's "relatively anxious profile" and findings from the BASC-2 revealed a level of distress that "place[d] [the student] in the At-Risk range" (id. at pp. 5-6). Moreover, the private psychological evaluation indicated that "findings from both the Depressive Inventory of the Beck Youth Inventory (BDI-Y) and the BASC-2 capture the pervasiveness of [the student's] depressive feelings" (id. at p. 6). As measured by the BASC-2, the student fell in the at-risk range in the areas of depression, locus of control, and sense of inadequacy (id. at pp. 6-7). The July 2014 psychological evaluation indicated that while the student demonstrated "[i]ncreased emotional organization, motivation, and self-direction, which [was] associated with a self-image which [was] increasingly confident and [she was] pleased with her performance," there were "[c]ontinued

indications of anxiety and depression, which can pervade her mood, and threaten her overall well-being" (id. at p. 7).

As indicated above, the disputed issue to be resolved is whether the placement recommended by the August 2014 CSE was appropriate and reasonably calculated to provide the student with educational benefits for the 2014-15 school year. While the August 2014 IEP continued to reflect the student's needs as identified in the July 2012 and May 2013 psychological evaluation reports, the IEP was modified to reflect the student's needs and diagnoses as identified in the July 2014 private psychoeducational evaluation (compare Parent Ex. I, with Dist. Ex. 64 at pp. 3, 9-10). The July 2014 psychological evaluation indicated a significant increase in the student's anxiety and depression, yet the August 2014 IEP indicated that the staff from the student's then-current school reported that the student had a "rocky start" to the 2013-14 school year but finished strong, exhibited some anxiety related issues associated with a dorm mate, was on medical leave for two weeks, and that the student was "always willing to go the extra mile" (Dist. Ex. 64 at pp. 9-10). With respect to physical development, the student continued to require medication to address her attention and depression issues, preferential seating to address her bilateral hearing loss and attention, as well as a restriction on her engagement in high impact activities due to her connective tissue disorder (id. at p. 10).

In order to address the student's needs, the August 2014 CSE recommended one 45-minute period per day in a resource room program in a group of five; one 45-minute period per day of ICT services in global studies; one 45-minute period per day of ICT services in English; twenty 45-minute individual counseling sessions per year; and accommodations, as needed, including checking for understanding, special seating arrangements, and refocusing and redirection (Dist. Ex. 64 at p. 13). Additionally, the August 2014 CSE recommended measurable post-secondary goals, nine annual goals to address study skills, mathematics, organization, social/emotional, and career/vocational needs, a coordinated set of transition activities, and testing accommodations (id. at pp. 11-17). Specifically, the hearing record shows that the student continued to demonstrate weaknesses with respect to initiation, study skills, working memory, planning/organization, and organization of materials (id. at pp. 7-9). To address these needs, the August 2014 CSE recommended a daily resource room program with five students and one special education teacher "because [the student] needed one period in her day where she could be retaught anything she had missed"; as well as a resource room teacher "that monitored her progress, that was her point person, that guided her special education instruction in the high school" (Tr. pp. 1229-30). Further, to address these needs, the August 2014 CSE recommended four study skills goals which included use of a planner to keep track of long and short term assignments, self-checking school work, seeking out appropriate assistance, using flash cards and visual aids, and constructing study guides (Dist. Ex. 64 at p. 12). Additionally, to address the student's needs in math, English and social studies, the August 2014 CSE recommended daily ICT services in English and global studies, and math goals including use of graphing calculator and identification of operation necessary to solve word problems, as well as semantic maps and graphic organizers to categorize information in word problems (id.). According to the district psychologist, the August 2014 CSE recommended ICT services in English and global studies for the student because "those two programs were there to give her additional support in those areas" as well as "additional instruction" (Tr. p. 1230). The district psychologist testified that the August 2014 CSE recommended counseling to provide the student with an "additional layer" of social/emotional support, and that the CSE's recommendations for the 2014-15 school year were "more than sufficient" (Tr. pp. 1232-34). The

district special education teacher who had been the student's resource room teacher in the 2012-13 school year participated in the August 2014 CSE meeting and testified that the recommendations for the 2014-15 school year provided an appropriate level of support for the student based on the student's academic and cognitive levels as well as her performance in the previous two school years (Tr. pp. 1288, 1289, 1304, 1310-11).

Based on the above, the August 2013 and August 2014 CSEs' decisions to recommend the student attend a general education classroom with the support of ICT services, a resource room program, and counseling was reasonably calculated to provide the student with educational benefits. It is also consistent with principals of LRE, which require that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment occur only when the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Newington, 546 F.3d at 120-21). Although the parents may have desired a smaller class environment in a residential setting for the student, the August 2013 and August 2014 CSEs' recommendations for a general education program with ICT services in global studies and English, additional supports of resource room services and counseling services, along with her annual goals and accommodations, were reasonable and appropriate given the student's academic and social/emotional profile. Additionally, once the district determined that placement in a general education class with ICT services was the least restrictive environment in which the student could be educated, it was not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at \*8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F., 2013 WL 4495676, at \*15).

To the extent the parents argue that the August 2013 and August 2014 IEPs were procedurally defective, an independent review of the record does not reveal any procedural deficiencies that impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

## **VII. Conclusion**

Since the August 2013 and August 2014 IEPs met the student's educational needs and contained appropriate program recommendations, the district offered the student a FAPE for the 2013-14 and 2014-15 school years and it is unnecessary to reach the issues of the appropriateness of the private school or to consider whether equitable factors favor an award of tuition reimbursement (see A.C., 553 F.3d at 173; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 5, 2016**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**