



The University of the State of New York

The State Education Department State Review Officer

No. 08-080

Application of the [REDACTED] DEPARTMENT OF
EDUCATION for review of a determination of a hearing
officer relating to the provision of educational services to a
student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Emily R. Goldman, Esq., of counsel

Skyer, Castro, Foley & Gersten, attorneys for respondents, Jesse Cole Foley, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son based on a failure to provide an individualized transition plan and ordered it to reimburse the parents for their son's tuition costs at Bay Ridge Preparatory School (Bay Ridge) for the 2007-08 school year. The parents cross-appeal from the portion of the impartial hearing officer's decision which determined that a lack of multisensory instruction at the district's recommended placement did not render the district's program inappropriate. The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending twelfth grade at Bay Ridge (Tr. pp. 34-35). Bay Ridge is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (Dist. Ex. 8; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student is described in the hearing record as having dyslexia and dysgraphia, and being disorganized (Dist. Exs. 2 at p. 1; 8 at p. 3). His psychoeducational/vocational evaluation indicated that he had a positive attitude toward school, but required reassurance and

encouragement when confronted with challenges and that his self-esteem was an area in need of development (Dist. Exs. 3 at p. 4; 8 at p. 4). Academically, he exhibited deficits in reading, spelling and writing, with "significant" delays in decoding and processing of information (Dist. Exs. 3 at pp. 2-4; 8 at p. 3).

The student attended public school from grades first through eighth (Tr. pp. 226, 228-29, 264). He reportedly had a "great deal of difficulty with sound, symbol correspondence and learning to read" when he was in first grade (Tr. p. 226). Over the course of his attendance in public school, he received special education services, including "resource room," speech-language therapy, occupational therapy (OT), and counseling (Tr. pp. 228-29). Since the ninth grade, he has continuously attended Bay Ridge (Tr. pp. 231, 264). At Bay Ridge, the student participates in the "Bridge Program," which is purportedly a component of Bay Ridge high school that is specifically geared toward students with learning disabilities (Tr. p. 174).

On October 6, 2005, a school psychologist for the district conducted a psychoeducational/vocational evaluation of the student (Dist. Ex. 3 at p. 1). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full scale IQ score of 107 (average range), a verbal IQ score of 110 (high average range) and a performance IQ score of 100 (average range) (id. at p. 2). According to the evaluator, the student's verbal reasoning skills were in the upper end of the average range, while the student's performance on nonverbal tasks reflected significant difficulty with visual/perceptual tasks (id.). The evaluator reported that the student was able to use good eye/hand coordination, but had difficulty with strictly visual tasks with no motor component and described the student as an auditory rather than a visual or hands-on learner (id.).

The Woodcock Johnson Tests of Achievement-Third Edition (WJ-III ACH) was administered to assess the student's academic functioning (Dist. Ex. 3 at pp. 1-3). The student achieved scores in reading that indicated his decoding skills were at a 7.1 grade level, passage comprehension at a 5.8 grade level, and reading fluency at a 4.8 grade level (id. at pp. 2-3). The evaluator opined that the student's scores were indicative of his difficulty processing abstract information, making inferences and predictions, his slow reading rate, and delayed decoding skills (id.). In writing, the student's performance was estimated to be at a fourth grade level and the evaluator reported that although "thought content was there," the mechanics of writing were very weak (id. at p. 3). When asked to write a short paragraph on a given topic, the student was only able to produce several incomplete sentences with significantly delayed handwriting, spelling, sentence structure, and grammar (id.). The student achieved a score in spelling at a 3.1 grade level (id.). The student's performance in math indicated varied ability across subtests ranging from a grade equivalent score of 3.9 in math fluency (solving simple addition, subtraction and multiplication problems within a specific time frame) to a score at the 6.7 grade level in calculation (completing arithmetic problems involving addition, subtraction, multiplication, division, simple fractions, etc.), with a difficulty in long division and decimals, and a score at the 11.4 grade level in applied problems in which he demonstrated the ability to solve mathematical word problems (math reasoning skills), often without the use of paper and pencil (id. at pp. 3-4).

In the social/emotional domain, the evaluator described the student as a "somewhat shy youngster who has high aspirations for the future" (Dist. Ex. 3 at pp. 4-5). The evaluator also noted that the student's peer relationships were well developed (id. at p. 4).

The student's vocational assessment was completed using an instrument identified in the hearing record as "The Career Decision Making System (CDM)," which indicated that the student's "highest areas of interest" were in the business and arts fields (Dist. Ex. 3 at pp. 1, 4). The student reported that his favorite pastimes were playing sports, listening to and making up songs, computer technology, robotics and being with his friends (id. at p. 4). The evaluator suggested that the student's interest in music and business were reflected in the CDM results, and that the student should meet with his guidance counselor and further discuss his plans for after high school (id.).

The evaluator opined that the student would benefit from continued special education supports including multisensory and particularly auditory aides, redirection as needed, repetition and re-phrasing (id. at p. 5).

A social history of the student was taken by a district social worker during an interview with the student's mother on October 6, 2005 (Dist. Ex. 2). The report reflects that the student had been attending the self-contained special education Bridge Program at Bay Ridge since ninth grade and had previously attended a public charter school where he struggled academically and was assigned a "para" due to his significant dyslexia, dysgraphia and disorganization (id. at p. 1). Although no longer necessary, the student had also received vision therapy and had worn glasses to address visual perceptual delays (id.). The student's mother reported that she was pleased with the student's private school and believed that her son was happy and making progress there (id.). The parent further reported that her son "gets along well with others and that he has a strong desire to succeed" (id.). She further noted that the student had increased confidence in himself, had experienced academic gains, and had greater expectations of himself since attending Bay Ridge (id.). The student was reported to be in good health and lived with his parents and older brother who attended college in a program for students with learning disabilities (id. at p. 2). The student's interests were reported to include spending time with friends, playing basketball, and making jewelry to sell (id.). At school, he was involved in the stock market club, robotics club and the drama club as a stage crew member (id.).

The student was observed by a district special education teacher in his class at Bay Ridge on December 6, 2006 (Tr. pp. 22-25; Dist. Ex. 4). The observation report reflected that the student appeared interested in the class discussion, asked questions and copied notes from the board (Dist. Ex. 4). He was attentive, listened and watched a demonstration that was presented (id.). The teacher reported that the student typically showed an interest in the topics presented although he had difficulty reading, processing, and remembering facts necessary for exams (id.). She also reported that his homework was usually done on time (id.). During the observation, the class ratio was eleven students to one teacher (id.).

The student's 2006-07 first semester report card from Bay Ridge reflected grades of either "A" or "B" in modified English III, U.S. history, statistics, modified earth science I, physical education, art and "SAT prep" (Dist. Ex. 7). The student's grade in his earth science lab was "P"

(pass) for both first and second quarters, while the student's grades in psychology were "C" for the first quarter and "INC" (incomplete) for the second quarter (id.). Homework grades for both quarters were predominantly "E" (excellent) with two "G" (good) ratings and two "S" (satisfactory) ratings in each quarter (id.). The student's ratings for conduct, attentiveness to lecture, influence on other students, punctuality and dress code were almost exclusively "E" (excellent) for both the first and second quarters (id.).

On February 2, 2007, the student's English teacher at Bay Ridge completed a progress report indicating that the student had consistent attendance and arrived on time to class (Dist. Ex. 5). The student's teacher indicated that although the student received an "A-" for the first semester, his "high academic standing could be contributed to his modified program" (id.). The teacher also indicated that the student had strong comprehension skills which were reflected in his abstract reasoning, but reading, spelling and writing continue to be difficult for him (id.). The teacher reported no behavioral or parental concerns (id.).

An unsigned, undated teacher report for the 2006-07 school year reflected the student's performance in his reading/writing class (Dist. Ex. 6). The report indicated that the student's attendance and punctuality were excellent, reading comprehension was at a ninth grade level, silent word reading was at a fourth grade level, and the student had very strong abstract reasoning skills and phonetic spelling, but awkward syntax and poor use of conventions (id.). The report indicated that the student behaved appropriately for his age and that there were no parental concerns at that time (id.).

On April 19, 2007, the Committee on Special Education (CSE) convened for an annual review of the student's IEP (Dist. Ex. 8). The student's mother, a district representative, a school psychologist and a school social worker were present for the meeting (id. at p. 2). Additionally, the student's private school math teacher, English teacher, and reading specialist participated by telephone (id.). The resultant individualized education program (IEP) for the 2007-08 school year classified the student as learning disabled and recommended placement in a 10 month, 15:1 public school special class with counseling services of one 30-minute individual session per week (id. at pp. 1, 12).

Present levels of performance reported in the student's IEP indicated that the student had weaknesses in reading, spelling and writing, with stronger listening comprehension than reading comprehension skills (Dist. Ex. 8 at p. 3). The student was described as being dysgraphic, displaying organization issues and having continued self-esteem issues (id.). Teacher estimates indicated instructional levels for the student were at a sixth grade level in decoding, a ninth grade level in reading comprehension, a fifth grade level for writing, and a tenth grade level for math (id.).

The IEP listed the student's academic management needs as "redirection and refocusing as needed; allow ample time to complete in-class assignments and exams; multi-sensory approach to be incorporated into instruction; use of auditory aids; opportunities to express himself verbally; limit writing assignments; pre-printed copies of notes; provide review sheets; encouragement, feedback and praise; repetition, review and rephrasing" (Dist. Ex. 8 at p. 3).

Although an assistive technology device was recommended on the IEP, there was no specific device listed in the student's academic or physical management needs (id. at pp. 1-2, 5).

Accommodations for the student's participation in assessments reflected in the IEP provided double time for all tests longer than 30 minutes, a special location with not greater than 15 students, questions to be read aloud to the student, answers to be recorded in any manner, the use of calculator to be permitted, directions read and reread, and the use of arithmetic tables (Dist. Ex. 8 at p. 12).

The IEP contained five annual goals with short-term objectives addressing the student's needs in decoding, comprehension, writing, math, and counseling (Dist. Ex. 8 at pp. 6-9). There were no goals addressing the student's identified organizational needs (id.). Standard criteria were indicated for the student's promotion (id. at p. 12).

The transition portion of the IEP contained long-term adult outcomes for the student to "integrate into the community independently," "attend a post secondary institution for a Master of Science degree," "live independently," and "be competitively employed" (Dist. Ex. 8 at p. 15). Transition services recommended in the IEP, with responsible parties for each activity specifically delineated, included that the student "will relate school subjects to potential careers," that the student "will explore career opportunities by networking with community resources," that the student "will schedule and arrange college tours," and that the student "will assess his personal strengths and weaknesses" (id. at pp. 13, 15).

The district sent the parents a Notice of Recommended Deferred Placement, dated April 20, 2007, that summarized the CSE's recommendations on the student's IEP, informed them of their right to an immediate placement in the program, and recommended that the parents defer placement in the program until the start of the 2007-08 school year (Parent Ex. C). The notice also stated "[s]hould you wish to discuss this recommendation at a CSE meeting or with an individual member of the CSE, please call or write to us at the CSE address to arrange a meeting," and further advised that the parents could bring to the meeting "other individuals who have knowledge or special expertise regarding your child" (id.).

On April 24, 2007, the district provided the parents with a Final Notice of Recommendation (FNR) that again summarized the CSE recommendations on the student's IEP and contained the specific school location for the placement recommended at the April 19, 2007 CSE meeting (Parent Ex. D). The FNR advised the parents of their due process rights, including the right to request mediation or an impartial hearing and enclosed a statement of parental rights (id.). The FNR also gave the name and telephone number of a district contact person and advised that the parents could telephone or write her if they wished to discuss the final recommendation at another CSE meeting, and further advised that the parents could bring to the meeting "other individuals who have knowledge or special expertise regarding your child" (id.). The parents returned the FNR to the district with the words "I do not agree with this placement" written across the bottom of it (Dist. Ex. 9).

On June 13, 2007, the parents signed a contract enrolling the student at Bay Ridge for the 2007-08 school year and paid an enrollment deposit (Parent Exs. F; G at p. 3). A signed contract

and enrollment deposit were required by Bay Ridge to be submitted by June 25, 2007 in order to secure a placement for the student (Parent Ex. G at p. 2).

By letter from the parents' attorney dated August 20, 2007, the parents notified the district that they were placing the student at Bay Ridge as of the first day of school for the 2007-08 school year and intended to seek funding for the placement from the district (Parent Ex. B).

By due process complaint notice dated December 14, 2007, the parents alleged that the student was denied a FAPE on both procedural and substantive grounds (Parent Ex. A).

On December 18, 2007, the district responded to the parents' due process complaint notice (Dist. Ex. 1). The district denied all of the allegations contained in the parents' due process complaint notice, except it admitted that the CSE convened on April 19, 2007 to review the student's program; that the CSE continued the student's classification of learning disabled; that the CSE recommended a special class with a 15:1 student teacher ratio; that the CSE considered the student's social history, psychoeducational evaluation, classroom observation and teacher progress reports; that the CSE considered but rejected other programs for the student and considered the least restrictive environment in recommending an educational program for the student; and that an FNR was issued to the parents on April 24, 2007 with a specific placement site and the placement was reasonably calculated to enable the student to obtain meaningful educational benefits (*id.* at pp. 1-3). The district also maintained that the student's IEP contained a transition plan with long-term adult outcomes and annual goals, and that the student would be functionally grouped in the proposed class (*id.* at p. 3).

An impartial hearing convened on February 1, 2008 and concluded on May 15, 2008 after three days of testimony (Tr. pp. 1, 84, 284). The district called three witnesses and submitted ten documents into evidence (Tr. pp. 15, 90, 171; Dist. Exs. 1-10). The parents called two witnesses, one being the mother of the student, and submitted ten documents into evidence (Tr. pp. 225, 290; Parent Exs. A-J).

By decision dated July 1, 2008, the impartial hearing officer found that although the IEP was procedurally flawed because the CSE inappropriately relied on the student's private school English teacher as a regular education teacher for purposes of the CSE review,¹ the violation did not result in a loss of educational opportunity to the student (IHO Decision at pp. 13-16). Substantively, the impartial hearing officer found that the IEP was "reasonably calculated to enable the student to receive educational benefits" (*id.* at p. 16). The impartial hearing officer further determined that there was full participation by the student's private school providers in preparing the IEP; uncontroverted testimony that the CSE reviewed the student's most recent psychological and social evaluations, report card, teacher progress reports and classroom observation; and that the IEP provided for services that the student has been receiving and thriving under at Bay Ridge (*id.*). The impartial hearing officer noted that the lack of a formal assessment or formal observation of the student, as conceded by the district, is not "fatal to the

¹ Testimony indicates that the student's English teacher is certified in special education, but does not clarify whether the teacher is also certified in general education as asserted at the impartial hearing by the district's special education teacher and as noted on the attendance portion of the student's IEP (Tr. pp. 65-66, 212; Dist. Ex. 8 at p. 2).

[district's] claim that it offered the student a FAPE" (id.). Further, the impartial hearing officer determined that the district's recommended placement did not use multisensory instruction, as required by the IEP, but that this determination did not render the student's program inappropriate (id. at pp. 16-17).

However, despite finding that substantively "the IEP developed by the CSE is reasonably calculated to enable that student to receive educational benefits," the impartial hearing officer also determined that the district failed to offer the student a FAPE due to "the absence of an individualized transition plan" (IHO Decision at pp. 16, 18). The impartial hearing officer stated that there was "nothing in the record to indicate that the recommended school, or the student's IEP offers a transition plan based on the individual student's needs, taking into account the student's preferences and interests" and that the statements in the IEP consisted of "nothing more than conclusory statements indicating that the student is entering his last year of High School" (id. at p. 17).

Upon determining that the district failed to offer the student a FAPE based upon its lack of an individualized transition plan, the impartial hearing officer proceeded to find that the parents met their burden of proving that the student's placement at Bay Ridge was appropriate and that the equities favored the parents (IHO Decision at p. 18). Based on his findings, the impartial hearing officer ordered the district to reimburse the parents, upon proof of payment and attendance by the student, for tuition paid to Bay Ridge for the 2007-08 school year (id. at p. 19).

The district appeals the decision of the impartial hearing officer, alleging that the student's IEP was procedurally and substantively appropriate. It further alleges that even if the IEP transition plan was deficient, it was a de minimis error,² and did not amount to a denial of a FAPE. The district further alleges that the impartial hearing officer erred in finding Bay Ridge appropriate for the student and finding that the parents cooperated with the district. The district requests that the impartial hearing officer's decision awarding tuition reimbursement be annulled.

In their answer, the parents deny many allegations in the petition and contend that the district did not develop an individualized transition plan for the student as required by statute and regulation. The parents also cross-appeal, alleging that the impartial hearing officer improperly determined that the lack of a multisensory teaching approach at the district's proposed placement did not deny the student a FAPE. The parents further allege that their unilateral placement at Bay Ridge was appropriate for the student and the parents cooperated with the district such that equities do not bar an award of tuition. The parents request that the decision awarding tuition reimbursement be upheld.

The district submitted a reply to the parents' answer and an answer to their cross-appeal, arguing that the parents are not aggrieved because they prevailed at the impartial hearing level and, therefore, are not entitled to appeal. They further argue that even if the parents are permitted to appeal, the recommended district placement would have fulfilled the student's multisensory needs as required by the student's IEP.

² The district alleges that the transitional services offered by its recommended placement site more than compensate for any deficiency in the IEP transition plan.

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 district has an affirmative obligation to offer an eligible student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]; see Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137). 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]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). "The IEP is the central mechanism by which public schools ensure that their disabled students receive a free appropriate public education" (Polera v. Bd. of Educ., 288 F.3d 478, 482 [2d Cir. 2002]).

The federal and state statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53).

"An IEP must satisfy a range of detailed procedural requirements" (A.A. v. Philips, 386 F.3d 455, 459 [2d Cir. 2004]; see 20 U.S.C. § 1414[d]; 8 NYCRR 200.4[d][2]; A.A., 386 F.3d at 459, n.1). However, while school districts are required to comply with all IDEA and state 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]; Application of a Bd. of Educ., Appeal No. 05-058). If a procedural violation of the IDEA is alleged, a hearing 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]; see also 34 C.F.R. § 300.513[a]; 8 NYCRR 200.5[j][4]).

Substantively, 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; see also Thompson R2-J Sch. Dist. v. Luke P., 2008 WL 3984361, at *4 [10th Cir. Aug. 29, 2008]). A school district is not required to provide "every special service necessary to maximize each [disabled] child's potential" (Cerra, 427 F.3d at 195, quoting Rowley, 458 at 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, to fulfill its substantive obligations under the IDEA, 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]; Perricelli, 2007 WL 465211, at *15).

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).

Also under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]).

Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]). It must also include the transition services needed to assist the student in reaching those goals (id.).

Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]).

The student's recommended program must also be provided in the least restrictive environment (LRE) (see Walczak, 142 F.3d at 132). The IDEA provides that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other case facilities, are educated with children who are not disabled" and that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that regular 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 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]).

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]; see 20 U.S.C. § 1412[a][10][C]). 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).

In 2007 the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Upon the facts in this case, I find that the hearing record does not support the impartial hearing officer's determination that the district failed to offer the student a FAPE because of "the

absence of an individualized transition plan" (see IHO Decision at p. 18). Here, where the district offered a transition plan on the IEP, the issue in dispute is whether the transition plan was adequate, and if not, did the inadequacy rise to the level of denying the student a FAPE. Regardless of whether the alleged deficiencies in the transition plan were procedural errors or substantive deficiencies, or both, the hearing record does not contain facts which support a conclusion that such deficiencies significantly impeded the parents participation in the development of the IEP or that substantive educational harm or deprivation occurred as a result which rose to the level of a denial of a FAPE.

Uncontroverted testimony by the district representative indicates that although the student did not attend the CSE meeting, he was invited by way of a letter sent to his parents that notified them of the meeting (Tr. p. 37). Upon review of the transition portion of the IEP, I find that the plan developed by the April 19, 2007 CSE reflected the student's interests as indicated in his October 6, 2005 psychoeducational/vocational evaluation (see Dist. Exs. 3 at p. 5; 8 at pp. 13-15). The student's IEP included statements of the student's academic and social/emotional needs as they relate to his transition from school to postsecondary education (Dist. Ex. 8 at pp. 3, 4, 13, 15). Although not separately detailed in the IEP, the hearing record evidences that the student's mother, in order to assist in formulating the student's transition plan, was asked for input regarding the student's post high school intentions, interests and whether he had intentions of attending college which were considered in the drafting of the IEP (Tr. pp. 34-35). The hearing record also evidences that the student's mother and three of the student's private school teachers had the opportunity to contribute to the IEP (Tr. p. 37). There is nothing in the hearing record to illustrate that any of those individuals voiced concerns about the content of the IEP, including the content of the transition plan, at the April 2007 CSE meeting. The hearing record demonstrates that the student's mother was significantly involved in the IEP formulation.

The transition portion of the student's April 19, 2007 IEP included measurable long-term adult outcomes (goals) for the student, including integrating into the community independently; attending a postsecondary institution for a Master of Science degree; living independently; and being competitively employed (Dist. Ex. 8 at p. 15). The IEP reflected that the student's diploma objective is a Regents diploma (*id.*). Consistent with applicable regulations, I find that the student's transition plan delineated who was responsible for each of the transition activities (Dist. Ex. 8 at pp. 13, 15; see 8 NYCRR 200.4[d][2][ix][e]).

The student's transition objectives were sufficiently linked to his long-term adult outcomes. To address the student's desire to attend college and pursue a master's degree, he was pursuing a Regents diploma and had an objective to schedule and arrange for college tours (Dist. Ex. 8 at p. 15). His objective to relate his school subjects to potential careers was likewise linked to the outcome of attending college, as the student's math skills were a strength, and he was planning to pursue a business degree at a private university (Tr. pp. 185, 254). The student's transition objective of exploring career opportunities by networking with community resources was linked to the student's long-term outcome to be competitively employed and to integrate into the community independently (Dist. Ex. 8 at p. 15). The student's transition objective to assess his personal strengths and weaknesses in independent living skills was linked to his long-term outcome to live independently (*id.* at p. 14).

The student's IEP academic goals and objectives, which include a silent reading goal, a comprehension goal, a writing goal and a math goal, were also linked to his long-term adult outcomes for transition as all of the goals address the student's continued pursuit of academic achievement necessary for success in college (Dist. Ex. 8 at pp. 6-8). Additionally, the IEP included a counseling goal related to the student's long-term adult outcomes in addressing the development of skills needed to deal effectively with challenging situations in school (*id.* at p. 9).

In addition to the transition services specified on the student's IEP, the hearing record indicates that the student would have had numerous programs and services related to postsecondary options made available to him at the district's offered placement (Tr. pp. 122, 126-28). The assistant principal at the district's recommended school testified that the school offers a career awareness program that provided in-class information about career awareness, post-high school, "doing well in school" and available scholarships (Tr. p. 122). The recommended school also had a tutoring program to provide students with homework assistance and tutoring in different subjects, and offered clubs and activities (Tr. pp. 122-23). For students who desired to pursue higher education or vocational interests after high school, the offered placement location had a college advisor, courses to prepare for the PSAT and SAT, visits from different agencies and colleges continuously throughout the year, internships in particular areas of interest, and a culinary arts department (Tr. pp. 126-28).

Significantly, I note that the parents do not assert any specific substantive harm to the student in their pleadings, nor did the impartial hearing officer's decision point to or analyze any substantive harm to the student which would rise to the level of a denial of a FAPE on the basis of the alleged inadequate transition plan (*see* 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]). Moreover, there is no evidence in the hearing record that the student received any transition services at Bay Ridge that he would not have received at the district's recommended school. The hearing record indicates that the student was accepted at a private university and awarded a scholarship (Tr. p. 254).

Therefore, I find the student's IEP and transition plan were reasonably calculated to enable the student to receive educational benefits such that the district offered the student a FAPE in the LRE for the 2007-08 school year. The transition plan contains the requisite level of specificity for this particular student based on his individual needs, preferences and interests, and it includes long-term adult outcomes with objectives/activities in his areas of need including instruction, community experiences and in the development of his postsecondary adult living objective (college) in order to move the student toward those outcomes.

Nonetheless, even if the transition services as outlined in the student's IEP did not comport with statutory or regulatory requirements, such defects here did not rise to the level of causing substantive deprivation such that the student was not offered a FAPE (*see* 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Application of a Child with a Disability, Appeal No. 07-128; Application of a Child with a Disability, Appeal No. 97-70).

Turning to the parents' cross-appeal, I concur, but for different reasons, with the impartial hearing officer that the student was not denied a FAPE for reasons relating to the multisensory teaching approach required in the IEP. Specifically, I find that the impartial hearing officer

incorrectly found that a multisensory teaching approach, as required by the IEP, was not utilized at the district's recommended school.

According to the assistant principal at the district's recommended school, a multisensory approach refers to "different techniques that are used to assist students with their learning" and that these techniques include visual, audio, and tactile approaches (Tr. p. 161). The hearing record adequately demonstrates that the district's recommended school used multisensory teaching approaches such that the requirement for the same in the student's IEP could have been implemented at that location. The assistant principal testified that in addition to the Wilson reading program, which is used to address reading deficits which are more significant than that of the student in the instant case, the school used a multisensory approach in their self-contained English classes (Tr. pp. 160-61). Techniques included charts, overheads, videos, audio equipment such as an FM unit, and "theater type tactics" such as reading along while listening to a play and acting out roles (Tr. pp. 160-64). Although she was admittedly unsure of what specific approaches were utilized in the self-contained math class, the assistant principal testified that a multisensory approach was indeed utilized in that class (Tr. p. 162). The student's mother testified that she was verbally told by a special education teacher at the district's recommended school that multisensory techniques were not utilized at that school (Tr. pp. 236-38). However, the testimony by the assistant principal as to the approaches used at the district's recommended school was otherwise uncontroverted and, even if the student's mother was told by a teacher that no multisensory techniques were used, such a statement would not necessarily equate to the school not being able to fulfill the mandates of the student's IEP.

Based upon my determination that a multisensory teaching approach would have been utilized to implement the requirements of the student's IEP at the offered placement location, there was no denial of a FAPE pertaining to this aspect of the education offered to the student by the district and the parents' cross-appeal must be dismissed. Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether Bay Ridge was appropriate, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' other contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated July 1, 2008 that found that the district failed to offer the student a FAPE and ordered the district to reimburse the parents for tuition paid for the 2007-08 year are hereby annulled.

**Dated: Albany, New York
September 29, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**