



The University of the State of New York

The State Education Department State Review Officer

No. 08-085

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] SCHOOL DISTRICT for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability**

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Lisa S. Rusk, Esq., of counsel

Neal Howard Rosenberg, Esq., attorney for respondents

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 and ordered it to reimburse the parents for their son's tuition costs at Winston Preparatory School (Winston) for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Winston, which 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; see also Tr. pp. 575, 607-08). The student's eligibility for special education programs and services as a student with autism is not in dispute (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student has been provided with numerous diagnoses, including Asperger's Syndrome,¹ an anxiety disorder, and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 6 at pp. 19-22). His cognitive abilities have been determined to be in the average to superior range, and his academic abilities have been assessed in the average range (*id.* at pp. 11-12). Evaluators have identified that the student exhibits deficits in the areas of language, social skills and self-regulation, noting that the student's behavior is "inconsistent" (Dist. Ex. 13 at pp. 4, 6). Observers opine that his anxiety negatively affects his participation in all activities throughout the school day (*id.* at p. 4). Evaluators also have determined that the student exhibits sensory processing difficulties,

¹ The terms "Asperger's Syndrome" and "Asperger's Disorder" are used interchangeably throughout the hearing record. For consistency, I will use the term "Asperger's Syndrome" in this decision.

including sensitivity to loud noise and unexpected touch (id. at p. 6), and conclude that the student needs structure and routine; the "chunking" of academic tasks into smaller, more manageable pieces; prompting; and guidance to complete most tasks (id. at pp. 4-5).

The student began attending a private nursery school at two years of age (Tr. p. 777). The student's teacher informed the parent that the student had difficulty playing with other children and that he easily became agitated and angry (id.). In June 2000, the parents obtained a private neuropsychological evaluation of their son, which identified average to very superior cognitive abilities, social and behavioral difficulties at home, hypersensitivity, and poor emotional regulation (Dist. Ex. 6 at pp. 3-4). In October 2000, a private psychiatrist evaluated the student and identified sensory integration dysfunction, a reactive anxiety disorder, and "the precursors of a Nonverbal Learning Disability" (NVLD) (id. at p. 2). Both the examining neuropsychologist and the private psychiatrist recommended play therapy, occupational therapy (OT), parent counseling, and a home-based behavior plan (id. at pp. 2, 4).

In September 2000, the student attended a different private nursery school and was referred to the district's Committee on Preschool Special Education (CPSE) for evaluation (Tr. p. 778; Dist. Ex. 6 at p. 4). At that time, the student underwent a psychological evaluation, which, among other things, assessed the student's adaptive behavior skills, which his parents described as falling well below expectations in the areas of socialization, daily living and motor skills, and as rising above expectations in the area of functional communication (Dist. Ex. 6 at p. 4). An October 2000 speech-language evaluation of the student indicated that although he exhibited well-developed expressive and receptive language skills, he also demonstrated weaknesses in higher-level language formulation, social communication, pragmatic language, and symbolic play skills (id.). Subsequently, the CPSE found the student eligible for special education services as a preschool student with a disability, and provided him with two 60-minute sessions per week of in-school special education itinerant teacher (SEIT) services (id.). The parents obtained private OT, vision therapy,² play therapy (provided by a neuropsychologist), and pragmatic language intervention (provided by a "speech teacher") for the student (Tr. pp. 779-81). The parents also procured private psychiatric services for themselves to assist them with parenting concerns (Tr. p. 780).

At age four, the student continued to attend the private nursery school and receive district-funded SEIT services, while the parents continued to privately fund the same support services for the student as the previous year (Tr. pp. 780-81).³ Considering reports of the student's improved peer interactions, lack of learning problems, and improved ability to cope with environmental stimuli and his own reactivity, the CPSE did not recommend special education services for the student for the upcoming 2002-03 school year (Dist. Ex. 6 at p. 4). During the 2002-03 school year, the student continued at the private nursery school, in its kindergarten program, and although he did not receive any special education services from the

² The hearing record indicates that the student received vision therapy only during summer 2002 (Dist. Ex. 6 at p. 2).

³ The student's mother stated that the CPSE determined that the additional services she requested for her son were not necessary, so the parents continued to fund them privately (Tr. pp. 780-82). She further stated that the private services for the student, which continued through the 2006-07 school year, cost approximately \$18,000.00 to \$20,000.00 per year (Tr. pp. 783, 786, 788, 796, 806).

district, the parents continued to provide the same private support services as they had provided previously (Tr. pp. 783-84). The student's kindergarten teacher observed that the student exhibited anxiety and resistance to reading, oppositional behavior, and sensitivity to textures, sounds and tastes (Dist. Ex. 6 at p. 5). The kindergarten teacher further observed that the student experienced difficulty modulating his behavior when anxious or frustrated and with fine-motor tasks (*id.*). It was reported that the student required a high degree of supervision to maintain friendships, and his parents described him as "socially delayed compared to peers" (*id.*). In December 2002, the parents secured weekly private child psychiatric services for the student, due to his episodes of aggression, extreme anxiety, and destructive and verbally abusive behavior observed at home and in school (Tr. pp. 784-86; Dist. Ex. 6 at p. 3). The private child psychiatrist offered diagnoses of an anxiety disorder, NVLD and "probably" ADHD, and initiated the student on a trial of several medications (Dist. Ex. 6 at p. 3).

In spring 2003, due to the difficulties he experienced in kindergarten, the parents requested that the district's Committee on Special Education (CSE) evaluate their son (Dist. Ex. 6 at p. 5).⁴ Administration of a cognitive assessment to the student yielded full scale, verbal and performance IQ scores in the superior range of intelligence and his performance on measures of his academic achievement was assessed in the average to superior range (Dist. Exs. 6 at p. 5; 18 at p. 2). Although the student's basic language skills were reportedly in the average to superior range, the evaluator reported that his "abstract language development was delayed and his pragmatic language skills were weak for his age" (Dist. Ex. 6 at p. 5). The student achieved a score in the 97th percentile on the Asperger's Syndrome Diagnostic Scale (Dist. Ex. 18 at p. 7). The district's school psychologist opined that the student's abstract conceptual development "remain[ed] a significant vulnerability for him," that his flexibility of thinking was "problematic," and his difficulty predicting consequences "only exacerbates [his] already highly impulsive and anxious demeanor" (*id.* at p. 6). He also noted that the student's "rigidity of thinking and oppositional behavior [make] problem-solving a significant area of weakness" (*id.*).

The CSE determined that the student was eligible for special education services as a student with an emotional disturbance (ED), and for the student's first grade (2003-04) school year, developed an individualized education program (IEP) offering the student speech-language therapy, "teacher consultation," and OT consultation services (Dist. Ex. 6 at pp. 5-6). The student also received classroom modifications and adult support during non-academic classes, and during unstructured time on the playground and in the cafeteria (*id.* at p. 6). During first grade, the parents procured private "homework helper" services due to the student's refusal to complete homework (Tr. pp. 787-88). In May 2004, a private psychiatrist from the New York University Child Study Center opined that the student's presentation was consistent with Asperger's Syndrome, and that the student also exhibited "anxiety, rigid thinking and [ADHD] symptoms" (Dist. Exs. 6 at p. 3; 25).

For the student's second grade (2004-05) school year, the CSE recommended a co-teaching support program for all academic instruction, in addition to one session per week of in-school psychological support and two group sessions of speech-language therapy per week (Dist. Ex. 6 at p. 6). Reportedly, the student's second grade teacher indicated that the student made

⁴ In March 2003, the student's psychiatric care was transferred to another private psychiatrist, who also administered a variety of medications to the student (Dist. Ex. 6 at p. 3).

"excellent strides," and although he required frequent reassurance, the student was "more willing to take risks both academically and socially" (*id.*). The parents continued to provide the student with private psychiatric and homework helper services, private OT and speech-language therapy, and initiated private social skills group services (Tr. pp. 789-90).⁵

For the student's third grade (2005-06) school year, the CSE changed the student's classification from ED to autism, and recommended that he attend the district's third grade co-teaching inclusion class, which included four hours per day of special education teacher or special education teacher assistant (TA) services (Dist. Ex. 6 at p. 6; see also Dist. Ex. 24). The student's 2005-06 IEP also offered two sessions per week of small group speech-language therapy, one individual counseling session per week, one psychological consultation per month, three sessions per week of small group structured language support during English language arts (ELA), and classroom and testing accommodations (Dist. Ex. 6 at p. 6).

According to the student's mother, during fall 2005, the student's "anxiety intensified," he "became increasingly aggressive," and he "began to struggle with modulation of his emotions at home and in school" (Tr. pp. 791-93; Dist. Ex. 6 at p. 6). The student's third grade teachers reportedly advised the student's mother that he required a 1:1 aide, but according to the student's mother, the CSE declined her request for a 1:1 aide (Tr. pp. 793-94). His third grade teachers also reported incidents of the student leaving the classroom without permission, ripping up homework, and throwing his bag (Tr. p. 793). During third grade, the student was described as often "resistant, oppositional and defiant at school," and reportedly struggled socially in the classroom (Dist. Ex. 6 at p. 6). His teachers' responses on the Achenbach Child Behavior Checklist, Teacher Report Form "yielded clinical elevations on scales sensitive to problems with anxiety, affective problems, social problems, and thought problems, as well as a borderline clinical elevation on the scale sensitive to oppositional defiant problems" (*id.* at p. 7). The teachers' responses also revealed concerns about the student's perceived "low frustration tolerance, difficulty working independently, anxiety, self-deprecating behavior, peer relationships problems, and expressive written language problems" in addition to his observed "inattention and distractibility, poor organization, poor handwriting, difficulty with transitions, and expressive oral language difficulties" (*id.* at p. 6). The student's mother reported that she was in "constant communication" with school staff regarding occurrences at home and at school (Tr. p. 795). In December 2005, the parents consulted a private learning specialist, who identified weaknesses in the student's attention, gross-motor skills, social skills, abstract conceptual development, ability to predict outcomes, and flexibility of thinking, in addition to the student's manifest sensory processing difficulties (Dist. Exs. 6 at p. 7; 9). The private learning specialist recommended various classroom accommodations, the development of a classroom behavioral rewards system, and frequent meetings with the student's parents (Dist. Ex. 9).

On December 28, 2005, a neuropsychologist from the Columbia Presbyterian Medical Center conducted a neuropsychological evaluation of the student (Dist. Ex. 6). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ

⁵ The student's mother advised that the district was aware of the numerous private services she obtained for her son, but at no point did it offer to reimburse her for said services, nor did she ever request such reimbursement (Tr. pp. 790-91).

score of 115 (high average) and significant scatter among his various cognitive skills, with index scores ranging from the average (working memory: 99; processing speed: 106), to high average (perceptual reasoning: 110), to superior (verbal comprehension: 126) (id. at p. 11). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded performance scores in the average range across all academic areas, and while the student scored lower than expected considering his intellectual skills, he did not meet the criteria for specific learning disabilities (id. at p. 12). Although the student possessed a strong foundation in most basic academic skills, the evaluating neuropsychologist identified the student's emerging "relative weaknesses in the acquisition of higher-order academic skills involving reasoning, abstraction, organizing, and planning," that, she reported, typically begins in the third grade in most school curricula (id.).

Administration of a neuropsychological test battery revealed the student's relative weaknesses in "executive functioning, including attention to detail, organization and planning," and also identified the student's "variable" attention skills (Dist. Ex. 6 at p. 14). Self-reports completed by the student to measure his emotional functioning revealed "an extremely emotionally vulnerable boy who is experiencing clinical levels of anxiety, accompanied by negative self-feelings, low self-esteem, worries and concerns" (id. at p. 17). In the evaluator's opinion, "[s]uch psychological issues in turn can undoubtedly act as significant barriers to [the student's] learning" (id.). Behavioral measures completed by the parents regarding the student's behaviors at home identified his "problems with anxiety and mood, social problems, oppositional problems, repetitive, obsessive-compulsive behaviors and problems with attention" (id. at p. 8). The evaluating neuropsychologist concluded that results of the student's current evaluation "no longer lend credence to past descriptions of [the student] presenting with NVLD" (id. at pp. 18-19); rather, she surmised that the student's pattern of cognitive, emotional, and social strengths and weaknesses were more consistent with a clinical presentation of Asperger's Syndrome, ADHD, and an anxiety disorder-not otherwise specified (id. at pp. 19-22). The neuropsychologist further opined that because the student exhibited significant emotional and social difficulties that impeded his learning, together with his growing negative self-esteem, executive function weaknesses and emerging academic difficulties, "he may indeed benefit from future placement in a specialized school setting that provides students with a more structured, nurturing environment for learning than is afforded students in the inclusion classes at his current school" (id. at p. 22).

Considering these findings, the evaluating neuropsychologist proffered numerous school-based recommendations, including the provision of a 1:1 special educational aide, a positive behavioral plan, school-based counseling services, speech-language therapy, OT, and specific classroom accommodations and teacher strategies (Dist. Ex. 6 at pp. 22-25). Additionally, the neuropsychologist recommended that the student receive reading tutoring and individual psychotherapy, and that he continue to participate in a social skills training group, continue using the home-based behavioral modification system, and continue under the care of the private psychiatrist (id. at pp. 25-26).

On April 3, 2006, the CSE convened for the student's annual review and to develop an IEP for the student's fourth grade (2006-07) school year (see Dist. Ex. 15). CSE notes from the April 3, 2006 meeting commented that the student demonstrated growth in many areas, despite periods of time when he exhibited "anxious behavior that has impacted classroom performance"

(*id.* at p. 6). The parents shared their concerns about their son's difficulties experienced during the 2005-06 school year, including his "mood variability and oppositional behaviors," his "unpredictability and anxious behaviors [that] were not present last year," and his inability to work independently, and the parents ultimately requested that the CSE provide him with a 1:1 aide (Dist. Exs. 4; 15 at p. 6). The CSE responded that "[a]lthough he is inconsistent at times, he has been able to access the curriculum and information and has been available for learning. The teachers in the co taught classroom have been able to address his needs effectively. His academic achievement has been strong" (Dist. Ex. 15 at p. 6). Educational and speech-language assessments revealed average to above average skills, with needs noted in the areas of classroom written language skills, perspective taking and higher-order thinking skills (Dist. Exs. 5 at pp. 2-3; 8 at p. 4; 15 at p. 6). The CSE noted its consideration of the student's December 2005 neuropsychological evaluation report (Dist. Ex. 6) and concluded that the evaluating neuropsychologist's suggestion for a more restrictive placement in the future would be detrimental to the student, because "[the student] benefits from his class peers, who in turn, enjoy his presence in the class and provide positive role models for him on a regular basis" (Dist. Ex. 15 at p. 6). Classroom observations conducted in March 2006 by the assistant principal and CSE chairperson were reviewed, and the CSE noted that "[e]ach observation included activities that this student was able to successfully participate in without significant adult support" (Tr. pp. 24-25; Dist. Exs. 2; 15 at p. 6). With the exception of the parents, the CSE agreed that the student did not require a 1:1 TA based upon his current level of independence and classroom performance (Tr. pp. 794-96; Dist. Ex. 15 at pp. 6-7). The CSE agreed to conduct a functional behavioral assessment (FBA) and to develop a behavioral intervention plan (BIP) for the remainder of the 2005-06 school year, and for use during the upcoming 2006-07 school year (Dist. Ex. 15 at p. 7).

For the student's 2006-07 school year, the CSE recommended that the student be placed in a 6:1 co-teaching support program for all academic classes, in which he would receive four hours of special education teacher/TA instruction within the general education classroom, and small group special language instruction (Dist. Ex. 15 at p. 1). The CSE increased the student's counseling services to two individual sessions per week, one session located in-class and one in the therapist's office (*id.* at pp. 1, 7). It also recommended one session per month of psychological consultation services in order to allow time for the psychologist to consult with the teachers to implement strategies in the classroom on a regular basis (*id.* at p. 1). The CSE adhered to its recommendation that the student receive two group sessions per week of speech-language therapy (Dist. Ex. 15 at p. 1).⁶

In May 2006, the student's regular and special education teachers conducted an FBA and developed a BIP (Dist. Ex. 19). Targeted behaviors included the student's non-compliance with teacher directives and avoidance behaviors, and his teachers attributed their possible causes of the student's "[a]nxiety," "lack of control over his environment," and his "desire to be with adults" (*id.* at p. 1). The FBA enumerated numerous suggestions to prevent the behavior from occurring, and suggested alternative behaviors to be taught to the student (*id.*); the resulting BIP identified specific procedures to use when the behavior occurred (*id.* at p. 2).

⁶ Meeting notes from the April 3, 2006 CSE meeting indicated that the CSE recommended "family training" (Dist. Ex. 15 at p. 7). Meeting notes from the May 15, 2006 CSE meeting indicated that family training was a "successful support," and would continue for the 2006-07 school year, although this service was not specifically delineated in the April 3, 2006 IEP (*see* Dist. Exs. 1 at p. 8; 15).

On May 15, 2006, the CSE reconvened to review the BIP (Dist. Ex. 1 at p. 8). The parents reported that they observed little improvement in the student's behavior at home, noting that he "exhibit[ed] behavioral outbursts in the home" and voicing their concern that "as the expectations increase, [he will] be unable to maintain appropriate behaviors in the school setting" (*id.*). The parents maintained that the student needed TA support during the school day, and the family trainer and private psychologist recommended that the student be assigned a shared (3:1) TA to provide the student with behavioral support (*id.*). The CSE responded that "such behaviors are not seen during the school day," noted that "teachers report that this student is able to follow directions in the classroom," and that since the April 2006 meeting, he has exhibited "more positive emotion, socializing with peers, and playing with other children" (*id.*). Although acknowledging that the student exhibited "moments of noncompliance," his teachers reported that they "are able to work through these challenges with the student in a successful way" (*id.*). The CSE declined to recommend the addition of TA services at that time, and concluded that the co-teaching support program was the least restrictive environment (LRE) to meet the student's special education needs (*id.*). The student's "team" agreed to work on a plan to address crisis situations that he may encounter as he transitioned to fourth grade, and the May 2006 BIP was attached to his IEP (*id.*).

The student began his fourth grade (2006-07) school year enrolled in the co-teaching support program pursuant to his April 3, 2006 IEP (*see* Tr. p. 796). In late September 2006, the student's mother received an e-mail from his special education teacher informing her of the student's oppositional behavior and refusal to complete work (Tr. p. 797). The student's mother reported that the student had begun a "significant medication regime" in an attempt to "regulate" his behavior enough so that he could learn (*id.*). The district provided a "building plan," in which it agreed to provide the student with "additional support" if he reached a specified number of "bad days" in school, although the student's mother later noted that the district never specified exactly what form that support would take (*id.*). In mid-October 2006, the student's mother requested a CSE meeting because, according to her observations, the student was becoming "increasingly dysfunctional, unable to function" and she believed "his emotional and mental health [was] at risk" (Tr. p. 798). On November 6, 2006, the district's school psychologist prepared a communication intervention plan for the student, to provide a consistent communication format for teachers and providers to use with the student to teach him skills to reduce his defensiveness, anxiety and resistance to instruction and work completion (Dist. Ex. 20). The district's special education consultant conducted classroom observations of the student on November 28 and December 5, 2006 (Tr. pp. 334-35; Dist. Ex. 3). The consultant's observation reports reflected that the student's participation in classroom activities and his ability to complete activities without adult support was variable (Dist. Ex. 3). Additionally, the reports documented episodes of the student's name-calling behavior, leaving the classroom without permission, refusal to work, difficulty participating in classroom activities, and instances of expressing "I think I should die" (*id.* at p. 4).

On December 1, 2006, the district staff conducted an FBA and on December 5, 2006 prepared a BIP (Dist. Exs. 10; 31).⁷ The FBA revealed that when the student was not permitted

⁷ Although labeled both a "Positive Behavioral Support Plan" and "Behavior Management Plan," the December 7, 2006 CSE characterized the student's December 2006 behavior plan as his "BIP", which, for consistency, I

to do what he wanted, he exhibited his frustration by breaking or throwing objects, refusing to participate in an activity, and voicing his anger in the form of "put-downs" directed at peers, adults and the activity itself (Dist. Ex. 10 at p. 1). Additionally, the student made self-denigrating remarks that had escalated into expressing that he wanted to "die" (id.). The evaluators opined that the student's behaviors hampered social interactions with peers (id.). The FBA described in detail the antecedents and consequences of the student's behaviors, but also noted that with respect to his current level of functioning, the student was "capable of [completing] modified grade level work. He more often needs adult intervention to help him initiate and complete all class work" (id. at pp. 1-2). Behaviorally, the FBA documented instances of the student's "object assault," such as throwing objects, pounding his desk, shoving his desk or chair, ripping up papers, breaking pens/pencils, and demonstrating verbal outbursts across all school settings (id. at p. 2). Data analysis for patterns of days, times, subjects and locations of negative behaviors failed to reveal a clear pattern, leading evaluators to opine that such behavior likely stemmed from the student's "emotional lability and extremely unpredictable behavior" (id.). The evaluators did, however, agree that "what is certain is the duration of [the student's] problematic behavior is increasing, and the intensity is escalating" (id.). As did the previous May 2006 FBA (see Dist. Ex. 19), the December 2006 FBA identified strategies for the adults working with the student, specified those to be taught to the student, and suggested potential rewards for his compliance (id. at p. 3). The resulting BIP recommended specific language for district staff to use with the student throughout the day in different settings when negative behaviors occurred, and included a crisis plan "in the event that it became necessary to protect [the student] or other students from serious injury, safeguard physical property, and/or deal with a significant disturbance to the teaching/learning process" (id. at pp. 3-5).

On December 7, 2006, the CSE convened to review the results of the student's FBA and resulting BIP (Dist. Ex. 1 at p. 8). The student's mother stated that she informed the district about the student's verbalizations about suicide and instances of bed-wetting at home (Tr. pp. 798-99). She reported to the CSE that the student was in "crisis on a daily basis," and that he frequently complained to her about the pressures he felt at school (Dist. Ex. 1 at p. 8). She indicated that the student spent "a very good amount of time" in the school psychologist's office (Tr. p. 798). The CSE responded that "[a]lthough this student is able to complete grade level work, he is unable to maintain active engagement for long periods of time," thereby necessitating the modification of the length of assignments (Dist. Ex. 1 at p. 8). It was noted that the student left the classroom, frequently withdrew from the group, was reluctant to participate in class assignments and activities, required frequent breaks, and exhibited verbal outbursts when frustrated (id.). The CSE recommended that the student receive five hours per day of TA services to preview activities and social interactions during the day, and for consistent maintenance of his BIP (id.).

On December 8, 2006, the student's private psychiatrist and the school psychologist discussed the student's negative behaviors exhibited at home and school (Dist. Ex. 12). During the district's winter vacation, the student's mother contacted the district's director of special education and requested that the student be transferred to a different classroom with continued

will also do in this decision (Dist. Exs. 1 at p. 8; 10 at pp. 1, 3). The December 2006 BIP incorporated some strategies from the student's November 2006 communication intervention plan (compare Dist. Ex. 10, with Dist. Ex. 20).

TA services (Tr. pp. 799-800). When the student returned to school after the winter vacation, he was placed in a general education class with 45-minutes per day of in-class direct consultant teacher services and five hours per day of TA services (Dist. Ex. 30; see Dist. Exs. 13 at pp. 1-2; 30). A classroom observation conducted by the district's special education consultant on January 3, 2006, the second day in the student's new classroom, indicated that the student's participation in classroom activities and academic instruction remained variable, despite regular education teacher and TA assistance (Dist. Ex. 30). Beginning in early January 2007, the regular education teacher, TA and the student daily documented their impressions of how frequently the student stayed in the classroom and participated in class (Dist. Exs. 21; 27; 33). On a date in January 2007 not specified in the hearing record, the student's mother again contacted the district's special education director to thank him for changing the student's class, and to inquire about other programs that might be appropriate for the student (Tr. pp. 800-01). She testified that the director stated to her that he believed the student could be educated in the district, and therefore, he could not suggest or recommend any other programs for the student (Tr. p. 801). On her own, the student's mother contacted several schools that she believed had programs that could meet her son's needs, and requested that the district send information packets about her son to those schools (id.).

On January 18, 2007, the CSE convened for a review of the student's special education program (Dist. Ex. 1). The student, who attended a portion of the meeting, indicated that although he found the TA helpful, he was "uncomfortable by the feeling as though he is being followed around" (id. at p. 8).⁸ The CSE recommended that the school psychologist work with the student to identify times during the school day that the TA would be helpful to him (id.). The CSE discussed the student's progress in class performance, and although he continued to "exhibit some resistant behaviors," they opined that the support of his teachers and TA "have had an overall positive effect" (id.). The CSE recommended continuing the student's program of direct consultant teacher services and TA support, one individual session of counseling in the therapist's office, one session per week of group speech-language therapy, and one group psychological consultation session per week (compare Dist. Ex. 1 at pp. 1, 8, with Dist. Ex. 15 at p. 1). The CSE also recommended two hours per week of indirect consultant teacher services, one individual speech-language therapy session per week, and parent counseling and training (Dist. Ex. 1 at p. 1).⁹

In February 2007, the district revised the student's BIP, in an effort to increase his participation in class, which it defined as the student "being present in the same physical environment as classmates and engaged in the same activity" (Tr. pp. 370-71; Dist. Exs. 11; 32). The BIP offered the student choices of two different levels of participation in an activity, with one choice ("✓+") weighted with greater reward for completion than the other choice ("✓") (Dist. Ex. 11 at p. 1). The student was provided with the opportunity to review choices for each activity as it occurred, and as soon as possible after each activity, a faculty member recorded a "✓+," "✓" or "-" to indicate whether or not they believed the student met the expectations for that activity (id.). The percentage of "✓+s" and "✓s" relative to the total number of

⁸ Although designated as a shared (2:1) TA on the student's IEP, the TA provided individual support services to the student during the second half of the 2006-07 school year (Dist. Exs. 1 at p. 2; 14).

⁹ The January 2007 IEP stated that the parents "have chosen not to take advantage" of the parent training and counseling offered by the CSE (Dist. Ex. 1 at p. 2).

opportunities was calculated daily, and staff also documented the total number of minutes the student participated in an activity out of the total number of minutes of the activity (Dist. Exs. 11 at p. 1; 28).

On March 30, 2007, the student's private psychiatrist forwarded correspondence to the CSE recommending that the student be placed "in a school environment in which the external stimuli and stressors in the classroom are minimized in order to reduce possible factors that may contribute to his losing control" (Tr. pp. 744-48; Dist. Ex. 22). The private psychiatrist further opined that considering the upcoming transition to middle school, he did not believe that the student was capable of navigating classrooms of 25 students with multiple transitions and teachers throughout the day (Dist. Ex. 22). He believed that "[a] more appropriate education environment for [the student] is a small classroom setting of six to nine [students]. In that setting, [the student] will be better able to emotionally regulate and attend to his lessons" (id.).

On April 11, 2007, the CSE convened for the student's annual review (Dist. Ex. 13 at p. 8). According to CSE meeting notes, the parents reported that the student had shown "general improvement," and that "changes in medication and maturation have had a positive impact on his overall performance," although he continued to perform below his peers in the areas of reading, writing, mathematics and social development (id.). District personnel reported that the student's academic skills were in the "average range" (id.). Although he demonstrated the ability to participate in classroom activities, the student did not do so on a consistent basis, and he also "demonstrate[d] significant levels of anxiety and [could] be distracted" (id.). At times, he had difficulty engaging in academic tasks and refused to participate in activities (id.). The student exhibited "significant frustration" when having difficulty understanding what was asked of him or interpreting a social situation (id.). The student reportedly refused to attend non-academic classes (id.). The parents expressed their concern that the middle school was not an appropriate recommendation for the student, but agreed to visit it while it was in session (id.). The parents also requested extended school year (ESY) services for the student during summer 2007 (id.). The CSE chairperson testified at the impartial hearing that "many of the recommendations" for the student's fifth grade (2007-08) special education program were similar to what he had received during the 2006-07 school year, including the co-teaching support program and 2:1 TA services (Tr. pp. 16, 29-32).

On April 13, 2007, the parents visited the district's middle school (Dist. Ex. 14). In an e-mail to the CSE chairperson, the parents requested that for the upcoming 2007-08 school year, the CSE provide their son with 1:1 TA services in the co-teaching, not consultant, teacher program model, because the co-teaching model offered "the most amount of support" to assist the student with the transitions associated with middle school (id.). The parents expressed concern about the "blaring music that blasts from the speakers each morning" as students entered the school, and acknowledged that district personnel suggested that the student enter the building from a side door to avoid this difficulty (id.). The parents also renewed their request for ESY services (id.).

Prior to their scheduled June 2007 CSE meeting, the parents visited five public and two private out-of-district special education programs, including Winston (Tr. pp. 811-12). On or about May 14, 2007, three weeks prior to the CSE meeting, the student's mother signed an

enrollment agreement with Winston for the student's enrollment for the 2007-08 school year and paid a non-refundable \$5,000.00 deposit (Tr. pp. 815-16; Parent Ex. K).

On June 13, 2007, at the student's mother's request, the CSE convened for a review of the student's special education program (Dist. Ex. 13 at p. 7). Participants included the student's mother, the student's private psychologist, the CSE chairperson, a CSE co-chairperson, two school psychologists, the district's special education consultant, and the student's then-current assistant principal, special and regular education teachers, the student's TA, and a speech-language pathologist (Dist. Exs. 8 at p. 3; 13 at p. 7). A "team" from the proposed middle school, including regular and special education teachers and the assistant principal, also participated in the June 2007 CSE meeting (Tr. pp. 29, 33-36, 129-30; Dist. Ex. 13 at p. 7). At the meeting's outset, the student's mother stated that the student required smaller classes than the middle school had to offer in order to make educational progress (Dist. Ex. 13 at p. 7). The CSE chairperson disagreed, stating that packets of information sent out on the student's behalf yielded responses from out-of-district programs recommending that the student remain in the community school (*id.*). The CSE discussed the program recommended for the student at the April 11, 2007 CSE meeting, discussed the student's progress since the April 11, 2007 CSE meeting, and identified changes that it deemed necessary to efficiently transition the student to the middle school (Tr. pp. 29-30). Middle school faculty assured the student's mother that the middle school "would be able to deliver the services required to attain the goals" and that the student's goals proposed by the June 13, 2007 CSE could be met at the middle school (Dist. Ex. 13 at p. 7). The CSE reviewed the proposed program and related services, and, after considering recommendations from the student's mother and the district's middle school staff, recommended that the student receive summer 2007 ESY services, and, for the 2007-08 school year, receive a co-teaching support program, five hours per day of 1:1 TA support, counseling and speech-language therapy services (*id.* at pp. 1-2). The parents were recommended to receive parent training and counseling, and the middle school staff was recommended to receive psychological consultation services (*id.*). The members of the June 13, 2007 CSE, with the exception of the student's mother, agreed to the 2007-08 program recommendations (Tr. pp. 34-35, 60-61).

By letter dated June 20, 2007 to the district's director of special education, the parents acknowledged their appreciation for the June 13, 2007 CSE's offer of "every service and accommodation possible" for the student, but reasoned that "no amount of service or support is enough for [the student] to learn in a mainstream school environment" (Dist. Ex. 34 at p. 1). After their visit to the middle school, the parents concluded that its "overwhelming and stimulating" environment was "toxic" for the student, and "would make it virtually impossible for him to manage day-to-day and learn" (*id.*). They cited the daily music in the morning and the multiple transitions between classes with accompanying locker and student noise as examples of daily routines that would "emotionally derail" him (*id.*). Although the parents acknowledged that district administration was willing to work with the student, they surmised that it was impossible to modify the "chaotic" middle school environment to the degree that was necessary to ensure that their son "can be emotionally regulated, remain in control and attend to his lessons" (*id.* at p. 2). The parents formally rejected the 2007-08 IEP, advised the district that they would enroll the student at Winston, and requested that the district provide transportation (*id.*).

By letter dated June 29, 2007 to the parents, the district's director of special education stated that after reviewing the student's program and services recommended for the 2007-08 school year, he believed that the student's goals could be appropriately met in the recommended program at the middle school (Dist. Ex. 35). The director offered to reconvene the CSE to discuss the parents' concerns outlined in their June 20, 2007 letter, and invited them to contact his office to schedule a program review (*id.*). He also furnished the parents with information regarding their due process rights (*id.*).¹⁰ During summer 2007, the student attended the district's ESY program, which consisted of two 30-minute sessions of individual direct consultant teacher instruction in reading and one individual session of counseling per week at the middle school (Tr. pp. 442-44; Dist. Ex. 13 at p. 2). The student attended Winston during the 2007-08 school year (Parent Exs. C; E).

Through their attorney, the parents filed a due process complaint notice on September 27, 2007 (Joint Ex. 1 at pp. 1-3).¹¹ In their complaint, they stated that they "are requesting an impartial hearing because the placement recommended does not offer a [free appropriate public education] FAPE and would not confer a meaningful educational benefit to [the student], but actually cause him to regress" (*id.* at p. 2). They sought an order from the impartial hearing officer: (1) declaring that the district's recommended placement was inappropriate; (2) declaring that the parents' unilateral placement of the student at Winston was appropriate; and (3) reimbursing the parents for "tuition, transportation, compensatory education, attorney fees, related costs such as the cost for a private evaluation and report and other related expenses" (*id.*).

An impartial hearing convened on February 4, 2008, and concluded on May 15, 2008, after five days of testimony. In her 35-page decision dated July 12, 2008, the impartial hearing officer placed the burden of proof relative to the district's offering of a FAPE upon the parents, by virtue of the filing date of their due process complaint notice (IHO Decision at p. 5). She decided in favor of the parents, awarding them tuition reimbursement for the 2007-08 school year at Winston (*id.* at p. 35). The impartial hearing officer first determined that the parents sustained their burden and proved that the district did not offer the student a FAPE for the 2007-08 school year (*id.* at pp. 29-33). She cited the student's "chronic and persistent history of severe behavioral and emotional difficulties that have consistently prevented the student from maintaining himself in a general education environment, despite the supports provided by the school district as well as the ones provided by his parents privately" (*id.* at p. 30). She also concluded that although the hearing record demonstrated that the student successfully participated in some of the classroom activities and achieved some degree of academic progress while in the general education environment, it also established that the student achieved only

¹⁰ Although the June 29, 2007 letter advised that the parents' request for their son's transportation to Winston was not timely, the district did provide the student's transportation to the private school during the 2007-08 school year (Tr. p. 818; Dist. Ex. 35).

¹¹ The hearing record also contains an "amended" due process complaint notice dated November 1, 2007, which is identical to the September 27, 2007 due process complaint notice, except that the November 1, 2007 complaint erroneously identifies the parents' unilateral placement as being the "Windward School" (Joint Ex. 1 at pp. 4-5). The hearing record further contains a "corrected amended" due process complaint notice, dated November 6, 2007, which corrects this error by identifying Winston as the parents' unilateral placement and the November 6, 2007 complaint is otherwise identical to that of September 27, 2007 (Joint Ex. 1 at pp. 6-7). For the purposes of this appeal, I consider the complaint filed on September 27, 2007 to be the controlling document, and I will not further address the subsequent complaints.

three of the nine academic goals listed on the January 18, 2007 IEP, and that he continued to have difficulties with his social-emotional functioning (*id.*) (emphasis added). She also opined that the district's co-teach program model did not comply with 8 NYCRR 200.6(g) because during the program, there would be a period of time (during a core academic class) when the student would not be provided with the services of a special education teacher (*id.* at pp. 30-31). Finally, the impartial hearing officer reasoned that although the hearing record showed that the student was "maintained and controlled" more successfully through the use of the 1:1 aide and a BIP, the hearing record also showed that he did not receive meaningful benefit from said program, citing *J.L. v. Mercer Island Sch. Dist.*, 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006) in support of her position (*id.* at pp. 31-32).

With respect to the parents' unilateral placement of the student at Winston, the impartial hearing officer determined that the parents sustained their burden of establishing the appropriateness of the student's placement at Winston (IHO Decision at pp. 33-34). She opined that the hearing record established that the placement afforded the student a "very meaningful education during the 2007-08 school year," that the student "made progress academically, socially, and emotionally," and that the program was "successful" for him (*id.* at p. 33). The impartial hearing officer also found the testimony of the parents' private psychiatrist to be "extremely credible" in establishing the appropriateness of the Winston placement (*id.* at p. 34).

The impartial hearing officer also concluded that the hearing record established that equitable considerations supported the parents' request for tuition reimbursement (IHO Decision at pp. 34-35). She noted that the parents worked closely with the district in order to maintain the student in the public school system, and found the fact that they signed the enrollment contract with Winston prior to the June 13, 2007 CSE meeting to be an insufficient basis upon which to deny their reimbursement request (*id.*).

The district appeals from the impartial hearing officer's decision, seeking an order from a State Review Officer dismissing the impartial hearing officer's July 12, 2008 decision in its entirety and denying the parents' request for tuition reimbursement for Winston for the 2007-08 school year. The district first argues that the impartial hearing officer erred by finding that it failed to offer the student a FAPE for the 2007-08 school year, based upon the following arguments: (1) because the sole contention in the parents' due process complaint notice was the appropriateness of the district's recommended placement; the parents did not allege any procedural deficiencies, nor did they challenge the substantive content of the June 13, 2007 IEP, including its classification, evaluation, present levels of performance, goals, or level of services contained therein; (2) because the impartial hearing officer's finding that the student remained unable to develop social relationships with peers is not supported by the hearing record; (3) because the student's former fourth grade regular education teacher testified that the student would have benefited from the district's recommended program; (4) because district witnesses testified that the offered program was the most intense program available in the district; (5) because the impartial hearing officer's determination that the student remained unable to negotiate through the day in a class of more than 20 students, including transitions and focusing, is not supported by the hearing record; (6) because district witnesses testified that the recommended program would have met all of the goals enumerated on the June 13, 2007 IEP; (7) because the district's behavioral consultant testified as to the appropriateness of the district's program for the student, given his behavioral difficulties; (8) because the district's school

psychologist testified that the recommended program would have provided the student with an education commensurate with his cognitive abilities, in the LRE; (9) because, by contrast, the testimony of the parents' private psychiatrist was not credible because it was inconsistent with the progress notes he maintained, and because his recommendation letter to the CSE was actually authored by the student's mother herself as a means to support her case for reimbursement; (10) because in determining that the district's placement was inappropriate, the impartial hearing officer ignored the mandate to educate the student in the LRE; and (11) because the impartial hearing officer exceeded the scope of her authority in determining that the proposed placement did not comply with 8 NYCRR 200.6(g), insofar as this objection was not raised in either the parents' due process complaint notice or during the impartial hearing, and hence, should not have been decided, and because temporally, the regulation in question became effective after the development of the June 13, 2007 IEP.

The district also asserts that the impartial hearing officer erred in finding Winston appropriate for the student for the 2007-08 school year, based upon the following contentions: (1) because Winston is a school specializing in students with learning disabilities, and the student did not receive a diagnosis of a learning disability; (2) because Winston does not accept students with primary behavioral or emotional issues, yet the hearing record establishes that the underlying factors contributing to the student's school difficulties are "social, emotional and psychological in nature rather than due to more fundamental learning disabilities" (*see* Dist. Ex. 6 at p. 21); (3) because the academic progress noted in Winston's progress reports should be accorded no weight, because they simply reflect skills already developed and/or mastered in the student's public school placement; (4) because the parents' private psychiatrist's refusal to attribute any of the student's progress during his year at Winston to medication changes is not credible, insofar as his testimony is contradicted by his own written progress notes; (5) because Winston lacks psychological services; (6) because Winston's faculty, particularly the student's fifth grade special education teacher, are not qualified to teach autistic students, and the school does not follow the State curriculum; and (7) because the student is able to perform academically on or above grade level, and therefore does not need a full-time special education environment.

The district also maintains that the impartial hearing officer erroneously determined that equitable considerations supported the parents' reimbursement claim, because the hearing record demonstrates that the parent signed the Winston enrollment contract and placed a non-refundable deposit with the school prior to the June 13, 2007 CSE meeting, proving that the parents never seriously intended to enroll the student in the district placement for the 2007-08 school year.

The parents, through their attorney, answer, arguing that: (1) the impartial hearing officer erroneously placed the burden of proof with respect to proving that the district offered a FAPE to the student upon the parents, based on her determination that an impartial hearing commences at the time of the filing of a due process complaint notice, rather than the date that the impartial hearing actually begins; (2) that the district failed to offer the student a FAPE because its recommended placement was not "reasonably calculated to produce educational progress;" (3) that the unilateral placement of the student at Winston was appropriate because he has made significant academic and emotional progress in a small, structured special education school with individualized academic support, and because the district's argument that its placement was the LRE is without merit, insofar as its use of a full-time 1:1 TA is, in fact, more restrictive and isolating than Winston; and (4) equitable considerations supported the award of tuition

reimbursement to the parents for the 2007-08 school year at Winston because the hearing record clearly establishes that the parents notified the district as early as June 20, 2007 of their rejection of the recommended placement, yet the district failed to offer any alternative at any time thereafter. The parents also raised four affirmative defenses: (1) that the district's petition failed to state a claim upon which relief may be granted; (2) that the decision should be upheld in its entirety because it sets forth the factual basis and reasons for its determination that are supported by law; (3) that at all times relevant, the parents acted in good faith and cooperated fully with the CSE; and (4) that the district failed to timely object and thus waived its right to raise issues on appeal.

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, 206-07 [1982]).

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

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

advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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).

Initially I will address the parents' contention that the impartial hearing officer incorrectly placed the burden of proof upon the parents to show that the district failed to offer the student a FAPE for the 2007-08 school year. The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student with a Disability, Appeal No. 08-030; Application of the Bd. of Educ., Appeal No. 08-029; Application of the Bd. of Educ., Appeal No. 08-016). An impartial hearing is commenced with the presentation of a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child" (Vultaggio v. Bd. of Educ., 343 F.3d 598, 600 [2d Cir. 2003]; see Application of the Dep't of Educ., Appeal No. 08-018; Application of a Student with a Disability, Appeal No. 08-015; Application of a Child with a Disability, Appeal No. 07-136). Here, the parents' initial due process complaint notice is dated September 27, 2007 (Joint Ex. 1 at p. 1). Accordingly, the parents had the burden of proof to demonstrate that the district did not offer the student a FAPE for the 2007-08 school year, as their due process complaint notice predated the effective date of the amended statute. Consequently, the impartial hearing officer's placement of the burden upon the parents was correct.

I will now turn my attention to the district's argument that the impartial hearing officer exceeded the scope of her authority in determining that the district's proposed placement did not comply with 8 NYCRR 200.6(g), insofar as this objection was not raised in either the parents' due process complaint notice or during the impartial hearing, and hence, should not have been decided, and because temporally, the regulation in question became effective after the development of the June 13, 2007 IEP. The hearing record supports the district's argument that the parents neither raised this objection in their due process complaint notice, nor amended their notice to include this allegation. Furthermore, the issue was not raised during the course of the impartial hearing.

Based upon the foregoing, I find that in determining that the district's recommended placement for the 2007-08 school year did not comply with 8 NYCRR 200.6(g), the impartial hearing officer exceeded her jurisdiction by deciding an issue that she herself raised sua sponte in her decision that was neither identified in the parents' due process complaint notice, nor raised during the impartial hearing. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer

disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). It is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base her determination on an issue raised sua sponte. The impartial hearing officer should have confined her determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

I will also address the impartial hearing officer's reliance on J.L. v. Mercer Island Sch. Dist., 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006)¹² in applying the legal standard to determine whether the student in this case was substantively offered a FAPE. The impartial hearing officer applied the language in the Mercer Island case to determine that the student did not receive "meaningful educational benefit" from the district's recommended program under the IDEA (IHO Decision at pp. 31-32). She erred in not applying the Rowley standard as applied within the Second Circuit. Neither the 1997 nor 2004 amendments to the IDEA specifically addressed changing the well-settled Rowley standard (see Lessard v. Wilton Lyndeborough. Coop. Sch. Dist., 518 F.3d 18, 28-29 [1st Cir. 2008]; Mr. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 300 [D. Me. 2008]). The Second Circuit continues to utilize the Rowley standard (Gagliardo, 489 F.3d at 108, 113).¹³ The United States Supreme Court continues to cite favorably to its Rowley decision in recent decisions (see, e.g., Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000 [2007]). As such, I am not persuaded that the Rowley substantive standard, as interpreted and applied by the Second Circuit Court of Appeals, should not continue to be the applicable standard for appeals brought under the IDEA and Article 89 in New York State (Application of the Dep't of Educ., Appeal No. 08-056).

In considering the remaining portion of the impartial hearing officer's determination with respect to the special education program offered to the student for the 2007-08 school year, for the reasons stated below, I am constrained to concur with the impartial hearing officer that despite the district's offer of numerous supports and special education services, the IEP as developed was not reasonably calculated to confer educational benefit given this student's

¹² This case is presently on appeal before the United States Court of Appeals for the Ninth Circuit (see J.L. v. Mercer Island Sch. Dist., 2006 WL 3628033 [W.D. Wash. Dec. 8, 2006], appeal filed, No. C06-494MJP [9th Cir. Aug. 28, 2007]).

¹³ 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 Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006); M.K. v. Sergi, 554 F. Supp. 2d 201, 222 (D.Conn. June 6, 2008); A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 173 (D.Conn. Feb. 9, 2006); Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 381 (S.D.N.Y. Feb. 7, 2006).

significant level of specific needs and the recommendation that the program be implemented in the district's middle school general education environment for the 2007-08 school year.¹⁴

The hearing record reveals that during the first half of the 2006-07 school year, while enrolled in the co-teaching program, the student exhibited numerous negative behaviors, such as leaving the classroom without permission, not wanting to stay in the work environment, refusing to complete work that was assigned, and participating "very little" in the class (Tr. p. 261; Dist. Exs. 3; 15 at p. 1). The hearing record reveals that when frustrated, he occasionally "verbally call[ed] out" and "insulted other people" (Tr. p. 261; Dist. Ex. 3). The student spent a "very good amount" of time in the school psychologist's office, underwent numerous medication changes and verbalized at school and home that he "wanted to die" (Tr. pp. 169-70, 180, 798; Dist. Ex. 3 at pp. 3-4; Parent Ex. G at p. 1). By January 2007, the student's behavior at school had declined to the extent that he required a change in classrooms and the addition of a 1:1 TA (Tr. pp. 799-800).

The hearing record reflects that numerous supports and services were added to the student's program during the second half of the 2006-07 school year, including a refined FBA and BIP, a 1:1 TA, an indirect consultant teacher and individual speech-language therapy services (Dist. Exs. 1 at p. 1; 11; 32). Although district witnesses testified that the student demonstrated an overall improvement in his behavior during the second half of the 2006-07 school year, despite the addition of these services, his behavior and ability to participate in the general education environment and curriculum remained extremely variable (Tr. pp. 179-80, 261-63, 349; Dist. Exs. 27; 28; 33). Additionally, the student's regular education teacher during the latter half of the 2006-07 school year testified that the student did not regularly participate in "special" classes such as music and library (Tr. pp. 266-67).

I agree with the impartial hearing officer that the hearing record reflects that during the second half of the 2006-07 school year, the student successfully participated in only some classroom activities (Tr. pp. 258-65, 269; Dist. Ex. 29), and that testimony from his teacher establishes that he achieved only some degree of academic progress (Tr. pp. 270-84). However, the hearing record contains neither the student's report card from the 2006-07 school year, nor testimony from any witness to rebut the student's mother's testimony that during the student's educational career in-district, two thirds of his subject grade designations were either a "one" or a "two" ("one being the worst"), out of a possible "four" ("four being the best"), indicating difficulty with behavior, math, spelling and reading, despite the student's average to high average academic and cognitive skills (Tr. p. 820; Dist. Exs. 5; 6).¹⁵

Despite observing some degree of behavioral and academic improvement in the student during the second half of the 2006-07 school year, the student's mother testified during that

¹⁴ The district's director of special education testified that he considers the recommended co-teach program to be a general education program (Tr. pp. 540-41).

¹⁵ The student's mother testified that the student received designations of "three" and "four" in science and social studies (Tr. p. 820). The hearing record reflects that the student achieved three out of nine academic IEP annual goals listed on the January 18, 2007 IEP; with respect to three other goals, he demonstrated either some progress or progressed satisfactorily; and he did not achieve three other enumerated goals (Tr. pp. 298-301; Dist. Ex. 1 at pp. 10-12).

school year the student only had two play dates, and a third was cancelled because her son initiated a physical altercation with the other student (Tr. pp. 810-11). She testified that the student "dropped out" of all extracurricular activities, and, according to her, was either "at school or [having a] temper tantrum at home for the whole year" (Tr. p. 811). During the second half of the 2006-07 school year, the student's regular education teacher testified that the student had two classmates with whom he preferred to play with at recess (Tr. pp. 268-69), although the school psychologist, who had worked with the student since first grade, denied that the student had "friends," describing his contact with peers as "transient kinds of relationships, acquaintances, but nothing as a lasting friendship" (Tr. pp. 173, 204). The school psychologist further testified that the 1:1 TA assisted the student's ability to socialize with others,¹⁶ but acknowledged that the student always had difficulty socializing with other students and socialization was "difficult for him all the way through" (Tr. pp. 181-82).

The proposed middle school placement recommended for the student by the June 13, 2007 CSE consists of grades five through eight (Tr. p. 454). Fifth grade students are placed on a "team" consisting of four teachers, including a homeroom teacher, with whom they begin and end their day (Tr. pp. 437, 454). Students transition with the other students in their team to all academic classes, but are "departmentalized" for classes such as art, physical education, health and foreign language (Tr. pp. 438, 455). Between classes, students utilize metal lockers in the hallways, and complete approximately seven class transitions per day (Tr. pp. 455, 467). During the 2007-08 school year, the proposed co-teaching support classroom had 21 students in the class, four of whom also had IEPs (Tr. pp. 456-57).

The recommended co-teaching support program consists of four hours per day of 6:1 special education teacher/TA support in all academic classes (Tr. pp. 434-35; Dist. Ex. 13 at p. 1). The district's middle school special education teacher testified that the program recommended for the student was the "most intensive" offered at the middle school in that in all academic classes there would be a regular education teacher, a special education teacher or TA, and the student's 1:1 TA (Tr. pp. 430, 434-35; see Tr. pp. 19-20). The special education teacher works in the general education classroom during three out of four core academic subject instructional periods per day, and the special education TA remains in the general education classroom during the remaining one core academic instructional period (Tr. pp. 434-35). At the end of the school day, the special education teacher provides small group instruction to students who receive special education services during an "academic extension class" (id.).

During the 2006-07 and 2007-08 school years, the CSEs recommended five hours of 1:1 TA services per day to support the student's participation in classroom assignments and activities, to consistently enforce the student's BIP, to preview the student's academic day, and to prepare him for transitions (Dist. Exs. 1 at p. 2; 13 at p. 2). The student's 1:1 TA would also assist the student by maintaining his attention in the classroom, reducing his resistance, and pulling him out of the classroom if necessary (Tr. pp. 185, 189-90). The school psychologist and the student's regular education teacher for the second half of the 2006-07 school year testified

¹⁶ The hearing record does not provide any specific information about how the 1:1 TA provided the student with socialization support.

that the 1:1 TA recommendation for the 2007-08 school year was a critical part of the student's special education program (Tr. pp. 189-90, 316).¹⁷

The student's regular education teacher during the second half of the 2006-07 school year testified that transitions could be difficult for the student, which is consistent with information contained in the student's June 13, 2007 IEP (compare Tr. pp. 307-08, with Dist. Ex. 13 at pp. 2-3, 5-6). The June 13, 2007 IEP also identified the student's difficulty with noisy, loud environments and cautioned that that he may become upset by unexpected touch from an unfamiliar person (Dist. Ex. 13 at pp. 2, 6). At the June 13, 2007 CSE meeting, the CSE discussed the parents' dual concerns about the student's difficulty entering the middle school through the main door among other entering students, and his potential discomfort caused by the volume of music that played in the school building over the loudspeaker (Tr. pp. 449-50). In an effort to address these concerns, the CSE considered options, including affording the student an alternate entrance into the building, and reducing the volume of the music played at the school (Tr. pp. 450-51). Regarding transitions between classes, in order to minimize the student's exposure to a potentially frenetic middle school hallway environment, the CSE considered allowing the student and his 1:1 TA to leave classes early or late, and locating the student's classes closer together (Tr. pp. 131-32). Although I commend the district's willingness to accommodate the student's needs, I share the impartial hearing officer's concern that these types of accommodations would further isolate an already anxious student (Dist. Ex. 1 at p. 8; IHO Decision at pp. 32-33).

Both the school psychologist and the student's mother testified that the student's behavioral improvement during the 2006-07 school year was directly related to his positive relationship with his regular education teacher during the second half of the 2006-07 school year, and the school psychologist noted that "once [the student] was transferred from his initial teacher in the fall, from September through December [2006], there was definitely an enormous change once he was transferred to another teacher ..." (Tr. pp. 181, 796-97). The student's increase in compliant behavior during the second half of the 2006-07 school year was in large part attributed by both witnesses to the "good relationship" that he had with his regular education teacher during the second half of the 2006-07 school year (Tr. pp. 181-82, 802). However, the student's mother qualified her testimony by adding that the student's behavior did not actually improve during the 2006-07 school year, but his regular education teacher's ability to "manage" the student's behaviors that were already present proved decisive (Tr. p. 802).¹⁸ The hearing record reflects

¹⁷ In her decision, the impartial hearing officer opines "it can reasonably be argued that if [the student] required a one-to-one aide at his side in order for him to function in a program, the program should not be considered to be appropriate to meet his needs" (IHO Decision at p. 32). The impartial hearing officer offers no authority in the decision drawn from the hearing record, statutory, regulatory, or case law to support this argument, and consequently, I accord it no weight in my consideration of the merits of this appeal. A one to one aide is a recognized programming service which can be utilized to support a general education placement (see 8 NYCRR 200.1[bbb]).

¹⁸ The student's mother testified that her son had a "great relationship" with his second grade teacher who, as a result, was able to "manage" his behavior better than many others (Tr. p. 789). By contrast, she also testified that the student's special education teacher during the first half of the 2006-07 school year was "sarcastic and she tends to raise her voice readily. ... [The student] is extremely sensitive to voice and noise. As a child with Asperger's, he does not understand sarcasm" (Tr. pp. 796-97). The hearing record indicates that the student's placement in her class coincided with the recurrence of his "refusing to do work" and "oppositional behavior"

that the student experienced difficulty with specific elementary school teachers despite his exposure to a relatively small number of different faculty members per day. At the middle school, the student would be required to complete approximately seven daily transitions and to relate to more regular education teachers per day, aside from his special education teacher, the special education TA and his 1:1 TA (see Tr. pp. 454-55; Dist. Ex. 13 at pp. 1-2). Based on the student's experience during the 2006-07 school year, I do not believe that this student could have adequately navigated the middle school environment and its multiple transitions, while remaining available to learn and receiving educational benefits from the district's recommended program.

Based upon the hearing record, I conclude that the parents have demonstrated that the student IEP was not reasonably calculated to confer educational benefit in the district's recommended program, despite the good intentions, collaboration and extensive interventions of the parents, district personnel, and private providers. I concur with the impartial hearing officer's finding that the only way the student could function in the proposed general education environment was to "employ a constantly increasing set of accommodations and supports while he remained in an environment that was detrimental to his well-being and not conducive to his ability to achieve academically" (IHO Decision at p. 32). Considering the middle school environment and program proposed for the student for the 2007-08 school year as described in the hearing record, I further agree with the impartial hearing officer's finding that the student would likely "only endure further discomforts and difficulties when he transitioned to middle school for the 2007-08 school year" (*id.*). I therefore concur with the impartial hearing officer's determination that the district did not offer a FAPE to the student for the 2007-08 school year.

Having concurred with the determination of the impartial hearing officer that the district did not offer the student a FAPE for the 2007-08 school year, I now consider the appropriateness of the parents' placement of the student at Winston, and the equity considerations for tuition reimbursement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419, *aff'd*, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same

(see Tr. p. 797). Additionally, the student's regular education teacher for the second half of the 2006-07 school year testified that the student did not like to participate in music class, acknowledging that the student did not "get along" with his music teacher (Tr. pp. 270-71).

considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F. 3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Winston is described as a private school for students in grades 5 through 12 with language-based disorders, NVLD, Asperger's Syndrome, attention deficit disorders (ADD), and for students "on the spectrum" (Tr. pp. 561-62). Winston utilizes a combination of teacher-created and published materials in the classroom, and although the school does not follow state curricula, it "refer[s] to [them] as a guideline" (Tr. pp. 574-75).

During the 2007-08 school year, the student received instruction in science, language and literature, math, history, physical education, art, and drama (Parent Exs. C; E). Winston also offered the student a daily "focus" class, consisting of an individual 43-minute session with a Winston faculty member and addressing skill development and targeting the student's

organizational, study, social, written language and reading comprehension skills (Tr. pp. 562-63, 642-43). Each school day concluded with a final period, entitled "reflect, assess, prepare and serve" (RAPS), providing students with the opportunity to clarify their homework, to ensure that they have the appropriate materials to complete assignments, and to discuss community service opportunities (Tr. pp. 568-69).

The school places students in groups of six to eight based upon their learning profiles, which consist of cognitive, achievement and projective test results and a determination of the academic and social-emotional skills in need of targeting (Tr. pp. 562, 570-71). During the 2007-08 school year, except for the individual focus session, the student attended classes with five to seven other students (Tr. pp. 567-69, 606-07, 655). The student's group is comprised of classmates with "average to above average intelligence such as [the student's]," who also have "some memory issues, some impulsivity issues, attentional, written language difficulties, organization, somewhat of an executive function overlap," and "bright students who have difficulty with more abstract understanding and reasoning" (Tr. p. 619). Students in his class "have a lot of impulsivity ... difficulty with organization ... struggle with the why, cause and effect," and "lack the study skills to really independently prepare on their own where they need to be given specific guidelines on how to prepare for a test" (Tr. p. 695). The student typically traveled with his group throughout the school day, with the exception of math class (Tr. p. 570).

The hearing record reveals that with the exception of physical education, each of the student's classes were located in one hallway of the school building, which was carpeted and devoid of lockers (Tr. pp. 645, 648, 650-51, 817). The student's daily schedule contained two "double" periods (math as well as language and literature) that did not require the student to transition to a different classroom (Tr. pp. 671-72). His focus teacher testified that the student moved independently from one class to another, and did not require an escort or aide to assist him (Tr. p. 648). He further testified that there was no need for the student to leave class earlier than his classmates in order to arrive to the next class on time (id.).

According to the student's 2007-08 class schedule, the student was exposed to five different teachers during the week (Parent Ex. E). One teacher instructed the student for four periods of the day (a double period of math, and one each of science and focus), two teachers each instructed the student for two periods per day (one teacher taught a double period of literature and language, and one teacher taught history and RAPS), and two teachers alternated days instructing the student for one period per day (in art and physical education) (id.). In the fall semester at Winston, the student achieved the following grades: "B-" in language and literature; "B+" in math; "A-" in history; "A-" in science; "B+" in focus; "A-" in drama; and a passing grade in physical education (Parent Ex. C). Additionally, the hearing record evidences that the student demonstrated academic progress and exhibited grade level skills during the 2007-08 school year at Winston, in that he read age-appropriate chapter books, and demonstrated a fifth to sixth grade level math, language and literature skills (Tr. pp. 582, 584, 657; Parent Exs. A; B). The student's focus, math and science teacher testified that since September 2007, the student's written language, ability to make inferences, study and organizational skills had all improved (Tr. pp. 658-60; Parent Ex. E). The head of Winston testified that the school did not provide, nor did the student require, a TA in his classrooms (Tr. pp. 577-78).

Winston's focus sessions afforded the opportunity for the focus teacher and the student to discuss emotional situations that arose in class or throughout the day, and to examine options for handling situations differently (Tr. pp. 642-43). Focus session goals set for the student to achieve in fall 2007 included improving the student's ability to cope with anger and frustration with peers, learning empathy and considering another's perspective, and increasing his ability to listen and reflect (Parent Ex. A at p. 2). His winter 2008 focus session progress report noted that improving the student's social skills and developing his coping strategies for managing frustration were primary goals (Parent Ex. B at p. 1). The student's focus teacher testified that he was in contact with the student's private psychologist, and that he implemented the strategies she recommended to increase the student's understanding of the cause of his behavior in social situations, and to improve the student's ability to manage frustration more effectively (Tr. p. 644; Parent Ex. B at p. 1). The focus teacher reported that he provided instruction to the student about specific strategies to improve these skills, including positive self-talk and use of social stories (Parent Ex. B at p. 1). He added that he met with the student at times outside of the focus session to discuss social situations that the student experienced, and that he made himself available to the student on an as needed basis (Tr. pp. 565, 643-44).¹⁹ The student's focus teacher also testified that he addressed emotional concerns that the student brought to him, that he and the student had a "nice rapport," and that "when he is feeling frustrated ... he is able to come to me and really discuss what's bothering him and we can work it out together" (Tr. p. 658). The focus teacher observed that the student shared similar relationships with his other teachers at Winston (Tr. p. 670).

The hearing record demonstrates an improvement in the student's behavior and self-regulation skills during the 2007-08 school year (Parent Ex. B at p. 1). Early in the 2007-08 school year, the student exhibited "verbal outbursts" and "would sometimes be physical with a chair, perhaps kick a chair or table" (Tr. p. 594). Winston collaborated with the student and his family to target those behaviors, and the head of Winston testified that school staff had not observed similar incidents since that time (Tr. pp. 594-95). Although the winter 2008 progress report noted that the student made confrontational remarks when under stress, frequent opportunities for self-reflection to examine the effect of his statements on others resulted in a gradual decline in their occurrence (Tr. pp. 667-68; Parent Ex. B at p. 1). Winston did not employ a behavioral checklist with the student because he exhibited neither any behavioral problems that needed to be addressed daily, nor any noncompliant or resistant behaviors (Tr. pp. 663, 668-69). The head of Winston testified that the student's "tolerance level has increased dramatically and he is just a very comfortable student who is learning, who has become a wonderful self-advocate" (Tr. p. 578). She described how the student becomes aware when he needs a break during stressful moments, takes a break, and is then able to return to the classroom (*id.*). His focus teacher also testified that the student's ability to handle frustration with academic work improved, as demonstrated by decreasing the number and durations of breaks that the student took during the school day, down from two to three 15-minute breaks per week at the beginning of the school year, to a three to five minute break "once in a blue moon" by May 2008 (Tr. pp. 660, 690). His focus teacher related a situation during a basketball game during which the student independently removed himself because he was becoming overwhelmed, and

¹⁹ The head of Winston testified that the student received "counseling" in school on an as needed basis, although "less and less" since the beginning of the 2007-08 school year (Tr. pp. 555, 577-79). Her testimony suggests that the student's "counseling" was provided by his focus teacher, who does not hold any licenses or certifications (*see* Tr. pp. 578-79, 592, 677-78).

appropriately involved himself with another activity (Tr. p. 665). His focus teacher opined that the student responded positively to having choices, and found that as "the year has gone on, [the student] doesn't need as many options" (Tr. pp. 662-63). As the school year progressed, the focus teacher observed that the student demonstrated the ability to manage transitions, such as changes in his daily schedule, "a lot better" (Tr. pp. 664-65). He also noted that the student's unscheduled visits to him decreased, from three to four times per week at the beginning of the 2007-08 school year, to approximately once per month by May 2008 (Tr. pp. 695-96).

Socially, the student's focus teacher testified that early in the 2007-08 school year, the student experienced difficulty considering another person's point of view and showing empathy (Tr. p. 660). By the time of the impartial hearing in May 2008, the focus teacher noted an increase in the student's ability to show empathy, as manifested by the student's offer of "moral support" to troubled peers (Tr. p. 660), and his willingness to discuss misinterpretations of a peer's or adult's comments when they occur (Tr. pp. 578-79). At the beginning of the 2007-08 school year, the student ate by himself three to four times per week (Tr. p. 689). As the school year progressed, the student "made several friends" at Winston, two or three of whom he ate lunch with and played with during recess on a daily basis (Tr. pp. 579-80, 649). His focus teacher testified that the student was "a lot more comfortable" participating in social activities, referring to the student's initial fear of birthday and pizza parties in the early part of the 2007-08 school year (Tr. p. 661). By May 2008, the student had joined the school's crew team, and participated in swimming lessons, archery, birthday parties and a sleepover (Tr. pp. 661, 821).

The district argues that the positive changes observed in the student during the 2007-08 school year are attributable to a change in his medication implemented in July 2007 and subsequent dosage increases (Tr. pp. 753-56). However, the student's private psychiatrist, who has treated the student since May 2004 and supervised numerous medication changes, testified "unequivocally" that "the most likely and most certain reason he's doing so well this year has to do with the school change" (Tr. pp. 712, 767-69; Parent Ex. G). He added: "frankly, I have less confidence in my ability to pick the sole medication that is going to help the [student] at this point, twenty or thirty medications prior to that that failed, than I do in the change in the educational setting, in the milieu, which happened simultaneously" (Tr. pp. 768-69).

Based upon the evidence in the hearing record, it is apparent that Winston was appropriate to meet the student's special educational needs (see Gagliardo, 489 F.3d at 112, 115). Consequently, I concur with the impartial hearing officer's determination that the parents met their burden to demonstrate that Winston was an appropriate placement for the student during the 2007-08 school year, and therefore prevailed with respect to the second Burlington criterion for an award of tuition reimbursement (IHO Decision at pp. 33-34).

The final criterion for a reimbursement award is that the parent's claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d

530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). With respect to equitable considerations, the IDEA provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, fail to engage with potential placements offered by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Frank G., 459 F.3d at 363-64, 376; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; see also Voluntown, 226 F.3d at n.9).

The district's sole argument with respect to equitable considerations is that because the hearing record demonstrates that the parent signed the Winston enrollment contract and placed a non-refundable deposit with the school prior to the June 13, 2007 CSE meeting, the parents never seriously intended to enroll the student in the district placement for the 2007-08 school year. I do not find the district's contention supported by the hearing record. The student's mother testified that she did not dismiss the possibility of eventually accepting an appropriate district program after she signed the Winston enrollment contract, stating "I need to see what's happening with the [June 13, 2007] CSE, and I said they might find an environment that works for my son" (Tr. p. 816). However, she added "but it was incumbent upon my husband and I to make sure that if the CSE was unable to provide a safe and healthy environment in which [the student] could learn appropriately, then we need to secure him a place at this school" (id.). The district did not produce any testimonial or documentary evidence to contradict this testimony.

Furthermore, although the student's mother conceded that she did sign the enrollment contract and place a non-refundable deposit with Winston prior to the June 13, 2007 CSE meeting (Tr. pp. 815-16; Parent Ex. K), the totality of the hearing record demonstrates that the parents cooperated fully with the district during the entirety of the student's public school career, as demonstrated by their attendance and participation at multiple CSE meetings (see Dist. Exs. 1 at pp. 7-9; 13 at pp. 7-8; 15 at p. 6), as well as their repeated expenditure of private funds (for which they did not seek reimbursement) to provide related support services to the student so that he could be maintained in his public school district placement (see Tr. pp. 782-84, 786-88, 790-91, 796, 806). Additionally, the hearing record clearly establishes that the student's mother communicated her concerns about the recommended program being inappropriate beginning at the April 11, 2007 CSE meeting (Tr. pp. 805-06; Dist. Ex. 13 at p. 8) and again at the June 13, 2007 CSE meeting (Tr. pp. 805-06; Dist. Ex. 13 at p. 7). The parents properly put their concerns before the CSE. Despite their concerns, the parents nevertheless accepted the district's invitation to observe the recommended placement prior to removing the student from the district (Tr. p. 806; Dist. Ex. 13 at p. 8).

Under these circumstances, I concur with the impartial hearing officer that the parents should not be denied tuition reimbursement based on equitable reasons (IHO Decision at pp. 34-35).

I have reviewed the entire hearing record, the impartial hearing officer's decision and the parties' arguments relative to these issues. I have stated my differences with the impartial hearing officer's analysis as it pertains to Prong 1 of the Burlington/Carter analysis; however as noted above I concur with her conclusion that the district did not offer the student a FAPE. The impartial hearing officer also correctly determined that the parents sustained their burden to establish that the student's placement at Winston was appropriate,²⁰ and that the hearing record established that equitable considerations supported the parents' request for tuition reimbursement. Accordingly, I find that the impartial hearing officer properly ordered the district to reimburse the parents for their son's tuition costs at Winston for the 2007-08 school year.

I have examined the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 15, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

²⁰ The district argues that the testimony of the student's private psychiatrist was not credible because (1) he did not author the draft of the letter he wrote to the district concerning the student's need for a small classroom placement [see Parent Ex. I; see also Tr. pp. 744-48, 766-67]; and (2) his testimony is contradicted by his written treatment notes (see Parent Ex. F; see also Tr. pp. 740-62). The impartial hearing officer "found [the psychiatrist] to be extremely credible," and declined to discredit his testimony (IHO Decision at p. 34). A State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019; Application of a Child with a Disability, Appeal No. 97-73). Here, a review of the complete hearing record does not compel a contrary conclusion.