



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-082

**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

Susan Luger Associates, Inc., attorney for respondent, Joseph M. Fein, 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 respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled at Stephen Gaynor in a self-contained "transitional class" consisting of 11 students (Tr. p. 288). Stephen Gaynor has not been approved by the Commissioner of Education as a school with which 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 speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student began attending a private preschool when she was 2 1/2 years old (Dist. Exs. 8 at p. 2; 11 at p. 2). During preschool, the student made adequate social adjustments indicating that she liked school, but experienced frustration when the work became more complicated (Dist. Ex. 11 at p. 2). For the 2000-01 school year, the student attended kindergarten at a private general education elementary school where she was enrolled through the 2004-05 school year (Dist. Exs. 8 at pp. 1-2; 11 at p. 2). Since the first or second grade, the student has received tutoring twice per week (Dist. Ex. 11 at p. 2). According to the parent, the student's first grade

teacher remarked that the student was sometimes inattentive and her listening skills were weak (id. at p. 3). The parent testified that she first noticed that the student had special learning needs when the student was in the second grade (Tr. p. 325). In January 2004, the student received speech-language therapy once or twice per week, which focused on the student's listening skills (Dist. Ex. 11 at p. 2). When the student was in the fourth grade, the parent referred the student to the district's Committee on Special Education (CSE) citing concerns regarding the student's needs for organizational skills, speech-language services and testing accommodations (id. at pp. 1-2). Over the following years, the parent had the student independently evaluated (Tr. p. 326; see Dist. Ex. 14; see also Parent Ex. E).

In a psychoeducational evaluation dated December 2, 2004, the parent reported to the evaluator that according to the student's fourth grade teacher, the student was performing below grade level, had difficulty with reading and science, thinking abstractly, expressing herself and retaining information in content areas (Dist. Ex. 10 at p. 1). The parent reported that the student's concentration and attention levels were also noted to be variable (id.). The parent indicated that the student exhibited difficulty with receptive and expressive language skills, understanding word problems, making inferences and "struggle[d]" in science (id. at p. 2). The evaluation reflected that the student's overall cognitive functioning was in the low average range (id. at p. 3). The evaluator noted that although the student responded well to praise, she was quick to respond with "I don't know" when presented with a difficult item, was reluctant to attempt unknown items and had a tendency to rush through tasks without rechecking her work (id. at p. 2). The evaluator administered the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) which yielded a full scale IQ score of 84 (low average range), a verbal comprehension index score of 83 (low average range), a working memory index score of 107 (average range), a perceptual reasoning index score of 77 (borderline range) and a processing speed index score of 88 (low average range) (id. at pp. 3-5). The evaluator also administered the Wechsler Individual Achievement Test - Second Edition (WIAT-II) which yielded a reading composite score of 95 (average range), a mathematics composite score of 104 (average range) and a written language composite score of 98 (average range) (id. at pp. 5-6). To assess the student's social and emotional functioning, the evaluator administered a sentence completion task using 22 open-ended questions to allow the student to express her feelings (id. at p. 6). The student had difficulty with this task and provided responses to ten out of 22 questions (id.). The student also completed a human figure drawing, which the evaluator opined lacked detail and was "somewhat immature for her age" (id.). The evaluator concluded that the student was "a friendly and respectful youngster with low average cognitive potential", who appeared to be likeable and socially appropriate (id. at pp. 6-7). Academic testing indicated average skills in the areas of reading, math and written language (id. at p. 7).

On December 8, 2004, the parent completed an application for the student to attend Stephen Gaynor (Dist. Ex. 8). The application indicated that the student's sibling was currently attending Stephen Gaynor, that the student would benefit from the school's small class sizes and the attention from learning specialists and that she would be "taught strategies that [could] enable her to learn and work to her potential" (id. at p. 2).

On April 4, 6, 11 and May 4, 2005, a private neuropsychological and educational evaluation of the student was conducted to address the parent's concerns regarding the student's difficulty learning lessons in class, completing homework independently, receptive and expressive language skills, and writing skills (Dist. Ex. 14 at p. 1). The evaluator opined that the

student was "a well related, engaging and pleasant child who was a pleasure to work with" (id. at p. 8). Although the report reflected that the student demonstrated variable effort, testing results indicated age appropriate capacity to learn, reason and solve problems with specific weaknesses in the student's ability to accumulate knowledge through visual means (id.). The student's academic skills were at or above expected levels for single word reading, mathematics, spelling and writing, but her reading comprehension showed mild weaknesses in deriving information from lengthier text and in inferencing (id.). The evaluator noted that the student did not readily understand the academic tasks presented to her, if such tasks were not explicitly stated to her, over-relied on simple sentence structures and was disorganized in her writing (id.). Neuropsychological testing indicated that the student had adequate ability to sustain attention over time and to attend to visual and auditory information (id.). The evaluator reported that the student exhibited significant difficulty on open-ended and ambiguous tasks when rules were not clearly outlined and despite indications that the student was cognitively able to do so, the student did not apply good reasoning skills during ambiguous situations, which made independent work challenging (id.). Prior language testing indicated that although the student's ability to process auditory information and understand language was developing normally, she had difficulty with higher-order language functioning; including her ability to appreciate ambiguity in language and interpret figurative, non-literal language (id.). The test results were also consistent with the student's difficulties in day-to-day life in understanding abstract information and concepts, which were less explicit and direct (id. at p. 9). The evaluation indicated that the student's visual-spatial skills were weak and she displayed difficulty constructing with concrete materials, drawing and copying (id.). The student was able to learn, retain and recall visual information when tasks involved visual and verbal components (id.). In terms of the student's social, emotional and behavioral functioning; she did not present internalizing, externalizing or attentional disorders (id.). The evaluator concluded that the student was "a girl of average verbal cognitive potential and slightly weaker potential for learning and problem solving in novel, nonverbal learning situations" (id.). Weaknesses were present in "higher-order language functioning, visual-spatial perception and learning, visual-motor integration skills, and executive functioning related to task performance under ambiguous and open-ended circumstances" (id.). The evaluator suggested that a diagnosis of a learning disorder, not otherwise specified (NOS) was warranted (id.). The evaluator recommended support services of a collaborative team teaching (CTT) classroom, "resource room" twice per week and continued language therapy outside of school (id. at p. 10).

The student began attending Stephen Gaynor at the beginning of the 2005-06 school year (Tr. p. 327). The student's 2005-06 and 2006-07 teacher from Stephen Gaynor described the school as a small independent school for students between the ages of five and fourteen who present with learning disabilities (Tr. p. 268). The students at Stephen Gaynor exhibit language difficulties and dyslexia, with "some emotional overlays" (Tr. p. 288).

In an undated, ungraded progress report, the student's progress at Stephen Gaynor for an undetermined period of the 2006-07 school year was summarized in narrative form for all academic areas (Dist. Ex. 4).<sup>1, 2</sup> With regard to reading skills, the student was described as a

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<sup>1</sup> I note that the hearing record contains duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both the parent's and district's exhibits are identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>2</sup> I note that Parent Ex. H includes an undated Stephen Gaynor progress report and an undated Stephen Gaynor

fluent sight reader who had a good sense of phrasing, although she did not read with expression or for pleasure (id. at p. 1). The progress report noted that the student did not manifest a persistent pattern of decoding issues and was able to apply syllabication rules and strategies to decode (id.). Additionally, the student had improved in the areas of listening comprehension and class participation and was comfortable asking for clarification regarding figurative language, temporal relationships and complex cause/effect relationships (id. at p. 2). The progress report also noted that the student participated "more" actively in discussions, followed class lectures and took notes on a laptop computer (id.). With regard to the student's writing skills, the progress report reflected that the student was a confident writer who had a "good grasp" of capitalization rules, used end punctuation consistently, used commas to off-set items in a series, wrote in compound and complex sentences, understood basic paragraph structure, summarized stories, used the three-step writing process and proofread her work independently (id. at pp. 3-4). The progress report indicated that the student's areas of need included understanding of higher-level vocabulary, appropriate use of prepositions, synthesizing information to construct topic and concluding sentences, and expository writing (id. at p. 3).

In regard to the student's visual memory skills, the progress report noted the student copied accurately from both the blackboard and the whiteboard onto her laptop, had improved map skills and was able to better recognize significant information in pictures (Dist. Ex. 4 at p. 4). With regard to the student's gross motor skills, the progress report indicated that the student had good balance, right/left discrimination, body awareness and sitting posture, but used a teacher's chair and cushion to support her back due to a herniated disc (id. at p. 5). In regard to graphomotor skills, the student was reported to be left handed, have clear, legible handwriting, know cursive letter formations, but preferred manuscript (id.). The student used a variety of computer software to organize and present information and was a proficient typist (id.).

The progress report further described the student's organizational skills as a "strength," both in material organization and in time management skills (Dist. Ex. 4 at p. 6). The student made smooth transitions between subjects and free and work time, but took a long time to settle into her work in less structured situations (id.). The progress report indicated that the student followed oral directions well, sought immediate clarification when needed and, although at times she was confused by vocabulary, she followed written directions well (id.). With regard to oral language and communication, the student communicated her thoughts and ideas to teachers and peers, even though she continued to display deficits in reduced vocabulary and had difficulty organizing higher-level concepts (id. at p. 7). The progress report stated that although the student did not "pick up" on nonverbal cues which confused listeners, she was able to use teacher scaffolding to assist with clarification (id.). The progress report indicated that the student received speech-language therapy, had stronger social than academic language, used awkward syntax when she expressed conceptual ideas, had a limited vocabulary and poor understanding of higher-level language (id.).

With regard to the student's behavior, the progress report noted that the student had exemplary behavior in her homeroom and, although she had exhibited inappropriate and disrespectful behavior in other classes, her behavior improved after a parent-teacher-student

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mid-term report card. Both appear to be incomplete. Therefore, I will refer to Dist. Ex. 4 as the complete version of the undated Stephen Gaynor progress report. The hearing record does not contain a complete version of the Stephen Gaynor mid-term report card.

conference (Dist. Ex. 4 at p. 8). The progress report further noted the student's improvement in focus, attention and interest in learning, but that she was sensitive to perceived criticism and often misinterpreted constructive suggestions as disapproval (id.). The progress report also indicated effective methods in dealing with the student, such as the utilization of a highly structured environment with clear routines and expectations, opportunities to work with teachers who understood her learning issues, running short errands outside the classroom, the employment of a token reward system for model behavior, the use of the student's parent for support and the expertise of an outside specialist to assist the student in recognizing appropriate behavior limits and developing self-advocacy skills (id.). The progress report described the student as responsible in fulfilling her homework assignments, seeking clarification via e-mail and assisting peers with missing coursework and directions (id. at p. 9).

With regard to mathematics, the progress report indicated the student was performing at an approximate sixth grade level; was able to do multiplication and division with mixed numbers; improved her problem solving skills with fractions; solved decimal word problems; learned place values of decimals, added, subtracted, multiplied and divided decimals; and was able to do conversions with fractions, decimals and percentages (Dist. Ex. 4 at p. 11). In regard to social studies, the progress report indicated curriculum content areas of study, as well as, specific skills used to address the content, such as reading, writing, map skills, vocabulary strategies, critical thinking and public speaking (id. at p. 12). The student's performance and progress in social studies was not reported (id.). The student displayed strong organizational skills, worked independently and sought clarification when needed (id. at p. 13). The student's progress regarding spelling was not indicated (id. at p. 10).

The student's teachers at Stephen Gaynor also prepared an undated, ungraded 2006-07 school year mid-term report card commenting on the student's progression in numerous academic areas (Parent Ex. H at pp. 13-22). With regard to reading fluency, one of the student's teachers described the student as "a confident, accurate reader" whose successful use of decoding and phrasing strategies resulted in improved reading comprehension; however, the teacher recommended more expressive reading to augment comprehension skills (id. at p. 14). In regard to reading comprehension, the report card indicated the student had made enormous gains and consistently identified the main idea using a variety of strategies (id.). With regard to creative writing, the report card reflected the student wrote a first draft, edited her work independently, experimented with varied sentence structures and higher-level language, worked with teachers to fine-tune stories and was receptive to suggestions to add details and context and learn grammar rules (id. at p. 15). With regard to handwriting, the student's teachers indicated that the student's handwriting was "lovely," clear and elegant (id.). Additionally, the student developed excellent computer skills (id.).

In regard to grammar, punctuation and spelling, the student made "steady progress" diagramming sentences by use of a multisensory grammar program, "steadily" built an understanding of suffixes, applied what she knew about spelling to her own writing, used spell check and kept a notebook for frequently used homophones (Parent Ex. H at pp. 16-17). The student's teachers noted the student presented difficulty in identifying verbs and adverbs and exhibited inconsistency as to syllable analysis (id. at p. 16).

With regard to mathematics, the report card indicated that the student had done "an outstanding job" and had strengthened her skills in fractions, multi-step word problems, graphing

and statistic concepts (Parent Ex. H at p. 17). The teacher reported that the student worked well with other students; however, she did her best work independently (id.). She was also neat, well organized, thorough and eager to learn more advanced math topics (id.). In regard to social studies, the report card reflected that the student made "outstanding progress," namely she demonstrated high interest in topics, made good efforts in understanding concepts, was prepared for class, participated in class discussions, recognized cause/effect relationships and used note taking strategies to assist in fact recall (id. at p. 18). With regard to the student's science progress, the science teacher reported that she had made "steady progress" using the "Scientific Method," exhibited frustration with review and vocabulary work, "tune[d] out" at times, but asked questions and showed a "good grasp of the current material" (id. at pp. 18-19). With regard to computer skills, the report reflected that the student continued to demonstrate an understanding of advanced computer concepts, applied all of the required skills and strategies, used tools, equipment and materials correctly with little assistance and was helpful to her peers (id. at p. 19).

General comments from the student's teachers in the mid-term report card indicated that the student had become a positive leader during cooperative learning work; used organizational skills to move group projects to a timely completion; socialized with a broader circle of people; showed respect for her homeroom teacher and school administrators; made "excellent progress" in the academic areas of reading comprehension, math and writing; developed strong work habits; incorporated reflection and rewriting tactics; increased her class participation and asked questions (Parent Ex. H at p. 22).

On January 17, 2007, a classroom observation of the student was conducted by a district special education teacher at Stephen Gaynor (Dist. Ex. 5). The observation report indicated that the student was observed in an English class comprised of ten students, a teacher and two teacher assistants (id.). The student was reported to have participated "well," was "on task" and "well behaved" (id.). The observer noted that the student read fluently at a good pace with no errors in pronunciation (id.).

On March 10, 2007, the parent signed a 10-month contract with Stephen Gaynor for the student's enrollment for the 2007-08 school year (Parent Ex. F). On March 15, 2007, the parent paid a registration fee to Stephen Gaynor (Tr. p. 345; Parent Ex. F at p. 3).

On May 21, 2007, the CSE convened for student's annual review and to develop her individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 1).<sup>3</sup> Participants included both of the student's parents; the district representative, who was also the school psychologist; a district regular education teacher; the school social worker; a district special education teacher; an additional parent member; and an educational advocate on behalf of the parent (Tr. pp. 82, 223; Dist. Exs. 1 at p. 2; 3). The student's classroom teacher at Stephen Gaynor participated by telephone (id.). The CSE had before it for consideration an undated progress report from Stephen Gaynor, the CSE file, a December 2004 psychoeducational evaluation, a May 2005 neuropsychological and educational evaluation, a January 2007 district observation of the student and the student's medical records (Tr. pp. 83-84; see Dist. Exs. 4; 5; 7; 10; 14). Based upon teacher reports, the student's academic performance and learning

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<sup>3</sup> I note that Parent Ex. A is incomplete. Therefore, I will refer to Dist. Ex. 1 as the complete version of the student's May 21, 2007 IEP.

characteristics portion of the May 21, 2007 IEP reflected that the student read fluently, used phonemic strategies to decode, her written work was "OK," and that the student understood most of what she read, although she needed improvement in the area of inferencing (Dist. Ex. 1 at p. 3). In regard to the student's performance in math, the May 21, 2007 IEP indicated that the student performed multi-digit multiplication and division of mixed numbers, decimals and percentages (id.). The May 21, 2007 IEP noted that the student's instructional levels were estimated by "teacher report" to be at a 5.0 grade level equivalent in reading and a 6.0 grade level equivalent in math (id.). The student's present level of social/emotional performance on the May 21, 2007 IEP indicated that the student respected teachers, although she was stubborn and non-compliant at times, was sensitive to criticism, often misinterpreted constructive suggestions and displayed a high degree of test anxiety when taking tests (id. at p. 4). The student's May 21, 2007 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the regular and/or special education teacher (id.). The CSE did not develop a behavioral intervention plan (BIP) for the student (id.). Management needs for the student's social/emotional issues included a well-structured, integrated educational setting with appropriate remediation, particularly in the area of reading and appropriate related services of speech-language therapy and counseling (id.). The May 21, 2007 IEP reflected that the student did not display medical or physical needs and was able to participate in all activities without limitations (id. at p. 5). The May 21, 2007 IEP contained goals and short term objectives related to the student's needs in reading, writing, math, language and counseling (id. at pp. 6-11).

The May 21, 2007 CSE determined that the student continued to be eligible for special education services as a student with a speech or language impairment (Dist. Ex. 1 at p. 1). For the 2007-08 school year, the May 21, 2007 CSE recommended a 10-month program consisting of a CTT class with a staffing ratio of 13:1 and related services in a separate location of group counseling one time per week for 30 minutes, individual speech-language therapy two times per week for 30 minutes and group speech-language therapy one time per week for 30 minutes (id. at pp. 1, 13). The May 21, 2007 IEP indicated that the student would participate in state and local assessments with accommodations, including separate testing locations, extended time allotted for tests, directions read and reread aloud and questions read aloud, except for tests of reading comprehension (id. at p. 13). The May 21, 2007 CSE considered and rejected a "special 12:1 class" because the student continued "to require support, instruction and selective modification of curriculum to address [her] areas of delay" (id. at p. 12). The May 21, 2007 CSE determined that the student required "an integrated program where she can receive adequate academic challenge" (id.). The hearing record reflects that both the parent and the student's teacher from Stephen Gaynor expressed their disagreement at the May 21, 2007 CSE meeting with the CSE's recommendation for a CTT class (Tr. pp. 327-29) and discussion ensued (Tr. pp. 272-73). The parent testified that she informed the CSE at the May 21, 2007 meeting that she did not believe that the CTT class was appropriate because she had visited a CTT class in "previous years" and believed that it was too large for the student (Tr. p. 328). The hearing record does not reflect that the parent, her advocate, or the special education teacher from Stephen Gaynor expressed any other concerns with the proposed IEP at the May 21, 2007 CSE meeting as the IEP was being developed.

A "CSE Review Rationale" (i.e. meeting notes), dated May 21, 2007, regarding the May 21, 2007 CSE meeting was drafted by the district's school psychologist and was consistent with the information on the student's IEP (compare Dist Ex. 1, with Dist. Ex. 3). The rationale indicated that the student's cognitive functioning was average, she had made "enormous

academic progress," and in addition to difficulty with inferencing, the student displayed difficulty understanding temporal relationships (Dist. Ex. 3).

The parent received a Final Notice of Recommended Deferred Placement, dated May 30, 2007, which indicated that she would receive a Final Notice of Recommendation (FNR) notifying her of a "specific location" for the student based upon the CSE's recommendations "on or before August 15, 2007" (Parent Ex. J). By FNR dated June 5, 2007, the district offered the student a CTT class at one of the district's community schools with related services of group counseling and individual speech-language therapy for the 2007-08 school year (Parent Ex. K). On June 8, 2007, the parent acknowledged receipt of the FNR and indicated that she had made arrangements to view the district's recommended placement on June 21, 2007 (Dist. Ex. 12). By letter dated June 21, 2007 to the CSE chairperson, the parent informed the district that she had visited the recommended "program" and that she believed the program was not appropriate for the student because the school and class sizes were "much too large" and the program would not "meet [the student's] needs" (Parent Ex. I). The parent stated that she was unable to accept the recommended program for the student and notified the district that the student would remain at Stephen Gaynor "until the department offers me an appropriate program" (*id.*). The parent did not inform the district in the letter that she would seek reimbursement for the cost of her placement of the student at Steven Gaynor for the 2007-08 school year (*id.*), nor did she indicate in her letter that she objected to the contents of the May 21, 2007 IEP or to the IEP formulation process. The parent testified that she did not receive a response from the district to her June 21, 2007 letter (Tr. p. 340). The parent further testified that the CSE did not reconvene to discuss her concerns about the recommended placement and did not offer another placement to the student (*id.*). The parent stated she was not contacted by anyone in the district with regard to observing another placement (Tr. pp. 340-41). The parent asserted that that the June 21, 2007 letter was her last communication with the district for the 2007-08 school year (Tr. p. 341).

By "corrected" due process complaint notice dated October 23, 2007, the parent, through her advocate, requested an impartial hearing alleging that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Parent Ex. B at p. 2). The parent asserted that the student required a small self-contained special education class in a small self-contained special education school (*id.*). The parent stated that she had selected an appropriate placement for the student and cooperated with the CSE (*id.*). The parent sought reimbursement for the student's tuition at Stephen Gaynor for the 2007-08 school year (*id.*). The due process complaint notice did not identify any specific facts or concerns regarding the content of the May 21, 2007 IEP or the IEP formulation process (*id.*).

The impartial hearing convened on January 16, 2008 and concluded on May 28, 2008, after six days of testimony (Tr. pp. 1, 33, 76, 147, 232, 354). At the impartial hearing, the district presented documentary evidence and offered testimony by the special education teacher of the recommended CTT class, the district's school psychologist who participated at the May 21, 2007 CSE meeting and the teacher of the speech and hearing handicapped at the recommended school (Tr. pp. 47, 79, 357). The parent presented documentary evidence and offered testimony by the student's private speech-language pathologist, an educational advocate,<sup>4</sup>

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<sup>4</sup> I note that the educational advocate who testified at the hearing was employed by the same advocacy organization as the attorney who represented the parent at the hearing and on appeal (Tr. p. 229).

the private speech-language pathologist/audiologist who had evaluated the student in prior school years, the student's classroom teacher for the 2005-06 and 2006-07 school years at Stephen Gaynor, the student's classroom teacher for the 2007-08 school year at Stephen Gaynor and the parent (Tr. pp. 189, 221, 235, 266, 287, 325).

By decision dated July 9, 2008, the impartial hearing officer determined that the district had the burden to prove that it offered the student a FAPE for the 2007-08 school (IHO Decision at p. 8). In her decision, the impartial hearing officer reviewed the positions of the parties as presented at the hearing and without any explanation, summarily concluded "[in] this matter, it is the position of this hearing officer that the CSE did not make a valid placement recommendation with respect to the child's educational program" (*id.*). The impartial hearing officer offered no analysis or explanation for her conclusion that the district did not offer the student a FAPE.<sup>5</sup> Further, the impartial hearing officer stated that based upon testimonial evidence, the parent's unilateral placement of the student at Stephen Gaynor was an appropriate educational setting for the student as the student demonstrated "consistent progress" (*id.* at p. 9). Lastly, the impartial hearing officer determined that the parent had cooperated with the district throughout the process and that the cost of tuition at Stephen Gaynor was not unreasonable (*id.*). Accordingly, the impartial hearing officer ordered the district to reimburse the parent for the student's tuition at Stephen Gaynor for the 2007-08 school year, upon presentation of all required documents to the district (*id.*).

The district appeals asserting that the impartial hearing officer incorrectly determined that the district bore the burden of "proving by substantial evidence" that it had "made a valid and timely placement offer" (IHO Decision at p. 8). Additionally, the district argues that the impartial hearing officer incorrectly held that the district denied the student a FAPE for the 2007-08 school year. The district maintains that the impartial hearing officer failed to explain how she reached her decision that the district denied the student a FAPE. The district also asserts that: (1) it was not disputed that the May 21, 2007 CSE was duly constituted; (2) the May 21, 2007 IEP contained present levels of performance in the areas of academic achievement, functional performance, learning characteristics, social and physical development and management needs; (3) the May 21, 2007 IEP included an appropriate classification for the student; (4) the May 21, 2007 IEP contained measurable goals and short-term objectives;<sup>6</sup> (5) the May 21, 2007 IEP recommended a special education program with related services in the least restrictive environment (LRE); and (6) the May 21, 2007 IEP recommended appropriate testing accommodations. The district further argues that the issue of whether the parent was included in the placement decision made by the May 21, 2007 CSE was only raised at the impartial hearing, but was not raised in her due process complaint notice and; therefore, should not be addressed on

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<sup>5</sup> State regulations provide in relevant part, that "[t]he decision of the impartial hearing officer ... shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). It is not clear from the impartial hearing officer's decision that she made findings of fact. The impartial hearing officer is encouraged to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts, referencing applicable law, in support of her conclusions.

<sup>6</sup> The district argues in its petition that although the parent challenged the May 21, 2007 IEP goals at the impartial hearing, the parent failed to raise the issue in her due process complaint notice and; therefore, it should not be addressed on appeal (Tr. pp. 133-136; see also Dist. Ex. B). However, I note that the district did not object at the time of the impartial hearing to the parent challenging the IEP goals (see Tr. pp. 88-91, 96-97, 114, 133, 197-98, 224-25, 325). Therefore, I will address this issue on appeal.

appeal. The district also maintains that the impartial hearing officer incorrectly held that the parent's unilateral placement of the student at Stephen Gaynor was appropriate. The district requests that the impartial hearing officer's decision be annulled.

The parent submitted an answer admitting and denying the district's allegations. Specifically, the parent argues that, at the impartial hearing, the district did not object to the parent raising both the issue of whether the goals were appropriate and whether the parent was part of the placement decision made by the CSE and; therefore, the district cannot raise objections to these issues on appeal.

Two primary purposes of the Individual 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]). A student's educational program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

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 Bd. of Educ., Appeal No. 08-070; 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).

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).

I have considered the district's argument regarding the burden of proof; however I have reviewed the hearing record and reached my determination in this matter while placing the burden of proof and production on the district. A thorough review of the hearing record demonstrates that the district adequately complied with the necessary procedural requirements and that the special education program and related services recommended by the district in the May 21, 2007 IEP were reasonably calculated to confer educational benefits to the student and were offered in the LRE. Thus, at the time it was formulated, the May 21, 2007 IEP offered the student a FAPE for the 2007-08 school year.

The student's cognitive and academic needs were reflected in a private neuropsychological and educational evaluation of the student conducted in April and May 2005 (Dist. Ex. 14). Although the results of the report suggested that the student had an age appropriate capacity to learn, reason and solve problems, the student displayed specific weaknesses in her ability to accumulate knowledge through visual means (*id.* at p. 8). Additionally, the report indicated that even though the student's academic skills were "at or above expected levels" for single word reading, mathematics, spelling and writing, the student's reading comprehension revealed mild weaknesses in deriving information from lengthier texts and inferencing (*id.*). Also, the student had difficulty understanding academic tasks presented to her if those tasks were not explicitly presented to her, over-relied upon simple sentence structures and was disorganized in her writing (*id.*). The report indicated the student had difficulties with impulsivity and self-monitoring in the classroom and open-ended and ambiguous tasks, when rules were not clearly outlined for her (*id.*). In terms of attention, the report reflected that the student had adequate ability to sustain attention over time and to attend to visual normal functioning (*id.*). Similar findings were reported in a district psychological evaluation of the student dated December 2004 (Dist. Ex. 10). The student's scores indicated low average cognitive potential and average academic ability in reading, math and written language (*id.* at pp. 6-7).

In October 2007, the student was reevaluated by a private evaluator to assess the status of her auditory and language processing (Parent Ex. E).<sup>7</sup> The evaluator stated that based upon an initial evaluation of the student, "[a] language processing disorder was identified with difficulties in receptive, expressive and executive language functions, and temporal integration and processing speed delays" (*id.* at p. 1). The evaluation revealed that the student's hearing was within normal limits, her formal auditory processing tests were normal, her phonological processing skills were "good and at grade level" and she was able to understand ambiguous sentences; however, she presented with language processing deficits, such as, inferencing and meaning from context, had difficulty in word retrievals and expressing herself in a conversation, all of which were not commensurate with the student's other skills (*id.* at p. 6).

The May 21, 2007 IEP reflected the student's needs in the academic and social/emotional present levels of performance as indicated in the reports that were before the May 21, 2007 CSE (Dist Ex. 1 at pp. 3-4). The student needed improvement in reading comprehension and, based upon teacher estimates, the student's reading instructional level of 5.0 indicated an approximate delay of two years, while her math instructional level of 6.0 indicated a delay of approximately one year (*id.* at p. 3). The student was described as stubborn, non-compliant, and sensitive to criticism, and it was noted that the student misinterpreted constructive suggestions and experienced test anxiety (*id.* at p. 4).

The district's speech-language teacher at the recommended placement testified that she reviewed the student's May 21, 2007 IEP and the student's speech-language evaluations of 2006 and 2007 (Tr. p. 366). She opined that even though the student achieved scores in the average

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<sup>7</sup> The auditory and language processing re-evaluation (Parent Ex. E) submitted by the parent at the impartial hearing was not before the CSE team in May 21, 2007. Further, I note that the student was initially evaluated in December 2003 and reevaluated in November 2004, December 2005, December 2006 and October 2007 (Parent Ex. E at p. 1). Additionally, the re-evaluation in 2007 specified the previous years testing results (*id.* at pp. 2-5, 8).

range in most of the test areas on the evaluation, the student's speech-language needs would be addressed by goals on inferencing, word finding and expressive language and, if there were any deficiencies, they would be mild (Tr. p. 369).

The student's Stephen Gaynor teacher for the 2005-06 and 2006-07 school years testified that the student's needs also included a "small class size" and "idea maintenance" (Tr. pp. 271, 275). The teacher testified that the student also had difficulty solving word problems and exhibited distractibility (Tr. pp. 275-76).

To address the student's academic needs in the LRE, the May 21, 2007 CSE recommended a 13:1 CTT placement for the 2007-08 school year with related services of group counseling and individual and group speech-language therapy (Dist. Ex. 1 at pp. 1, 14). The May 21, 2007 CSE opined that "an integrated program where [the student] can receive adequate academic challenge remain[ed] the most appropriate" (*id.* at p. 13). The May 21, 2007 IEP included annual goals in reading, math and writing, which were consistent with increasing the student's noted instructional levels by one year and corresponding short-term objectives, which targeted the student's specific areas of need in reading comprehension and inferencing (*id.* at pp. 3, 8-10). The district representative, who was also the school psychologist, testified that the district's special education teacher at the May 21, 2007 CSE based the student's goals on the progress report of Stephen Gaynor that the CSE had before it (Tr. p. 113).

The student's related service needs were addressed in the May 21, 2007 IEP with recommended services of group counseling one time per week for 30 minutes, individual speech-language therapy two times per week for 30 minutes and group speech-language therapy one time per week for 30 minutes (Dist. Ex. 1 at p. 14). The May 21, 2007 IEP included one annual goal and five short-term objectives addressing the student's social/emotional needs, namely the student's test anxiety and behavior related to testing situations (*id.* at p. 10). This goal and the accompanying short-term objectives were consistent with the testimony of the district representative who stated that at the May 21, 2007 CSE the student's current classroom teacher indicated that the student had difficulty with test anxiety (Tr. pp. 133-34). Further, the May 21, 2007 IEP addressed the student's needs for testing accommodations, such as separate testing locations, extended time allotted for test taking (i.e. double time), directions read and reread aloud and questions read aloud, except tests of reading comprehension (Dist. Ex. 1 at p. 14). Additionally, the May 21, 2007 IEP included two annual goals and seven short-term objectives addressing the student's expressive and receptive language needs (*id.* at p. 9). These goals and short-term objectives were consistent with the opinion of the district's speech-language teacher and the student's 2006 scores on the auditory and language processing re-evaluation (Tr. p. 369; Parent Ex. E at p. 5).

Upon reviewing the student's May 21, 2007 IEP, the district's CTT special education teacher opined that the May 21, 2007 CSE recommended placement of a CTT class for the student for the 2007-08 school year was appropriate (Tr. pp 51-53, 64-68). She testified that her CTT class was comprised of 27 students; 16 of which were general education students, and 11 of which were special education student (Tr. pp. 60-61). The district's CTT teacher testified that students in her class were classified as being learning disabled, speech-language impaired and emotionally disturbed (Tr. pp. 64-65). The CTT special education teacher testified that the age range of the students in her classroom ranged from eleven to fourteen years old (Tr. p. 64). She further stated that the functional levels of the students in her class ranged from two years below

grade level to one year above grade level (Tr. p. 65). Additionally, the district's CTT teacher stated that the recommended placement would provide the student with appropriate testing accommodations (Tr. pp. 70-71). She testified that the recommended placement had three guidance counselors, two social workers, a psychologist and a family counselor (Tr. p. 53). She further testified that the recommended placement would not only have been able to provide on-site speech-language therapy and counseling services for the student, but would have increased the length of the sessions from 30 minutes to 40 minutes and provided push-in services, if needed (Tr. pp. 66-69). The hearing record supports a conclusion that based upon the student's classification, age, speech-language needs and the academic and social/emotional functional levels delineated in the May 21, 2007 IEP, the CTT classroom would have been appropriate to meet the student's needs (Dist. Ex. 1 at pp. 1, 3-4).

The district's CTT teacher testified that the CTT placement offered several additional components (Tr. pp. 56-57, 69-70, 72). She stated that she and the student's math teacher were both trained in "Schools Attuned," which is a program for teachers that focuses on the needs of students, such as identifying students' weaknesses and providing assistance and feedback to students' teachers in dealing with those weaknesses (Tr. pp. 69-70). The "Schools Attuned" program "tailor[s] to each student's need and what they really need and [then] we pass that information on to all the teachers" (Tr. p. 70). Strategies utilized in the "Schools Attuned" program were checklists, color coding notebooks, giving the student more time to speak and different modalities of learning (*id.*). The district's CTT teacher further testified that the recommended program offered Academic Intervention Services (AIS) to provide academic support, either 1:1 with a student or in a group during school hours or a 50 minute extended school day (Tr. p. 72). The CTT teacher also described the district's "inquiry team," which was comprised of five teachers and the assistant principal, who review individual student's performance on assessments given throughout the school year, to identify the student's areas of need and, then address those needs with the student's particular teacher (Tr. pp. 56-57). She further testified that the CTT teachers communicated regularly to discuss students needs (Tr. p. 69). Although the academic management needs section of the IEP was not completed, the district's speech-language teacher testified that she works with the CTT teachers to provide learning strategies within the classroom, such as encouraging students to reread instructions, underline, highlight, note important elements; having students repeat instructions verbatim before they initiate a task; and having students restate instructions using different terminology to verify their comprehension of directions (Tr. pp. 373-74).

With regard to similar needs, the student's Stephen Gaynor teacher for the 2005-06 and 2006-07 school years objected to the CTT class at the May 21, 2007 CSE because she believed that the student would benefit from a class "geared towards [students] with similar needs, specifically in terms of language and learning style" (Tr. p. 271). However, I note the student's current Stephen Gaynor teacher testified at the impartial hearing that students in his current classroom exhibited "language difficulties, dyslexia [and] some [students] with emotional overlays" and, as noted above, the district's CTT teacher testified that students in her class were classified as being learning disabled, speech-language impaired and emotionally disturbed (Tr. pp. 64-65, 288). Therefore, the hearing record demonstrates that the district's recommended CTT classroom and the parent's unilateral placement at Stephen Gaynor were similar in that they both contained students with similar needs and classifications as the student (*id.*).

With regard to the student's academic needs, the results of the May 2005 neuropsychological educational evaluation and the December 2006 auditory and language processing evaluation did not indicate a level of need commensurate with a self-contained placement (Dist. Ex. 14 at pp. 7-10; Parent Ex. E at pp. 4-6). The May 21, 2007 CSE considered the student's placement in the LRE, rejecting a 12:1 special class placement as inappropriate for the student (Dist. Ex. 1 at p. 13). The student's academic present levels of performance noted on the May 21, 2007 IEP indicated deficits of one to two grade levels in reading and math, which were consistent with the academic needs of the students in the district's recommended CTT class which were described by the district's CTT teacher as anywhere from two years below grade level to one year above grade level (Tr. p. 65; Dist. Ex. 1 at p. 3).

With regard to the student's ability to work with a peer, the student's speech-language therapist speculated that if the student was placed in the recommended CTT and paired with another student in a smaller work group, the student would "talk about what they did last night rather than talk about what was going on in the classroom" (Tr. p. 201). She further testified that the student "is not the type of student who is going to talk about the lesson, especially if you are going to break up singly [sic] with a friend who is going to talk about what they did at home" (id.). This testimony is not supported by the written documentary evidence in the hearing record. The student's teacher at Stephen Gaynor for the 2005-06 and 2006-07 school years reported in the student's mid-term report card which was prepared prior to the hearing, that the student was "a positive leader during cooperative learning group work," "help[ed] peers negotiate compromises" and used "strong organizational skills to help move group projects to timely completion" (Parent Ex. H at p. 22). The teacher's opinion of the student's ability to interact appropriately as indicated in the mid-term report card was also consistent with the assessment of other teachers at Stephen Gaynor (see id. at pp. 17, 19, 20). The mid-term report card was considered by the May 21, 2007 CSE and was supportive of the conclusion that the student was able to not only work appropriately with peers, but was able to take on positive leadership responsibilities (see id.).

The hearing record also shows that the CSE gave consideration to the parent's concerns regarding the recommendation of a CTT placement. As noted by the student's 2005-06 and 2006-07 Stephen Gaynor teacher, who, along with the parent, had "strong reservations" about placing the student in a CTT class, the other members of the May 21, 2007 CSE did not agree (Tr. pp. 272-73). As the teacher further testified, there was a general sense by the other CSE members "that [the student] [was] a highly organized individual ... who would be able to manage in mainstream classes," and she believed the May 21, 2007 CSE was "trying to put [the student] in the least restrictive environment" (id.).

Although the parent contends that the goals and short-term objectives were not discussed at the May 21, 2007 CSE meeting (Tr. pp. 224-25), the hearing record indicates otherwise. The student's 2005-06 and 2006-07 teacher at Stephen Gaynor testified that the May 21, 2007 CSE team asked her for "information," that she gave them information and then the May 21, 2007 IEP goals were drafted when she was no longer on the telephone (Tr. p. 270). The district representative, who was also the school psychologist, testified that the district's clinicians and the special education teacher all participated in the development of a draft of the May 21, 2007 IEP based upon the student's progress report from Stephen Gaynor (Tr. pp. 113-17). The district representative testified that they developed a draft of the goals before the May 21, 2007 IEP, then came together at the May 21, 2007 CSE meeting to discuss the draft goals and make

modifications, if necessary (Tr. p. 114). He further testified that not all of the draft goals were written prior to the May 21, 2007 CSE, but were developed as a result of the discussion at the May 21, 2007 CSE meeting, such as the need for a goal to address the student's difficulty with test anxiety (Tr. pp. 133-34). He testified that "the IEP meeting is very critical in modifying and making sure that this draft is refined to specifically address [the student's] specific needs" (Tr. p. 120). In regard to the student's speech-language goals, although the student's own speech-language therapist testified that she had concerns that the student had already mastered some of the goals on the May 21, 2007 IEP (Tr. pp. 197-98), it was unclear in the hearing record if she believed that these goals were mastered at the time of the May 21, 2007 CSE or when she testified at the impartial hearing in March 2008. As noted above, the hearing record does not reflect that the parent or her advocate raised any objection at the CSE meeting to the discussion of the IEP goals, or the absence thereof. Despite the allegation that the IEP goals were not formulated in a procedurally appropriate manner, the hearing record shows that the goals and short-term objectives are substantively adequate and appropriate. The hearing record does not show that there is a procedural or substantive infirmity on the IEP that would rise to the level of denying the student a FAPE.

The district asserts in its petition that at the impartial hearing, the parent alleged that the placement decision was made after the May 21, 2007 CSE meeting and without the parent's consultation. The district argues that although this issue was raised at the hearing, it was not raised in the parent's due process complaint notice and should not be addressed on appeal. As noted by the district in its petition, the parent raised this issue at the hearing (Tr. pp. 45, 137-39) and the district offered no objection. Therefore, I will address this issue on appeal. The CSE was required to indicate a recommended placement on the student's May 21, 2007 IEP (8 NYCRR 200.4[d][2][xii]). Although the IDEA requires parental participation in determining the educational placement of a student (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 CSE'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. 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 stated that it "referred to 'placement' as points along the continuum of placement options available for a student with a disability, and 'location' as the physical surrounding, such as the classroom, in which a student with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>8,9</sup> This

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<sup>8</sup> The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

<sup>9</sup> 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].

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]). In this case, there is no evidence in the hearing record that the student's special education and related services needs could only be met in a specific classroom or school. Moreover, the district offered a placement along the continuum (CTT) (8 NYCRR 200.6[g]) at the May 21, 2007 meeting. There is no evidence that the parent was denied participation in that decision, as evidenced by the fact that she voiced her concerns with regard to the CTT class at the CSE meeting (Tr. pp. 327-29). Therefore, I find that the fact that a specific school site was not offered by the district at the May 21, 2007 CSE meeting did not deprive the student of a FAPE.

In light of the foregoing, I find that the district's recommended 13:1 CTT placement in a district community school with related services, as indicated in the student's May 21, 2007 IEP, would have appropriately addressed the student's academic, language and social/emotional needs. As such, the district offered an appropriate program to the student with sufficient supports for the 2007-08 school year.

Having determined that the challenged IEP offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issues of whether the parent's unilateral placement of the student at Stephen Gaynor was appropriate or whether equitable considerations supported the parent's claim, 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 considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated July 9, 2008 is annulled.

**Dated:**            **Albany, New York**  
                         **October 30, 2008**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**