



The University of the State of New York

The State Education Department State Review Officer

No. 08-067

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Davis, Polk & Wardwell, attorneys for petitioner, Joseph J. Wardenski, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which found that respondent (the district) did not provide a free appropriate public education (FAPE) to the student for the 2007-08 school year, that the home school¹ program funded by the parent and provided to the student during a portion of the 2007-08 school year was inappropriate, and that the equities did not favor the parent. The district cross-appeals from the decision of the impartial hearing officer which found that it failed to offer a FAPE to the student for the 2007-08 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was receiving a private home school program consisting of six hours per day divided between two instructors based on a general education curriculum that was purchased by the parent (Tr. pp. 340, 387-89; Parent Ex. O). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

¹ The impartial hearing officer refers in her decision to the parent's program as a "home tutoring" program (IHO Decision at pp. 19-21).

The student's cognitive skills are in the low average range of intellectual abilities (Parent Ex. BB at p. 5). Academically, he exhibits strengths in spelling, math and vocabulary, and exhibits weaknesses in reading comprehension, composition and in his math problem solving skills (Dist. Ex. 12). He resides in a bilingual English/Spanish home and is able to appropriately "switch" between the two languages (Parent Ex. T at p. 3). However, he has moderate to severe language delays and global motor delays in the areas addressed by occupational therapy (OT) (Dist. Exs. 13 at p. 6; 14 at p. 4; Parent Ex. X at pp. 2-3). The student has also struggled with his social skills and finds it difficult to interact with peers and adults (Dist. Ex. 16). Additionally, the student has difficulty regulating his sensory processing needs, has been diagnosed as having under-responsive vestibular and proprioceptive systems, and an over-responsive tactile system (Parent Ex. X at pp. 3-4). These sensory processing issues cause the student to engage in self-stimulatory behaviors such as biting his hands or playing with his feet, and contribute to the student's difficulty in sustaining attention on school tasks (Tr. pp. 193-94, 222, 308, 331-32; Dist. Ex. 3 at p. 6; Parent Ex. X at p. 4; see also Parent Ex. W at p. 1).

The student began receiving special education services as a young child through the Early Intervention Program (Parent Ex. U at p. 2). In October 2002, the district's Committee on Preschool Special Education (CPSE) found him eligible for special education services as a preschool student with a disability (Dist. Ex. 1 at p. 1). In 2003, the student began receiving services from the McCarton Center (Parent Ex. Z at p. 1). At that time, the student was exhibiting expressive and receptive language deficits and fine, gross and graphomotor deficits (id.).

At the beginning of the 2004-05 school year, the student attended a collaborative team teaching (CTT)² kindergarten program with a "SEIT" at one of the district's schools (Tr. pp. 413-14; Parent Ex. CC at p. 2).³ The parent removed her son from the district's program after an incident where he left the classroom unnoticed by the teacher and was later found in the school's bathroom (Tr. pp. 371-73; Parent Ex. CC at p. 2). For the remainder of that school year, the student attended a kindergarten class at St. Stephen of Hungary School (St. Stephen), a private, full-time general education school (Tr. p. 127; Parent Ex. Z at p. 1). St. Stephen has not been approved by the Commissioner of Education as a school with which districts may contract to

² "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

³ The hearing record refers to recommendations that the student receive in-school "SEIT" support once he became of school age (Parent Ex. CC at pp. 1-2). However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although it appears to be mischaracterized in the hearing record, I will continue to refer to the recommended school age educational support service as "SEIT" where documented, to remain consistent with the hearing record and to avoid confusion in this decision.

instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student attended the program at St. Stephen with a 1:1 "shadow teacher"⁴ and received five sessions of speech-language therapy, OT and physical therapy (PT) each week (Parent Ex. Z at pp. 1, 9).

On July 24, 2006, the Committee on Special Education (CSE) convened an annual review for the student's 2006-07 school year (Parent Ex. V). The CSE determined that the student was eligible for special education services as a student with an OHI and recommended placement in a 12:1 CTT program with the services of a full-time 1:1 health paraprofessional, speech-language therapy, OT, PT and counseling services (id. at pp. 1, 20).

On August 25, 2006, a speech-language pathologist from the McCarton Center conducted a speech-language evaluation of the student (Dist. Ex. 13). Following administration of assessments of the student's expressive and receptive language and vocabulary skills, the speech-language pathologist concluded that the student exhibited moderate to severe language delays in expressive and receptive language skills and a severe delay in language structure skills (id. at p. 6). His pragmatic language skills were significantly delayed (id.). The student also demonstrated weaknesses in verbal organization, verbal formulation and sentence structure (id.). The speech-language pathologist recommended that the student receive six individual 45-minute sessions of speech-language therapy per week (id.).

The student continued to attend St. Stephen during the 2006-07 school year while in second grade and received 1:1 assistance throughout the day (Tr. pp. 361-62). He also received SEIT services, speech-language therapy, OT and applied behavioral analysis (ABA) services from the McCarton Center (Tr. pp. 361-62; Dist. Ex. 15 at p. 1; Parent Ex. F at pp. 3-4, 6).

In January 2007, the student began attending a once weekly private 60-minute peer socialization group (Tr. pp. 396-97; Dist. Ex. 16). The focus of the group was to improve the student's social skills with peers, improve his self-confidence to take risks and try new things, improve and expand his play skills, assist him with his participation in structured activities involving rules, assist him in appropriately interacting with others, and increase his use of questions and comments during play and during conversation (Dist. Ex. 16).

On February 5, 2007, a speech-language pathologist conducted an oral-motor and speech evaluation of the student (Parent Ex. U). The evaluation report detailed the feeding, swallowing and gastrointestinal difficulties that the student had experienced as a younger child (id. at pp. 1-2). Following her observation and assessment of the student, the speech-language pathologist concluded that the student did not exhibit "any outstanding oral-motor or feeding issues" (id. at p. 4).

From late April to early June 2007, the district attempted to contact the parent in order to obtain information about the student in preparation for an upcoming CSE meeting (Dist. Exs. 6-9). In an undated progress report, the classroom teacher from St. Stephen prepared a summary of

⁴ The hearing record references the use of a "shadow teacher" provided by the McCarton Center, but does not describe the qualifications of the shadow teacher or the instructional/management services that the shadow teacher provided (see Tr. p. 366). The hearing record interchangeably refers to the student's shadow teacher as a "para" and a "SEIT" (Dist. Ex. 17; Parent Ex. T at p. 6).

the student's needs and estimates of his instructional levels (Dist. Ex. 11). The teacher indicated that the student exhibited grade appropriate decoding skills, but that his reading comprehension skills were below a first grade level (id. at p. 1). The student's written language skills were reportedly at a first grade level (id.). The teacher commented that the student's "composition" was limited, he had difficulty using correct grammar and his penmanship was difficult to read (id.). The student's communication skills were reportedly below average, his listening skills were estimated to be at a mid-first grade level, and he exhibited very limited expressive language skills (id. at p. 2). The teacher reported that the student's math computation skills were at an early second grade level, his math reasoning skills were below the first grade level, and that he struggled to apply his reading skills to math in order to understand word problems (id. at p. 1). Although he had shown great improvement in his relationships with peers while at recess, he demonstrated limited peer interaction in class (id. at p. 2). The teacher also indicated that the student needed constant reminders to stay on task and complete work (id.).

In late April 2007, the classroom teacher reiterated that the student exhibited strengths in spelling, math computation and vocabulary, but noted weaknesses in religious studies, reading comprehension, composition, math problem solving, and skills that required critical thinking and processing abilities which the student had not yet acquired (Dist. Ex. 12). She reported that the student made distracting noises in the classroom, and indicated that he had difficulty "getting ready" for the day (e.g., managing his coat, books and bag) (id.). She opined that the student needed a full-time SEIT to remain in a general education classroom, and recommended that if he was to remain at St. Stephen, he repeat second grade (id.).

On May 22, 2007, a McCarton Center occupational therapist conducted an OT evaluation of the student (Dist. Ex. 14). Administration of an assessment identified in the hearing record as the Bruininks-Oseretsky Test, 2nd Edition yielded below average scores in all areas assessed, including fine-motor, manual coordination, body coordination, strength and agility (id. at p. 1). The occupational therapist reported that the student had sensory processing deficits, manifested by under-responsive vestibular and proprioceptive systems and an over-responsive tactile system (id. at p. 3). The student was sensitive to auditory input, and had significant difficulty processing and demonstrating meaningful language interactions (id.). The occupational therapist recommended that the student receive six individual 45-minute sessions of OT per week (id. at p. 4).

On May 30, 2007, the student's educational ABA supervisor from the McCarton Center prepared an educational progress report (Dist. Ex. 15). The ABA supervisor reported that the student demonstrated improvements in his receptive and expressive language skills, his behavioral control, his academic skills, his activities of daily living and his social relatedness, but that he continued to struggle with social, attentional and behavioral problems (id. at p. 1). She concluded that the student demonstrated "marked improvements" in all areas and made significant progress in his ability to use and understand language (id. at p. 3). Although he "responded beautifully" to the structured and reinforcing school program, the ABA supervisor stated that the student continued to require a 1:1 teaching situation in order for him to exhibit the skills he had learned, to increase his cognitive skills and to help him develop his attentional, regulatory, academic and behavioral control skills (id.). The ABA supervisor opined that the student's communication needs required individualized teaching, and that he also needed a

consistent predictable routine, continuous positive reinforcement, and guidance during activities in order to resist maladaptive behaviors (id. at p. 1). The ABA supervisor also recommended a program that focused on generalized responding, due to the student's tendency to memorize tasks and respond without an understanding of the concepts (id.).

On June 5, 2007, the district received McCarton Center progress reports (Dist. Ex. 6 at p. 3). On June 12, 2007, the student's pediatrician prepared a medical history report that included documentation of the student's food allergies, feeding problems and language delays (Dist. Ex. 18). On June 13, 2007, the pediatrician stated that the student required a full-time SEIT or "para" during school hours due to his health "issues" (Dist. Ex. 17).

On June 14, 2007, the CSE convened for the student's annual review and to develop an individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 3; see also Dist. Ex. 10). Participants at the meeting included the district's school psychologist who acted as the district representative, a school social worker, a special education teacher, the parent, an additional parent member and the parent's attorney (Tr. pp. 368-69; Dist. Ex. 3 at p. 2). The student's classroom teacher from St. Stephen and the ABA supervisor from the McCarton Center participated by telephone (Dist. Ex. 3 at p. 2; Parent Ex. F at pp. 3, 6). The CSE recommended a 12:1 CTT program with the services of a full-time school health paraprofessional (Dist. Ex. 3 at p. 11). The CSE also recommended two individual sessions of counseling, three individual sessions of OT and PT and six individual sessions of speech-language therapy per week (id.). The CSE recommended a 12-month program and the student was recommended to receive OT, PT and speech-language therapy services during July and August 2007 (id. at p. 1).

By letter dated June 28, 2007, the parent, through her attorney, advised the district that because it had failed to offer the student the related services recommended on his IEP prior to the start of the 12-month school year, the parent had decided to continue the student at the McCarton Center and further that the student had begun to receive these related services on July 8, 2007 (Dist. Ex. 19). The letter further informed the district that the parent would seek payment for her placement of the student at the McCarton Center for summer 2007 (id.).

By final notice of recommendation (FNR) dated July 12, 2007, the district notified the parent that it recommended placement of her son in a CTT class with the related services noted on his IEP at one of the district's schools (Dist. Ex. 5).

The parent stated that she received the district's placement offer in July or August 2007 and contacted the district to make an appointment to visit the recommended school (Tr. p. 374). She was informed by the district that the school was closed for the summer and that she would have to wait until the beginning of the school year to visit the program (Tr. pp. 374-75). Thereafter, by letter dated August 21, 2007, the parent, through her attorney, advised the CSE chairperson that she had "serious reservations" about the recommended program and could not start the student in the program before visiting it (Parent Ex. M). The letter further advised that the student would be placed at St. Stephen for the 2007-08 school year, would continue at the McCarton Center to receive all of his related services, and that the parent would seek payment from the district for the tuition at St. Stephen and for the cost of the related services at the McCarton Center (id.).

In early September 2007, the parent visited the recommended district placement and spoke to one of the district's counselors (Tr. pp. 375-76, 416-17). The counselor told the parent that there were two CTT classes available, one composed of "higher" functioning students with a class size ranging from 17 to 25 students and another composed of "lower" functioning students with a class size ranging from 14 to 17 students (Tr. pp. 375-76).⁵ The counselor stated that the "higher" functioning CTT class already had 21 students in it and could get larger (Tr. p. 376). The parent informed the district that she rejected the district's proposed CTT program (Tr. p. 377).

The student attended St. Stephen at the beginning of the 2007-08 school year, repeating the second grade in a general education class with a full-time shadow teacher (Tr. pp. 362-63).⁶ He received related services through the McCarton Center after school and on weekends (Tr. p. 362; Parent Exs. H; I; T at p. 1; CC at p. 1). Specifically, the student received five individual 45-minute sessions of speech-language therapy, six individual 45-minute sessions of OT and six hours of individual behavioral therapy/special instruction per week (Parent Exs. H; T at p. 1).

By due process complaint notice dated September 10, 2007, the parent's attorney requested an impartial hearing, alleging that the district had not provided the related services mandated by the student's June 14, 2007 IEP during summer 2007, and had failed to offer an appropriate program for the student for the 2007-08 school year (Parent Ex. B at pp. 1, 2). The due process complaint notice proposed that the district fund the student's unilateral placement at St. Stephen and the related services and SEIT provided by the McCarton Center for the 2007-08 school year (id. at p. 2).

On September 10, 2007, a speech-language pathologist from the McCarton Center conducted a speech-language evaluation of the student (Parent Ex. T). The speech-language pathologist concluded that the student exhibited global delays in receptive and expressive language skills, and a severe pragmatic language delay (id. at p. 6). She reported that the student's classroom SEIT helped facilitate appropriate peer social interactions within the classroom and was necessary for the student when the language demands of the classroom increased (id.). She recommended that the student receive five 60-minute sessions of individual speech-language therapy per week and two weekly 60-minute sessions of speech-language therapy in a social/pragmatic language group with no more than two additional children (id. at p. 7).

⁵ Although the FNR refers to the student's recommended class as "Class T03," the hearing record does not specify which of the two CTT classes described to the parent was "Class T03" (Tr. pp. 375-76; Dist. Ex. 5). The district presented the testimony of the teacher of the "lower" functioning class at the impartial hearing, and the impartial hearing officer focused on that class in her decision.

⁶ The parent testified that although her son did well academically in second grade during the 2006-07 school year, he had "serious social, emotional and behavioral issues" (Tr. p. 362). St. Stephen, the parent and the McCarton Center agreed to retain the student in second grade for the 2007-08 school year in an attempt to improve his self-confidence and to reduce his need for the 1:1 shadow teacher (Tr. pp. 362-63).

In late October 2007, the parent removed her son from St. Stephen and discontinued the student's related services at the McCarton Center (Tr. p. 381; Parent Ex. CC at p. 1).⁷ In a social history update conducted by the district on November 27, 2007, the parent reported that she could not afford to pay for the cost of the private school, for the cost of a shadow teacher, or for the cost of the related services (Parent Ex. CC at p. 1). The parent stated that in October 2007, she began looking for a different school for her son, but found it difficult to find a school that would enroll the student two months into the school year (Tr. pp. 381-82).⁸ Although the district had provided the parent with related service authorizations (RSA) to obtain the student's OT, PT and speech-language therapy services, the parent reported that she was unable to locate any available providers from the district's list (Tr. pp. 378-80, 420-21; Parent Ex. CC at p. 1). Ultimately, the parent decided to provide her son's educational instruction at home (Tr. pp. 382-84; Parent Ex. CC at p. 1).

Beginning on November 1, 2007, the student began to receive instruction in a general education third grade curriculum from a certified special education teacher who provided teaching services for six hours per day, five days per week at the student's home (Tr. pp. 183-84; Parent Ex. CC at p. 1). The curriculum was purchased by the parent from Calvert Educational Services (Calvert School) and the parent hired the teacher to teach the student using this curriculum (Tr. pp. 189-90, 335, 340; Parent Exs. N; O).⁹

By letter dated January 3, 2008, the parent notified the district's "home school coordinator" at the "central home schooling office" that she intended to home school her son for the remainder of the 2007-08 school year (Parent Ex. P).¹⁰

In late February 2008, the parent hired a second instructor to teach the student (Tr. pp. 305, 309). The two teachers divided the student's home schooling program (Parent Exs. FF; GG). The parent also enrolled her son in karate, brought him to a weekly socialization group, to tennis once per week and provided additional socialization opportunities for her son by scheduling play dates with other children (Tr. p. 395).

The impartial hearing began on February 14, 2008 and concluded on May 23, 2008, after four days of testimony (Tr. pp. 1, 269). On February 27, 2008, after two days of testimony, the impartial hearing officer issued an interim order on pendency which found that a prior impartial

⁷ The parent testified that the student exhibited behavioral difficulties at both St. Stephen and the McCarton Center and that she felt pressured to pay for the services at the McCarton Center (Tr. pp. 365-66).

⁸ The hearing record indicates that the district did not offer a new placement for the student at this time (Tr. pp. 417-19).

⁹ According to the hearing record, Calvert Educational Services provides home-instruction programs for students in pre-kindergarten through eighth grade (Tr. p. 336). The parent purchased the third grade curriculum, science enrichment kit and advisory teaching services for her son (Tr. p. 340). The advisory teaching service provides support to the home-based instructors by assessing student performance at specified intervals during the school year and providing "tips and suggestions" in areas that need improvement (Tr. p. 339).

¹⁰ I note that the parent's January 3, 2008 letter states that her son is "in the third grade," although the hearing record reveals that the student had been repeating the second grade at the beginning of the 2007-08 school year with the parent's agreement (Tr. pp. 362-63).

hearing officer's unappealed decision regarding the 2005-06 school year had established the student's pendency (IHO Decision at p. 3). The impartial hearing officer directed the district to reimburse the parent for the September and October 2007 tuition costs at St. Stephen and related service costs at the McCarton Center under pendency (id.). Neither party appealed the interim decision on pendency.

By letter dated March 4, 2008, the parent's attorney filed an amended due process complaint notice indicating that the student's circumstances had changed because the student had stopped attending both St. Stephen and the McCarton Center and was currently receiving a "home instruction" program for six hours per day from privately obtained teachers (Parent Ex. L at p. 2). The amended due process complaint notice also stated that the parent had purchased the curriculum from the Calvert School for use by the private teachers and that the student had not received any of his related services (id.). The due process complaint notice further alleged that the parent had informed the district in January 2008 that she would be providing a home program for the student, but the district had failed to offer another program to the student (id.). The amended due process complaint notice proposed that the district both reimburse and prospectively fund six hours of daily "home instruction" from November 2007 through the end of the 2007-08 school year, and that the district reimburse the yearly fee for the Calvert School associated with the curriculum, materials and grading provided for the home education program (id. at pp. 2-3).¹¹

In April 2008, the district's school psychologist conducted a psychoeducational evaluation of the student (Parent Ex. BB). The psychologist noted that the student's verbal reasoning skills were delayed and language-based tasks presented a significant challenge for him (id. at p. 5). The student also exhibited weak mental control and processing speed, his reading comprehension skills were delayed, his math skills were below grade level, his ability to maintain focus and attention was poor, and his self-regulatory skills were weak (id.). The student exhibited deficits in social behavior and emotional functioning, difficulty socializing with others, and difficulty expressing his feelings (id.). The psychologist also noted that the student was better able to process, comprehend and correctly complete tasks that were visually presented or provided with visual supports (id.). The school psychologist concluded that the student's cognitive skills were in the low average range of intellectual abilities (id.). However she also stated that due to attention, focusing and language difficulties, she did not believe that the results were an accurate representation of the student's skills (id.). She indicated that the student appeared to have more skills than what he had demonstrated on the tests, specifically noting that his visual reasoning skills were an area of strength (id.).

The impartial hearing resumed on May 5, 2008 and was completed on May 23, 2008 (Tr. pp. 84, 446). The impartial hearing officer rendered her decision on June 10, 2008 (IHO Decision at p. 21). The impartial hearing officer held that the district bore the burden of proof with respect to whether the student was offered a FAPE for the 2007-08 school year (id. at p. 16). The impartial hearing officer also found that the June 14, 2007 IEP was procedurally valid

¹¹ The parent's attorney uses "home schooling" and "home instruction" interchangeably in the amended due process complaint notice. I note that under the definitions contained in the State regulations, it is clear from the hearing record that the parent in this case seeks funding for home schooling, not for home instruction (compare 8 NYCRR 200.1[w], 200.6[i], with 8 NYCRR 100.10).

and that the parent did not dispute the appropriateness of the recommended goals or related services (id. at p. 17). The impartial hearing officer further found that the CSE's recommendation that the student participate in a CTT classroom with related services and 1:1 paraprofessional support, was appropriate (id. at p.18). She stated; however, that she shared the parent's concern about the lack of information available at the time the placement offer was made as to what the overall class size would be (id.). Although, the impartial hearing officer found that the district's "lower" functioning CTT class met the students needs, she determined that the district failed to meet its burden to prove that its recommended placement was appropriate because the district's special education teacher testified that the proportion of special education students to general education students in the proposed class was not in conformity with what was required for CTT classes (id.).¹² She found that since the parent had no opportunity to observe the recommended class until September, the parent acted reasonably in rejecting the IEP in August 2007 (id.). Lastly, the impartial hearing officer determined that a finding in favor of the district, "if affirmed on appeal," would establish the CTT program as being the student's pendency placement, which would not be appropriate "unless the size of the class were limited to seventeen students" (id.).

The impartial hearing officer also determined that the parent failed to meet her burden of proving that the home schooling program was appropriate because: (1) one of the student's teachers was not qualified or trained to teach students with special needs; (2) the other teacher had no experience dealing with the unique behaviors presented by the student; (3) the third grade curriculum provided by the Calvert School was not a special education program; (4) the home schooling program failed to provide any related services to the student; (5) the third grade curriculum chosen by the parent provided no modifications to accommodate the student's lower comprehension, lower language functioning and difficulty with word problems; and (6) the 1:1 home school program was unduly restrictive (id. at pp. 19-20). The impartial hearing officer found that equitable considerations also did not support an award of reimbursement, finding that the parent had already made the decision to continue the student in the private school at the time of the June 14, 2007 CSE meeting, the parent failed to provide notice to the CSE that she was seeking another program after the student withdrew from the private placement, the parent failed to provide appropriate notice to the district that she would be providing the student with a home schooling program, and the parent failed to explore the district's proposed lower functioning class placement (id. at p. 20). The impartial hearing officer further found that "the parent acted unreasonably in rejecting the CTT class based solely upon her experience three years earlier, when [the student] was in kindergarten" (id. at p. 21). The impartial hearing officer denied the parent's request for reimbursement (id.).

The parent appeals, contending that the impartial hearing officer erred in finding that the two teachers providing the home school instruction did not have proper experience and arguing that she was not required to use certified special education teachers. The parent asserts further that the student made progress with the Calvert School program, that the parent's program was the best she could do given the district's failure to provide an appropriate placement, and that the parent's socialization and athletic activities were an admirable attempt to address the student's

¹² I note that the impartial hearing officer did not cite to any statute, regulation or case law to support her contention that the ratio of special education to general education students in the proposed CTT class violated any mandated legal requirement.

sensory and social needs after the unexpected withdrawal of the student from St. Stephen and the McCarton Center. The parent asserts that the impartial hearing officer's decision regarding the inappropriate proportion of special education students to general education students in the recommended CTT placement is at odds with her decision that the home schooling program was unduly restrictive. The parent further asserts that in finding that the home school program failed to provide the student with related services, the impartial hearing officer improperly shifted the burden to find related service providers from the district to the parent. Regarding equitable concerns, the parent asserts that she cooperated with the district, submitted two ten-day notice letters, participated at the CSE meeting, and notified the district that she would be home schooling the student.

In its answer the district asserts that the June 14, 2007 IEP and recommended placement were procedurally and substantively proper. The district contends that the impartial hearing officer was correct in finding that the district's recommendation of a CTT class with related services and a 1:1 paraprofessional was appropriate; however, it further contends that the impartial hearing officer erred in placing the burden of proof regarding whether a FAPE was provided upon the district and that she incorrectly determined that the recommended class was not appropriate because of its potential size. The district further asserts that there was no objective evidence presented to show that the Calvert School program was addressing the student's unique special education needs, and that the home school program was overly restrictive, that it failed to provide any related services, and that the home school instructors were not qualified to meet the student's specific special education needs. The district also asserts that the parent's unsuccessful attempt to observe the classroom does not mean that the district failed to offer a FAPE. Regarding equitable considerations, the district argues that the parent never intended to place the student in the district's proposed CTT placement and that the parent failed to provide proper notice that she would be home schooling the student. The district also cross-appeals from the impartial hearing officer's decision insofar as it found that the district failed to offer the student a FAPE and that the parent's rejection of the recommended placement was reasonable because she had no opportunity to visit the recommended placement until after the school year had started in September. The district argues that the parent's inability to visit the proposed placement in the summer months was caused by the parent's own delay in forwarding the student's progress reports, which in turn caused a delay in the preparation of the IEP and a corresponding delay in the district's placement notification. The district also asserts that the impartial hearing officer's decision improperly required the district to advise the parent about the exact class size of a placement, when no such requirement exists.

The parent submitted a reply to the district's answer and an answer to the district's cross-appeal. The parent argues that the district had the burden of proof because under the State regulations, the impartial hearing commenced on February 14, 2008, the date that the parent submitted her amended due process complaint notice.

Two purposes of the Individuals with Disabilities Education Act (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 Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]).

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132; Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089 [2d. Cir. Oct. 9, 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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 the 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]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

At the outset, the district contends in its answer and cross-appeal that the impartial hearing officer incorrectly placed the burden of persuasion on the district. An impartial hearing is commenced with the presentation of a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education [FAPE] to such child" (Vultaggio v. Bd. Of Educ., 343 F.3d 598, 600 [2d Cir. 2003]; see Application of the Bd. of Educ., Appeal No. 08-016). On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). This amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Previously, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). Under the circumstances of this case, it is not necessary for me to address the district's argument because I find, for the reasons set forth below, that the district has amply shown that it offered a FAPE to the student for the 2007-08 school year.

I now turn to the appropriateness of the district's recommended program and placement. The impartial hearing officer determined that the June 14, 2007 IEP was "procedurally valid" and that the CSE's recommendation that the student participate in an integrated classroom with the support of a 1:1 health paraprofessional and related services was appropriate (IHO Decision at p. 18). The impartial hearing officer also determined that the CTT class composed of 15 students was appropriate to meet the student's needs (id.).¹³ However, despite this finding, she ultimately

¹³ All further references to the district's CTT class will refer to the class with 15 students (the "lower" functioning class) unless otherwise specified.

deemed the district's placement to be inappropriate because of the potential for a large class size, and the district's special education teacher's testimony that the proportion of special education students to general education students in her CTT class was "a little bit out of compliance," because the ratio of general education students to special education students in the CTT class was usually 60 percent to 40 percent (Tr. pp. 132-36, 142-143; IHO Decision at p. 18).¹⁴ State regulations provide that the maximum number of students with disabilities receiving integrated co-teaching services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that effective July 1, 2008, the maximum number of students with disabilities in a CTT class shall not exceed 12 students (8 NYCRR 200.6[g][1]).¹⁵ The regulations further state that school personnel assigned to each CTT class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The special education teacher testified that the classroom had one special education teacher, one regular education teacher, one paraprofessional assigned to a particular student who helped out with the class and one student teacher (Tr. p. 164).¹⁶ Although the addition of the student to the CTT class might run counter to the district's own policy regarding the ratio of general education to special education students, I do not find it to be a violation of State regulations. The pertinent question is whether the number of students with disabilities in the CTT class was in accordance with the students' individual needs as recommended on their IEPs. There is no evidence in the hearing record to suggest that the ratio of special education students (8) to general education students (7) in the CTT class was not in accordance with the students' needs, including the student in this case. As there is no evidence in the hearing record that the ratio in the recommended CTT class would have been inappropriate given this student's individual needs and would have deprived the student of a FAPE, I am constrained to disagree with the impartial hearing officer's finding on this issue.

The evidence in the hearing record establishes that the recommended special education program, the recommended related services and the recommended placement were all reasonably calculated to confer educational benefits to the student. The hearing record reveals that the CSE properly reviewed, considered, and relied upon the student's records for an accurate assessment of the student's functioning. The school psychologist who participated in the CSE meeting testified that in preparing the June 2007 IEP she reviewed, considered, and relied upon available reports from the McCarton Center, the private peer socialization group, St. Stephen and the student's pediatrician (Tr. pp. 103, 105, 107-08). She also consulted with the student's teacher from St. Stephen and with the ABA supervisor from the McCarton Center during the CSE meeting (Tr. pp. 122-23). The June 2007 IEP contained academic present levels of performance gleaned from the St. Stephen's teacher's progress report and from her narrative report dated April 24, 2007 (compare Dist. Ex. 3 at pp. 3-4, with Dist. Exs. 11; 12). The June 2007 IEP also

¹⁴ Although the impartial hearing officer determined that the district failed to prove the CTT class was appropriate, in her rationale to justify her decision for the third criterion of the Burlington/Carter analysis, she faulted the parent for not re-considering the CTT program after the parent withdrew the student from St. Stephen and the McCarton Center (IHO Decision at pp. 18, 20).

¹⁵ I note that the placement offer was made in 2007; therefore, the mandate requiring no more than 12 students with disabilities in a CTT class was not in effect and does not apply to this case.

¹⁶ The student teacher in the CTT class began in March 2008 and continued through the remainder of the 2007-08 school year (Tr. p. 165).

contained teacher estimates of the student's grade equivalent/instructional levels and reported the student's strengths (spelling, math computation and vocabulary) and his weaknesses (expressive, receptive and pragmatic language delays and difficulty with critical thinking and processing skills) (Dist. Ex. 3 at p. 3).

The June 2007 IEP also recommended academic management strategies including: preferential seating, avoidance of distracting stimuli, use of a consistent predictable routine, continuous positive reinforcement, guidance during activities, use of multisensory presentation of content, use of visual aides and manipulatives, frequent opportunities for direct social skills instruction, and prompting to initiate or respond to social interactions (Dist. Ex. 3 at p. 3). At the impartial hearing, the special education teacher provided specific examples of how she implemented the types of academic management strategies contained in the June 2007 IEP in her class (Tr. pp. 139-41). For example, she explained the variety of ways that preferential seating can occur in her class, the use of a visual schedule so that the students could understand the daily routine, and how her instruction occurs in a multisensory fashion through the use of visual and verbal methods and manipulatives (Tr. pp. 139-40, 174). The special education teacher also testified that she used tangible manipulatives and allowed frequent movement breaks for students with sensory processing needs (Tr. pp. 264-66).

The special education teacher further testified that she did not know the student personally, but had reviewed the June 2007 IEP (Tr. pp. 136-37). She stated that the student's decoding skills were "probably" higher than most of her students, and the student's calculation skills were not "far off" from grade level (Tr. p. 139). She stated that the functioning levels of students in the CTT class ranged from two non-reading/non-writing students, estimated to be at a pre-kindergarten or early kindergarten level, to those who met or exceeded the third grade level (Tr. pp. 147-49, 167).¹⁷ In math, the CTT class contained students who had difficulty with addition and subtraction and others who were proficient with multiplication tables (Tr. p. 148). According to the special education teacher, the instructional levels contained in the student's IEP were "very comparable" to the functioning levels of the students currently in her class (Tr. pp. 138-39).¹⁸

The June 2007 IEP also provided for annual goals and short-term objectives in the areas of math, sensory processing, social interaction, attention, PT, OT, self-care, reading comprehension, expressive and receptive language and written language (Dist. Ex. 3 at pp. 6-8). The testimony of the special education teacher clarified how the student's reading comprehension goals would be addressed in her class (Tr. pp. 143-44). She testified that the student's reading and writing needs would be addressed with small group instruction (Tr. p. 138). She indicated that although all of the CTT students were exposed to the same reading and writing curriculum, it was modified to students' individual ability levels (Tr. pp. 144-45, 149-50, 174-75, 178).

¹⁷ The hearing record is unclear as to whether the special education teacher was referring to the students with disabilities or the general education students in her class (Tr. pp. 148-50, 168).

¹⁸ The special education teacher testified that the ages of the students in her class were all within a "three year" age range (Tr. p. 151).

Regarding math instruction, the special education teacher explained that math was taught using a parallel teaching method, in which she instructed the lower skill level group of approximately four students at the same time that the regular education teacher taught math to a group of higher functioning students (Tr. pp. 138, 177). The students in the special education teacher's math group learned the same content as the other students in the class, but at a slower pace, with more manipulatives, visual aides and charts to help meet their needs (Tr. pp. 177-78). This method ensured that prior work could be revisited if goals were not met (Tr. p. 138). The student's applied problem tasks would be modified to address his deficits in these areas (Tr. p. 139).

The special education teacher also testified that some of the special education students in the CTT class required additional individualized support (Tr. p. 135). To support those students, the special education teacher, the regular education teacher, and the paraprofessional conferenced daily, conducted guided reading groups, and facilitated small group work including the parallel teaching strategies described above (Tr. p. 135). Students individually "conference[d]" with the special or regular education teacher two to three times per week for five to ten minutes to address reading skills (Tr. pp. 178-79). The CTT class also provided opportunities for individual math instruction during small group or individual work time (Tr. pp. 179-80). In addition, the CTT program offered a 40-minute period before the beginning of the school day, four days per week, which students could attend for extra assistance in any subject (Tr. p. 180). According to the special education teacher, with the assistance of the student's recommended 1:1 paraprofessional, the student would have been able to function in her CTT class and she would have been able to meet his needs (Tr. pp. 137, 159). Although the impartial hearing officer found that the proposed CTT placement could have been too large of the student, I find that the hearing record shows that the proposed placement offered many opportunities for small group/1:1 instruction for the student. Furthermore, the student would have received a 1:1 paraprofessional in the class that would have met his needs.

The special education teacher further testified that the student's related services needs could be met in the recommended school (Tr. pp. 145-46). The special education teacher testified that related service providers could either pull students out for their related services or use a separate location within the CTT classroom to provide the services (Tr. p. 146). According to the special education teacher, no student in the CTT class was "underserved" in regards to their related services (Tr. p. 262).

The June 2007 IEP also addressed the student's potential behavioral concerns. The IEP stated that the student struggled with social, attentional, behavioral, and communication skills; and that his social interaction skills were highly variable and affected by his distractibility, but noted that these behaviors did not seriously interfere with instruction and could be addressed by the regular/special education teacher (Dist. Ex. 3 at p. 4). The June 2007 CSE did not recommend the formulation of a behavior intervention plan (BIP) (*id.*). At the impartial hearing the district's special education teacher testified to some of the strategies that she used to address behavioral and social issues in the CTT class. She indicated that book club reading, partner work, rug work, free choice time, "morning meeting" and small group work at tables were activities in the CTT class that would have addressed the student's need for frequent opportunities for social skills instruction (Tr. pp. 140, 157). During these activities, students

have the opportunity to discuss topics with partners and in small groups (Tr. p. 258). She testified that two students in her class used a "point sheet" to earn points for the display of positive behaviors, which was a constant reminder to them of what they should be doing (Tr. pp. 141-42, 169, 260-61). The point sheet went home with the students daily to be shared with the parents (Tr. p. 142). The point sheet was one type of behavior plan and the special education teacher testified that if it did not work with a particular student, class staff could try something else (Tr. p. 259). Behavior plans were reassessed on an as-needed basis (*id.*). If a student was disruptive to the class, one of the teachers either addressed their behavior in the classroom or pulled the student out of the classroom (Tr. pp. 169-70). The special education teacher testified that incidents of that type did not occur during the 2007-08 school year as much as they had in past years (Tr. p. 170). The special education teacher testified that students' social skills needs are also addressed during counseling sessions (Tr. p. 259).

The hearing record also reflects that the CSE recommended the CTT program for the student after it considered whether the placement was in the least restrictive environment (LRE). The June 2007 IEP noted that the CSE considered a 12:1 special class program, but deemed that program to be too restrictive in light of the student's strengths (Dist. Ex. 3 at p. 10). The CSE also considered a general education program without related services, but rejected that program as inappropriate due to the student's language, visual-motor and social skill needs (*id.*). The school psychologist testified that the teacher estimates of the student's instructional levels contributed to the recommendation of a CTT class because the CSE believed that the student could function in a general education class with a special education teacher to "attend to his needs" (Tr. pp. 111, 114-15). Additionally, she testified that the general education students in the CTT class were "hand picked" for their ability to model academic and behavioral skills and to give students with disabilities the opportunity to interact with typically developing peers (Tr. pp. 116-17, 142-43). The special education teacher testified that there was no noticeable separation of the general education and special education students in her CTT class, and that the students did not realize that she was a special education teacher (Tr. pp. 176-77).

I find that the hearing record supports the conclusion that the 2007-08 IEP sufficiently identified the student's areas of need, and that the recommended CTT placement would have met the student's needs at the time of the recommendation and was reasonably calculated to confer educational benefits to the student. For all of the reasons above, I do not find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is supported by the hearing record. Based upon the evidence in the hearing record, at the time they were formulated, the district's recommended special education programs and services were developed in a procedurally adequate manner and were reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395, n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I concur with the district that it offered the student an appropriate program for the 2007-08 school year.

As a penultimate matter, I now turn to the issue of whether the parent's inability to visit the proposed classroom prior to the beginning of the 2007-08 school year rose to the level of a denial of FAPE. I find that it did not. Although the IDEA requires parental participation in determining the educational placement of a child (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]), the assignment of a particular school is an administrative decision provided it is made in conformance with the IEP team's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, [4th Cir. 2007]). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).^{19, 20} This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the IEP team's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]).²¹ The USDOE has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]). While encouraging school districts to work with parents and offer opportunities to observe classroom and placement options, OSEP has opined that the IDEA does not entitle parents of children with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]). There is no evidence in the record to suggest that the student's special education or related services needs could only be addressed in a specific classroom or a specific school. In fact, the record indicates that there were two CTT classes at the proposed placement (Tr. p. 375-76). Moreover, the hearing record reveals that the parent was familiar with the concept of the CTT program, disagreed with this recommendation at the June 2007 CSE meeting, and in the letter dated August 21, 2007 indicated that in addition to her inability to visit the program she had "serious reservations" about the program (Tr. pp. 367-370,

¹⁹ The federal and state continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

²⁰ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]).

²¹ Educational placement decisions must also be made consistent with least restrictive environment principles (see 34 C.F.R. § 300.116[a][2], [b][3]).

373; Parent Ex. M). Although the parent was unable to visit the proposed classroom prior to the commencement of the 2007-08 school year I do not find that it supports a finding that the district failed to offer the student a FAPE (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; Application of the New York City Department of Education, Appeal No. 07-049).

Having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of the student in a home schooling program was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058). I have examined the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it found that the district had not offered the student a FAPE for the 2007-08 school year.

Dated: **Albany, New York**
 October 16, 2008

PAUL F. KELLY
STATE REVIEW OFFICER