



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-105

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

### **Appearances:**

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

Law Offices of Melvyn W. Hoffman, attorneys for respondents, Melvyn W. Hoffman, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Bridge Program at Bay Ridge (Parent Exs. B-C). Bay Ridge is a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Bay Ridge provides both a special education program and a mainstream program (Tr. p. 41). The Bridge Program is described as a special education program at Bay Ridge for students with learning problems related to language or "dyslexia" (Tr. p. 57). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this proceeding (Tr. pp. 24-25; Dist. Ex. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student is described as a "pleasant, cooperative, motivated, and well-adjusted young man," who is friendly, articulate and liked by his peers (Dist. Ex. 9 at p. 1). He displays overall

cognitive abilities in the low average range (Dist. Ex. 5 at p. 5). The director of the Bridge Program described the student as having delayed language skills that affect his functioning in school activities involving "heavy language content," such as reading, science, history, and math word problems (Tr. p. 58).

The hearing record is sparse with regard to the student's educational history, but reflects that the student attended Bay Ridge for approximately half of the 2006-07 school year and the 2007-08 school year (Tr. p. 231).

A December 8, 2006 structured observation report conducted by a district special education teacher indicated that the student was observed for 30 minutes in social studies class at Bay Ridge with a student-to-teacher ratio of 8:1 (Dist. Ex. 6). The class was presented with a problem that required "brainstorming" and the students' written opinions (id.). The special education teacher described the student as "very verbal" and as an "active participant" in the class (id.). According to the observation report, the student stated his views, raised his hand to share a personal experience regarding a solved problem, and was very clear and demonstrative (id.). The special education teacher noted in the observation report that the student's social studies teacher at Bay Ridge indicated that the student was "always on task and trying his best" (id.).

An April 5, 2007 speech and language report from Bay Ridge indicated that the student received speech-language therapy three times a week for 30 minutes<sup>1</sup> to address his difficulties with receptive and expressive language, primarily in the areas of sustained listening attention, auditory memory and expressive organization skills including defining and describing, grammatically correct sentence formulation, writing three to four paragraph essays, vocabulary enrichment, and word retrieval (Dist. Ex. 8 at pp. 1-2). Administration of select subtests of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) over four 30-minute sessions yielded scaled (and age equivalent) scores of 6 (9-1) in recalling sentences, 13 (19-1) in formulated sentences, 7 (10-3) in word classes-receptive, 10 (13-0) in word classes-expressive, 8 (11-6) in word classes total, 9 (11-11) in word definitions, and 9 in understanding spoken paragraphs (id. at p. 1). The narrative portion of the speech and language report stated that the results were indicative of a significant receptive and expressive language disability (id.). The student was noted to fatigue easily, especially during administration of subtests involving sustained listening attention (id.). The evaluators indicated that teacher reports were consistent with test findings that the student required repetition and redirection (id.). The student processed information most effectively when auditory channels were combined with visual cues or prompts (id.). The speech and language report also indicated that the student displayed severe word retrieval difficulties and difficulty formulating complex grammatical sentences, as well as displaying deficits in his working memory abilities (id. at p. 2). The student's ability to initiate, organize, sequence, and verbalize or produce written topic centered text was described as contingent on the use of teacher generated graphic organizers, verbal cueing, and semantic mapping (id.). Although the student presented with age-appropriate spontaneous social/pragmatic conversational skills with peers, his ability to offer an academic explanation, text summary, cause and effect, or conclusion was described as "dramatically deficient" due to

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<sup>1</sup> The speech and language report does not indicate if the student received individual and/or group speech-language therapy (Dist. Ex. 8).

his receptive and expressive deficits (id.). The evaluator recommended that the student continue speech-language therapy support and inclusion of slow verbal presentation in the classroom as well as use of visual and written aids, visual imagery, highlighting, graphic organizers, and semantic mapping (id.).

An April 2007 Bridge Program quarterly report card reflected that the student achieved the following grades for the third quarter: mathematics (B+); science (A-); language arts decoding and encoding (B+); language arts vocabulary, comprehension and grammar (B+); writing (A-); history (C+); computers (A+); art (A); music (A); and physical education (A) (Dist. Ex. 7 at pp. 2-6). The category "Meets Expectations" was marked on the report card rubric for class work, participation and homework in science; language arts decoding and encoding; language arts vocabulary, comprehension and grammar; and writing (id. at pp. 2-4). For mathematics and history, the report card noted that the student met expectations for class work and participation, but was categorized as "Approaching Expectations" for homework (id. at pp. 2, 4). Regarding social development skills and work habits, the student reportedly met or exceeded expectations in math, science, social studies, and language arts for "works independently," "works well in groups," "seeks help when needed," "presents work in a neat and organized way," "begins work promptly," "listens attentively to others," "cooperates with teachers," "practices self-control," "adjusts to transitions," and "interacts well with peers" (id. at p. 7). The student received a rating of "approaching expectations" in social studies for "organizes work and belongings," but he was rated as having met expectations for that area in math, science and language arts (id.).

During a social history update conducted on May 21, 2007, the student's teachers indicated that the student was motivated and was a pleasure to have in class (Dist. Ex. 4 at p. 1). The student's decoding skills were reportedly at a fifth to sixth grade level, with comprehension slightly higher (id.). Math was noted as a "relative strength" for the student (id.). The student was stated to work well in groups and to be a leader (id.). The student's father reported that the student was in good health, was involved in a variety of sports activities and had many friends in his neighborhood (id. at p. 2). The social history update stated that "due process was fully explained" to the student's father and that the father had received a "guide to special education" (id.).

On May 21, 2007, the district also conducted a psychoeducational evaluation of the student (Dist. Ex. 5). The evaluation report described the student's behavior as polite and cooperative during testing (id. at p. 2). The student reportedly appeared to understand all the instructions and directions given, and tried to do his best (id.). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index standard score of 79 (8th percentile) in the borderline range, a perceptual reasoning index standard score of 106 (66th percentile) in the average range, a working memory index standard score of 88 (21st percentile) in the low average range, a processing speed index standard score of 94 (34th percentile) in the average range, and a full scale IQ score of 89 (23rd percentile) in the low average range (id. at pp. 2-3, 6).

Administration of the Woodcock-Johnson – III Tests of Achievement (WJ-III ACH) yielded the following scores (standard score [SS]/percentile rank/grade equivalent [GE]): broad reading cluster (SS 90/26th percentile/GE 5.7); broad math cluster (SS 94/34th percentile/GE

6.6); broad written language (SS 87/20th percentile/GE 5.2); math calculation skills (SS 96/38th percentile/GE 7.1); written expression (SS 87/18th percentile/5.3); academic skills (SS 91/21st percentile/GE 5.8); academic fluency (SS 87/19th percentile/GE 5.6); and academic applications (SS 93/32nd percentile/GE 6.4) (Dist. Ex. 5 at pp. 3-6). Specific achievement tests score results were as follows: letter-word identification (SS 88/21st percentile/GE 4.8); reading fluency (SS 91/27th percentile/GE 6.0); calculation (SS 103/59th percentile/GE 8.8); math fluency (SS 81/11th percentile/GE 5.2); spelling (SS 89/24th percentile/GE 5.0); writing fluency (SS 85/16th percentile/GE 5.3); passage comprehension (SS 98/45th percentile/GE 7.7); applied problems (SS 92/31st percentile/GE 6.0); and writing samples (SS 91/28th percentile/GE 5.6) (id. at pp. 3-4, 6).

Regarding the student's social/emotional functioning, the psychoeducational report indicated that the student was able to interact with the examiner in an appropriate manner, engaged in conversation, and appeared to maintain a positive attitude during testing (Dist. Ex. 5 at p. 5). The evaluation report noted that the student's responses to projective testing and interview material were appropriate; conveyed conventional themes; and reflected a capacity for logical, creative thinking (id.).

In summary, results of the May 2007 psychoeducational evaluation indicated that the student's overall cognitive functioning was in the low average range (Dist. Ex. 5 at p. 5). Academic testing revealed that the student's reading abilities were estimated to be at a late fifth grade level, his math skills were estimated to be at a mid sixth grade level and his writing skills were estimated to be at an early fifth grade level (id.).

In a letter dated May 23, 2007, the Committee on Special Education (CSE) chairperson notified the director of the Bridge Program of a scheduled June 6, 2007 CSE meeting for the student (Dist. Ex. 10). The letter indicated that a regular education teacher and a special education teacher for the student "must" be available to participate during the review (id.).

A June 2007 counseling report from Bay Ridge indicated that the student received two 30-minute counseling sessions per week during spring 2007 (Dist. Ex. 9 at p. 1). The focus of the counseling sessions was to help the student deal with tensions, anger, uncertainty, fear, and an impending move due to a family situation (id.). The counseling report described the student as pleasant, cooperative, motivated, and well-adjusted (id.). In addition, he was described as friendly, well-liked by his peers, and as having many leadership qualities (id.). The student was noted to be athletic and involved in organized team sports and hip hop dancing (id.). The counseling report stated that during the 2006-07 school year, the student evidenced difficulty dealing with anger in several situations with classmates (id.). He was described as having a tendency to "simmer" for quite some time before "losing it," and discussed with the counselor several techniques to help him deal with his feelings of anger, such as verbalizing his frustration or engaging in physical activities as an outlet (id.). It was recommended that the student continue counseling sessions once a week the following semester to provide him with support during a forthcoming change in his family situation, that he partake in role-playing and modeling to encourage positive ways of dealing with his feelings of anger, and that he continue his involvement with physical sports as a healthy outlet for his stress (id. at p. 2).

The CSE met on June 6, 2007 for the student's annual review and to develop his individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 1 at pp. 1-2). The student's mother, a district representative, a district school psychologist and a district social worker attended the meeting (Tr. pp. 14, 19-20; Dist. Ex. 1 at p. 2). A math teacher from Bay Ridge participated in the meeting by telephone as a regular education teacher and a reading teacher from Bay Ridge participated in the meeting by telephone as a special education teacher (Tr. p. 19; Dist. Ex. 1 at p. 2). The CSE recommended that the student remain eligible for special education services as a student with a speech or language impairment (Dist. Ex. 1 at p. 1). The CSE also recommended that the student be placed in a collaborative team teaching (CTT) class with a student to teacher ratio of 13:1 and receive related services of speech-language therapy in a separate location one time per week individually for 30 minutes and two times per week in a group of three students for 30 minutes, as well as individual counseling in a separate location one time per week for 30 minutes (Tr. p. 25; Dist. Ex. 1 at pp. 1, 14).<sup>2</sup> The student's IEP included a recommendation for preferential seating and testing accommodations including extended time (double) for exams longer than 30 minutes, a special location, directions read and reread aloud, and questions read aloud except on tests of reading comprehension (Dist. Ex. 1 at pp. 12, 14). The CSE recommended that the student participate with typically developing peers in school activities such as lunch, assemblies, and trips (*id.*). The hearing record does not reflect that the student's mother raised any concerns at the CSE meeting.

The district sent a Final Notice of Recommendation (FNR) dated June 11, 2007 to the student's parents that indicated that the June 6, 2007 CSE recommended a CTT class for the student with related services of speech-language therapy and counseling, as detailed above, beginning in September 2007 (Dist. Ex. 2). The June 11, 2007 FNR stated that the district was unable to identify a specific school site at that time because the classes might undergo reorganization and functional groupings might change (*id.*). However, the June 11, 2007 FNR stated that the parents could expect an FNR notifying them of a specific site for the student before September 2007 (*id.*).

The district sent another FNR dated July 2, 2007 to the student's parents that again summarized the CSE's recommendations and also identified a specific CTT classroom for the student (Dist. Ex. 3). On July 10, 2007, the student's mother responded by writing on the FNR

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<sup>2</sup> "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). Although the placement recommendation on the June 6, 2007 IEP was for a CTT class with a 13:1 ratio, the hearing record reflects that the actual class composition at the time of the impartial hearing was 13:1+1 because there was a paraprofessional in the classroom who was assigned to a specific student in the class (Tr. p. 128). As discussed herein, the paraprofessional was also available to work with other students in the class (Tr. pp. 128-29). The June 6, 2007 IEP indicated that the recommendation for a CTT class placement for 2007-08 was a change from the student's 2006-07 placement recommendation (Dist. Ex. 1 at p. 2). Testimony by the district special education teacher, who participated in the CSE review as the district representative, reflected that the placement recommended on the student's 2006 IEP was for a general education class with special education teacher support services (SETSS) for the 2006-07 school year (Tr. pp. 10, 25). The teacher stated that the CTT class was a more restrictive placement than the general education class with SETSS (Tr. p. 25).

dated July 2, 2007 that she had not been able to see the recommended class in session because the school was closed for the summer (id.). The student's mother further stated that since the proposed class was not organized or constituted, she was unable to make a decision at that time (id.).<sup>3</sup> She also requested that the district provide her with a class profile and program description (id.).

The parents filed a due process complaint notice dated October 2, 2007 (Parent Ex. C). The parents requested an impartial hearing for the student relating to the 2007-08 school year and alleged that the June 6, 2007 IEP was procedurally and substantively flawed (id.). Specifically, the parents alleged that: (1) the goals developed for reading, writing and math were inappropriate and demonstrated an expectation of either no growth or regression; (2) the written notice of placement, dated June 11, 2007, did not provide them with an opportunity to visit and make a decision about the placement prior to the start of the school year as the school/class was deferred for September placement; (3) the placement was inappropriate because it was too large and overwhelming; (4) the CSE denied the student a free appropriate public education (FAPE); and (5) in order to receive educational benefit, the student needs a small nurturing school, a small class environment, to be grouped with functioning peers, and intensive education remediation and structure (id.). The parents listed Bay Ridge as the student's current school (id.). As a resolution, the parents proposed that the district provide them with tuition reimbursement, transportation and related services for the 2007-08 school year (id.).

Subsequent to filing the due process complaint notice, the student's mother sent a letter dated October 11, 2007 to the CSE advising it that she had visited the recommended placement on September 28, 2007 and found it to be unacceptable for her son (Parent Ex. B). She elaborated that the proposed school was "too big," "too noisy and very confusing," and that lunch and recess were "very loud," "not organized" and "full of students at the same time" (id.). The student's mother stated that the proposed school site would overwhelm the student because it was a school of 239 students housed within another school of approximately 400 students (id.). She also stated that the proposed CTT class allowed up to 10 students with an IEP and 20 general education students, but that the class could have a maximum of 40 students enrolled in it (id.). Although the CTT class had a special education teacher and a regular education teacher teaching all subjects and the class was broken into two groups, the student's mother indicated that she felt the teachers could not modify each subject to all of the students' needs (id.). The student's mother also indicated that there were no small groups for each subject being taught, that the teachers were not trained in Orton-Gillingham and that although the program used the "Wilson Method," she did not see it being taught (id.). She also stated that she witnessed a student with behavioral problems leaving the classroom and ripping posters, signs, and students' work off the walls in the hallway, requiring that security be called (id.). The student's mother indicated that she was frightened by this experience and opined that "[i]t would have been a horrible experience" for her son (id.). The student's mother stated that the Bridge Program was more suitable for her son because "he has done well there and continue[d] to do so," the classrooms are smaller, and he was taught in groups ranging from 6:1 to 8:1 (id.). Additionally, the student's

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<sup>3</sup> Contrary to the written comment by the student's mother on the July 2, 2007 FNR that the class recommended for September 2007 was not organized or constituted, the July 2, 2007 FNR indicated a specific program recommendation with a school name, address and telephone number (Dist. Ex. 3).

mother stated that all of the student's subjects at Bay Ridge were tailored to meet his learning needs, and he was taught by teachers trained in Orton-Gillingham (id.).

The hearing record contains a notarized affidavit from Bay Ridge dated February 4, 2008 reflecting that it had received payment in full for the student's tuition for the 2007-08 school year (Parent Ex. A).

In a May 22, 2008 response to the parents' due process complaint notice, the district indicated that the student had previously been classified with a speech or language impairment and that there was no reason for the CSE to change his classification; the CSE recommended a CTT program for the student; the CSE had, upon information and belief, relied on a social history update, a psychoeducational evaluation, a classroom observation, a related service progress report/evaluation, and the April 2007 quarterly report in making its decision; the CSE considered a special class 12:1 placement as too restrictive for the student; the CSE considered and rejected a general education placement without special education services;<sup>4</sup> and an FNR was issued to the parent on July 2, 2007 that offered a placement that was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 12 at pp. 1-3).

An impartial hearing convened for two days on May 30, 2008 and June 24, 2008 (Tr. pp. 1, 166).<sup>5</sup> The district called three witnesses and submitted twelve documents into evidence (Tr. pp. 7, 118, 170; Dist. Exs. 1-12). The parents called three witnesses, including the student's mother, and submitted three documents into evidence (Tr. pp. 55, 100, 223; Parent Exs. A-C).

In a decision dated August 14, 2008, the impartial hearing officer found that the district failed to offer the student a FAPE, that Bay Ridge was appropriate for the student, and that equitable considerations did not bar an award of tuition reimbursement to the parents (IHO Decision at pp. 10, 13).<sup>6</sup> He awarded the parents tuition reimbursement for the student's 2007-08 school year at Bay Ridge (id. at p. 14).

The impartial hearing officer found that although the June 6, 2007 CSE review of the student was "procedurally sound," the student was substantively denied a FAPE (IHO Decision at pp. 7, 10). Notwithstanding his conclusion that the CSE review was procedurally sound, the

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<sup>4</sup> The June 6, 2007 IEP indicated that general education without a special education services program would not address the student's educational needs, as he required the full-time support of a special education teacher within an integrated setting to work with him in all areas of weakness (Dist. Ex. 1 at p. 13).

<sup>5</sup> The hearing record does not explain the delay in conducting the impartial hearing. While the parents' due process complaint notice is dated October 2, 2007, the impartial hearing did not convene for more than seven months. The impartial hearing officer is reminded to comply with State regulations with regard to convening the impartial hearing (see 8 NYCRR 200.5[j][3][iii], [j][5][i]). State regulations further provide that "[t]he impartial hearing officer shall respond in writing to each request for an extension" and that "[t]he response shall become part of the record" (8 NYCRR 200.5[j][5][iv]).

<sup>6</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) was amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In his decision, the impartial hearing officer cited to the regulations as promulgated prior to the IDEA 2004 despite that the relevant events in the instant case took place after the effective date of the amended regulations. Unless otherwise noted, all citations in this decision refer to the regulations as amended.

impartial hearing officer found that the June 6, 2007 CSE was improperly composed because it lacked the participation of an additional parent member, whose participation the parents did not waive (id. at pp. 4-6; see 8 NYCRR 200.3[a][1][viii]). However, he found that the hearing record did not demonstrate that the absence of an additional parent member deprived the parents of any opportunity to participate in the meeting or that the absence thereof resulted in a denial of a FAPE (IHO Decision at pp. 4-6). The impartial hearing officer also found that there was no one present at the June 6, 2007 CSE meeting who could conduct the recommended CTT class, but that the absence of personal knowledge by CSE members of a proposed placement was not "per se" proof that the placement was inappropriate (id. at pp. 6-7; see 34 C.F.R. § 300.321[a][4][i]).

Substantively, the impartial hearing officer stated that there was "insufficient evidence to accept the IEP as developed as a valid IEP for the student" (IHO Decision at p. 10). He further stated that "[a]s a result of the finding with respect to the IEP [he found] the placement in the CTT class to be inappropriate" (id.). Although it is unclear, the impartial hearing officer's conclusions appear to be based upon his findings that it is "highly unlikely" that the student's teachers from Bay Ridge were present for the district psychologist's review of his report at the CSE meeting and that there is a "serious question with respect to some of the goals presented on the IEP since there is no testimony that those goals were ever discussed with the student's current teachers" (id. at pp. 8-9).

The impartial hearing officer also found that the parents met their burden to establish their unilateral private school placement was appropriate for the student because the student has been making "real educational progress" at Bay Ridge (IHO Decision at p. 13). The impartial hearing officer determined that Bay Ridge developed a program that met the special education needs of the student, and that the description of the language arts program by the director at Bay Ridge and the comments on the nature of teaching and the various specific activities utilized to engage the student met the requirements to develop individualized standards (id.). He further found that the equities favored the parents' request for tuition reimbursement because the parents cooperated in testing and evaluation of the student, attended the CSE review, and visited the recommended placement (id.).

The district appeals the decision of the impartial hearing officer and requests that it be annulled. The district alleges that, contrary to the impartial hearing officer's findings, the district offered the student a FAPE, the parents' unilateral placement of the student at Bay Ridge was not appropriate for the student, and equitable considerations do not favor an award of tuition reimbursement to the parents.

The district asserts that the June 6, 2007 CSE was duly composed, and the fact that the student's private school teachers were not present for the duration of the CSE meeting did not, alone, deprive the parents of a meaningful opportunity to participate in the review. The district notes that the parents did not voice any objection at the meeting to the early departure of the teachers. The district also alleges that an additional parent member was not a required member of the CSE. The district further alleges that the June 6, 2007 IEP was substantively appropriate and contained appropriate goals and behavior management strategies. It asserts that although the goals were not drafted until after the meeting, the underlying information upon which they were based was extensively discussed at the meeting. It also asserts that failure to specifically discuss

the goals at the IEP meeting did not automatically deny the student a FAPE, and that the proposed program was appropriate for the student within the least restrictive environment (LRE). The district maintains that the parents were provided with timely notice of the proposed placement.

The district alleges that the parents did not meet their burden of persuasion with respect to the appropriateness of Bay Ridge. Specifically, it alleges that the parents failed to demonstrate how Bay Ridge was specifically designed to meet the student's unique needs, and that the parents did not produce objective information regarding the student's progress for the 2007-08 school year.

With regard to equitable considerations, the district asserts that the parents failed to provide the CSE with sufficient notice permitting the CSE to reconvene in a timely manner, there was no testimony that the parents expressed concern over any portion of the June 6, 2007 IEP or that the parents notified the district during the June 6, 2007 CSE meeting that they would be placing their son at Bay Ridge. The district also argues that the parents failed to notify the district that they would be rejecting the CSE's recommendations until October 11, 2007. Alternatively, the district maintains that if the parents are entitled to tuition reimbursement, any reimbursement should be prorated from the time at which the parents notified the district of their concerns with the IEP on October 11, 2007.

In their answer, the parents deny many of the allegations in the petition. Particularly, the parents deny the district's allegations that it offered the student a FAPE, that the June 6, 2007 IEP was procedurally or substantively appropriate, that their unilateral placement of the student at Bay Ridge was not appropriate, and that the equities do not favor an award of tuition reimbursement for the full 2007-08 school year. The parents request that the decision of the impartial hearing officer be upheld.

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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). 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 P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

Parents who disagree with a proposed IEP may seek an impartial hearing by the filing of a due process complaint notice (20 U.S.C. § 1415[f]; 34 C.F.R. § 300.507; Educ. Law § 4404[1]; 8 NYCRR 200.5[i]; see Gagliardo, 489 F.3d at 108). A due process complaint notice shall include the name and address of the student and the name of the school which the student is attending; a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem; and a proposed resolution of the problem to the extent known and available to the party at the time (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). Failure to conform to the minimal pleading requirements may render a due process complaint notice legally insufficient (see M.S.-G v. Lenape Regional High Dist. Bd. of Educ., 2007 WL 269240, at \*3 [D.N.J. Jan.

24, 2007] [finding proper a dismissal of a due process complaint notice for failure to allege facts related to the problem and to propose a resolution of the problem]). An impartial hearing may not proceed unless the due process complaint notice satisfies statutory and regulatory sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).<sup>7</sup> A party may amend its due process complaint notice if the other party consents in writing to such amendment or if the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs (20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; Application of a Child with a Disability, Appeal No. 08-088).

Under the IDEA, the burden of persuasion in any administrative hearing challenging an IEP is placed on the party seeking relief (see Schaffer v. Weast, 546 US 49, 59-62 [2005]). In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). In this case, the State law does not apply because the impartial hearing was commenced before its effective date. Further, there is no dispute between the parties that the burden herein rests with the parents to show that the district failed to offer the student a FAPE, and the parties directly stated such at the impartial hearing (Tr. pp. 5-6). In any event, the evidence in the hearing record amply supports the decision herein and thus, the burden of proof is not dispositive in this case.

At the outset, I will address whether the CSE meeting at which the June 6, 2007 IEP was developed was duly constituted.<sup>8</sup>

The parents allege that the June 6, 2007 CSE was improperly constituted without an additional parent member or waiver thereof. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law and regulation requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL

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<sup>7</sup> The Senate Report pertaining to this 2004 amendment to the Individuals with Disabilities Education Act (IDEA) noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (*id.*).

<sup>8</sup> I note that there is no indication that the parents raised the issue of the CSE composition at the June 6, 2007 CSE meeting, and they did not raise a claim in either their October 2, 2007 due process complaint notice or in their subsequent October 11, 2007 letter to the district alleging that the CSE composition was improper such that the student was denied a FAPE or that the parent's participation in the IEP formulation process was significantly impeded (Parent Exs. B-C). Although both the parents and the district elicited testimony at the impartial hearing as to the composition of the June 6, 2007 CSE, the parents did not seek to amend their due process complaint notice (Tr. pp. 19-24; 36-40; 187-190). Neither party has alleged on appeal that this issue was beyond the jurisdiction of the impartial hearing officer.

1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL101618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). Specifically, the CSE is to be composed of, among other individuals,

an additional parent, residing in the school district or a neighboring school district, of a student with a disability, of a student who has been declassified and is no longer eligible for an individualized education program (IEP), or a parent of a disabled child who has graduated, for a period of five years beyond the student's declassification or graduation, provided such parent shall not be employed by or under contract with the school district, and provided further that such additional parent shall not be a required member if the parents request that such additional parent member not participate

(Educ. Law § 4402[1][b][1][a][viii]; see 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]).

It is undisputed that no additional parent member attended the June 6, 2007 CSE meeting at which the IEP for the student was developed (Dist. Ex. 1 at p. 2), nor is there any parental waiver of the additional parent member contained in the hearing record. While this is a procedural error and contrary to State law and regulations, I am not persuaded by the evidence in the hearing record that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). The parents do not allege any specific harm this procedural error caused the student or that the lack of an additional parent member impeded the parents' opportunity to meaningfully participate in the formulation of the IEP (see Matrejek, 471 F. Supp. at 419). They merely deny the district's assertion that the June 6, 2007 CSE was duly constituted. A review of the hearing record reflects that the parents had some familiarity with the IEP process as the student had previously received special education services from the district (Tr. pp. 25, 28; Dist. Ex. 1 at p. 2). Although the June 6, 2007 CSE meeting was improperly constituted under State law and regulation (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]), there is insufficient evidence in the hearing record to demonstrate that the composition of the June 6, 2007 CSE meeting rose to the level of a denial of a FAPE (R.R., 2006 WL 1441375 at \*5; Mills, 2005 WL101618765 at \*5; see Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058).<sup>9</sup>

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<sup>9</sup> The impartial hearing officer has included in his decision verbatim text from two prior decisions, namely, Application of the Bd. of Educ., Appeal No. 07-120 and Application of a Child with a Disability, Appeal No. 04-075 (IHO Decision at pp. 4-6). It is unclear whether the impartial hearing officer intended to quote the two decisions as authority or to adopt the analyses therein as his own. However, I note that the impartial hearing officer relied on these analyses without conforming the dates, the student's private school name, or the citations therein to reflect the hearing record in this particular case (id.). The impartial hearing officer is cautioned to use

The parents also allege that the June 6, 2007 CSE was also improperly constituted without a special education teacher who could have implemented the program. The IDEA requires that an IEP be developed by a group of individuals including at least one special education teacher, or where appropriate, at least one special education provider of such student (20 U.S.C. § 1414[d][1][B][iii]; see 34 C.F.R. § 300.321[a]; 8 NYCRR 200.3[a][1][iii]). The special education teacher or provider should be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). Here, the special education teacher of the student did attend the CSE meeting. The fact that the special education teacher of the student was from the private school did not negate the appropriateness of her participation as the special education teacher of the student.<sup>10</sup>

The hearing record demonstrates that the individual who attended the CSE meeting as the district representative was a teacher assigned to the review team for the district's applicable CSE region (Tr. pp. 9-10; Dist. Ex. 1 at p. 2). She was certified in both general education and special education, and she has taught in both settings, but testified that she did not attend the meeting as a teacher (Tr. pp. 10, 35). She also stated that she did not presently teach in the public school system and therefore could not implement the CTT program that was recommended for the student at that time (Tr. pp. 35, 47-48). Notably, the district representative had previously taught in a CTT classroom (Tr. p. 50). The district invited the student's teachers from Bay Ridge to participate in the meeting, two of whom participated by telephone (Tr. pp. 17-19). One of the teachers was a special education reading teacher and the other was a regular education math teacher (Tr. pp. 19-20; Dist. Ex. 1 at p. 2). The CSE meeting took approximately 40 or 50 minutes, and the student's mother testified that the Bay Ridge teachers participated for approximately ten minutes (Tr. pp. 23, 224). The district representative testified that the teachers from Bay Ridge also could not implement the CTT program in the public school (Tr. p. 48).

Although the hearing record demonstrates that there was no individual present at the June 6, 2007 CSE meeting who could have personally implemented the student's proposed IEP, I am not persuaded by the evidence in the hearing record that this was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see also 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the student's private school special education teacher. The student's private school teachers, one of whom was his special education teacher, provided information to the CSE on the student's progress both orally (Tr. p. 72) and by submitting report cards (Dist. Ex. 7) for the student for consideration. The district representative, who was a certified special education teacher with teaching experience and specifically as a special education teacher in a CTT setting, participated at the CSE meeting (Tr. pp. 10, 35, 50; Dist. Ex. 1 at p. 2). Moreover,

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greater care and clarity in future decisions to ensure the accuracy of his decisions and to comport with applicable regulations (see 8 NYCRR 200.5[j][5][v]).

<sup>10</sup> Again, I note that there is no indication that the parents raised the issue of the CSE composition at the June 6, 2007 CSE meeting, and they did not raise a claim in either their October 2, 2007 due process complaint notice or in their subsequent October 11, 2007 letter to the district alleging that the CSE composition was improper such that the student was denied a FAPE or that the parent's participation in the IEP formulation process was seriously impeded (Parent Exs. B-C; see n. 8, supra).

the parents have failed to allege any specific harm to the student or that parental participation was significantly impeded as a result of any such procedural error.

The parents further allege that the June 6, 2007 CSE was also improperly constituted without a regular education teacher present when the student's program was being changed from a general education based program to a special education based program. Federal and State regulations require that a CSE include at least one regular education teacher of the student if the student is, or may be participating in the general education environment (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher member "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and, supports, and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3][i],[ii]; 8 NYCRR 200.3[d]). The regular education teacher must participate in the review and revision of the IEP (20 U.S.C. § 1414[d][4][B]; see 34 C.F.R. § 300.324[b][3]; 8 NYCRR 200.3[d]). Here, the hearing record demonstrates that a regular education teacher of the student did participate in the CSE meeting. The fact that the regular education teacher of the student was from the private school did not negate the appropriateness of his participation as the regular education teacher of the student.

Like the private school special education teacher, the student's private school regular education math teacher participated in the CSE meeting by telephone (Dist. Ex. 1 at p. 3). The IEP reflected that the telephonic participation by the student's teachers provided sufficient information for the CSE to develop an appropriate IEP for the student, including information on the student's present levels of performance. Specifically, the IEP indicated that the student's teachers from Bay Ridge agreed that the results of the WJ-III ACH provided an accurate estimate of the student's current academic functioning and grade equivalent instructional level (id.). The present performance narrative portion of the IEP reflects that at the CSE meeting, the private school teachers provided additional information regarding the student's academic performance and learning characteristics (id.). The IEP states that the student was described as "generally an organized student who participate[d] in class and complete[d] assignments" (id.). According to one of his private school teachers, the student exhibited some difficulties in decoding multisyllable words, and his listening comprehension skills were stronger than his reading comprehension skills (id.). The student was reported to be better at expressing himself orally than in writing, that he needed help with outlines and in providing more detail in his written work, and that his academic management needs included repetition and review with feedback, use of outlines and graphic organizers, and use of a calculator (id.). The IEP further reflected that at the time of the CSE meeting the student was working at a sixth grade level in math (id.). In addition, the hearing record reflects that Bay Ridge submitted to the CSE a report card for the student that contained the grades the student earned in the classes of the two teachers who participated, as well as the grades the student earned in his other classes at Bay Ridge (Dist. Ex. 7). The hearing record indicated that the grades contained in the report card were considered by the CSE in developing the student's IEP (Tr. p. 14). Moreover, the district representative testified that the regular education math teacher provided information on the student's anxiety level as well as emotional difficulty (Tr. pp. 23-24), and provided information on the student's present performance levels pertaining to social/emotional performance (Dist. Ex. 1 at p. 4).

For the reasons below, I find that the student's regular education math teacher was a regular education teacher who met the standards set forth in the federal and State regulations for the CSE meeting. Although the district representative testified at the impartial hearing that the student's written IEP was drawn up after the CSE meeting, she also testified that the CSE discussed the student's progress, went over the reports it had available, listened to what the teachers at the CSE meeting had to say, reviewed the psychologist's tests and results, gave the parent and teachers an opportunity to ask questions, and asked their own questions (Tr. p. 33). After the CSE meeting concluded, the information was compiled and the district "drew up" the IEP (id.) and sent it to the parents with a notice containing an offer to further discuss the IEP with the parents at another CSE meeting or with an individual member of the CSE team (Dist. Ex. 2). I find that given the input provided by the regular education math teacher regarding the student's progress at Bay Ridge, taken together with the totality of circumstances of the CSE meeting, the parents have not shown that the CSE lacked a regular education teacher of the student as required under federal and State regulations, or in the alternative, if one was lacking that the student suffered educational harm or that parental participation was seriously impeded (see Matrejek, 471 F. Supp. at 419). Additionally, I note that the district representative, although not identified at the CSE meeting as a regular education teacher, was certified in general education, had previously taught in a general education setting, and had previously taught in a CTT classroom (Tr. pp. 10, 35, 50; Dist. Ex. 1 at p. 2).

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]; Patskin v. Webster Cent. Sch. Dist., 2008 WL 4761885, at \*4 [W.D.N.Y. Oct. 30, 2008] [stating that "the mere existence of procedural violations does not necessarily indicate that a student has been denied a FAPE"]; M.M. v. New York City Dept. of Educ., 2008 WL 4656876, at \*5 [S.D.N.Y. Oct. 21, 2008] [citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]; see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). I find that the lack of an additional parent member or waiver thereof, the lack of an individual who could have personally implemented the student's IEP, and the participation by the regular education math and special education teachers from Bay Ridge did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

The parents' argument that the student was denied a FAPE because they were not provided with a class profile or an opportunity to visit the proposed class over the summer is also not persuasive. The Second Circuit has held that school districts are not expressly required by statute or regulation to provide parents with class profiles, especially when they do not yet exist (Cerra, 427 F.3d at 194). Further, a district must ensure that a student's IEP is in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"]). In this case, it is undisputed

that the IEP itself was formulated in a timely fashion and that the district provided the parents with a specific school and class site for implementation of the IEP in July 2007 (Dist. Exs. 1, 3). Given that the statutory and regulatory requirements were met by the district, the inability of the parents in this case to view the specific class site offered to the student did not amount to a denial of a FAPE.

Turning to the substantive portion of the student's June 6, 2007 IEP, I agree with the district that the impartial hearing officer incorrectly found that the parents sustained their burden of proving that the district did not offer the student a FAPE. The hearing record reflects that, in developing the student's IEP, the June 6, 2007 CSE considered the December 8, 2006 structured observation report, the April 5, 2007 speech and language therapy report from Bay Ridge, the student's April 2007 quarterly report card from Bay Ridge, the May 21, 2007 psychoeducational evaluation conducted by the district, the May 21, 2007 social history update prepared by the district, and the June 2007 counseling report from Bay Ridge (Tr. p. 14; Dist. Exs. 4-9). Additionally, as discussed above, the student's teachers from Bay Ridge who participated by telephone provided the June 6, 2007 CSE with information regarding the student's performance including his problems with anxiety and other social/emotional difficulties (Tr. pp. 23-24, 72).

With respect to the student's academic performance and learning characteristics, the June 6, 2007 IEP indicated, consistent with the information in the reports available to the CSE, that the student's scores on tests of cognitive functioning revealed the student's overall abilities to be in the low average range (Dist. Ex. 1 at p. 3). Tests of academic achievement reflected the student's overall reading skills to be at a late fifth grade level, math skills to be at a mid-sixth grade level, and writing skills to be at an early fifth grade level (*id.*). The IEP indicated that the student's teachers from Bay Ridge, who participated in the meeting by telephone, agreed that the results of the WJ-III ACH provided an accurate estimate of the student's academic functioning (*id.*). The student was described as "generally an organized student who participates in class and completes assignments" (*id.*). According to one of his teachers, the student exhibited some difficulties in decoding of multisyllable words, and his listening comprehension skills were stronger than his reading comprehension skills (*id.*). The student was also reportedly better at expressing himself orally than in writing (*id.*). The IEP reflected that the student's academic management needs included repetition and review with feedback, use of outlines and graphic organizers, and use of a calculator (*id.*).

The student's social/emotional performance, as described in the IEP, characterized him as pleasant, cooperative, motivated, well-adjusted, friendly, articulate and well liked by his peers (Dist. Ex. 1 at p. 4). The IEP noted that during the 2006-07 school year, the student experienced difficulty managing his feelings of anger as he experienced stress and tension in regard to his family situation (*id.*). The IEP also indicated that it was anticipated that the stressors affecting the student would decrease in the future when his family situation was settled (*id.*). The student's social/emotional management needs included verbal support from teachers and counseling (*id.*). The CSE determined that the student's behavior did not seriously interfere with instruction, and could be addressed by the regular education and/or special education teacher in a CTT classroom (*id.*).

Consistent with the description of the student's present levels of performance noted above, annual goals and short-term objectives focused on the student's needs for automaticity in

silent reading, comprehension of text, writing skills, division involving fractions with whole number dividends and mixed number divisors, solving word problems, decreasing levels of anxiety or frustration by verbalizing feelings regarding school situations to teachers or during counseling sessions, improvement of expressive language by demonstrating the ability to formulate sentences containing adjectives while answering questions, improvement of receptive language skills by demonstrating the ability to answer a variety of questions after listening to short stories, and application of a variety of organizational techniques to manage time to complete school assignments (Dist. Ex. 1 at pp. 6-11).

The impartial hearing officer's decision is internally inconsistent. The impartial hearing officer stated that, based on the testimony of the district psychologist and district representative, the June 6, 2007 IEP was valid and appropriate to meet the student's needs (IHO Decision at p. 8). However, the impartial hearing officer proceeded to find that, based on testimony by the director of the Bridge Program at Bay Ridge, there was insufficient evidence to find the IEP "valid" (*id.* at p. 10). According to the impartial hearing officer, the testimony of the director criticized the psychoeducational evaluation report written by the district psychologist, particularly regarding the formal test results and goals included on the IEP (*id.* at p. 8).

An independent review and reading of the entire hearing record shows that the weight of evidence, including evaluative data, does not support the opinion of the director at Bay Ridge and that there is testimonial and non-testimonial evidence in the hearing record requires a conclusion that the impartial hearing officer erred in reaching his conclusion.<sup>11</sup> There is no indication in the hearing record that the director of Bay Ridge administered any testing of the student. There is no indication in the hearing record that the district's psychoeducational evaluation was improperly conducted or administered (Tr. pp. 174, 179). I note that both the director and the district psychologist held doctorate level degrees in psychology (Tr. pp. 56, 172). The director did not participate in the June 6, 2007 CSE meeting, whereas the district psychologist did participate (Dist. Ex. 1 at p. 2). Additionally, the district psychologist testified that he has participated in several thousand CSE meetings (Tr. p. 186). The evidence in the hearing record does not demonstrate that the psychoeducational evaluation was deficient, or that the opinion of the district psychologist was unreliable. I note also that the student's teachers from Bay Ridge, who participated in the June 2007 CSE meeting by telephone, reportedly agreed that the results of the district psychologist's academic testing provided an accurate estimate of the student's academic functioning (Dist. Ex. 1 at p. 3). The teachers' reported agreement has not been disputed by the parents. Accordingly, the hearing record does not show that the CSE's reliance upon the psychoeducational evaluation or the district psychologist's opinion in formulating the student's IEP was inappropriate (*see Watson*, 325 F. Supp. 2d at 145).

The director of the Bridge Program at Bay Ridge testified that a number of the student's levels of performance reported on the IEP were appropriate given how the student was performing in school (Tr. p. 63). However, he expressed a specific concern that the student's

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<sup>11</sup> A State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the 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 Dept 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).

passive comprehension subtest score (GE 7.7) on the WJ-III ACH was "a fairly high over-estimation of where [the student] really functioned in terms of reading comprehension," especially in consideration of the student's "significantly delayed" verbal comprehension index standard score of 79 (8th percentile) on the WISC-IV and his eligibility for special education services as a student with a speech or language impairment (Tr. pp. 63-64). When the impartial hearing officer asked the director his opinion regarding the student's ability to function in a 13:1 CTT class, the director opined that he had "some sense" of how special education was "normally comprised" in the district because his work experience included about five years as a school psychologist for the district prior to calendar year 2000 (Tr. p. 97). The director opined that the student was actually "more delayed than he might appear on paper" because the student had previously repeated a grade (Tr. pp. 65, 97).<sup>12</sup> The director also opined that the student was delayed four years, and might require "a lot more intense work" than would possibly be provided in district classes (Tr. p. 97). The director acknowledged that "there may have been some changes" since he worked in the district seven or eight years prior to the impartial hearing (*id.*). The director stated that he did not know about the composition of district classes or the needs of the students in those classes, but that if the student was in a class with similar students, "then there might be a chance to really focus on those skills" (*id.*).

The district psychologist testified that in administering the psychoeducational evaluation, he adhered to the explicit instructions and directions provided by the test publishers for the administration and scoring of the WISC-IV, WJ-III ACH and other published tests used during the evaluation (Tr. pp. 174, 179). He stated that he tests students individually in an area that is reasonably quiet and private (Tr. p. 179). In addition, the district psychologist indicated that during testing he "constantly observe[s]" a student to see if that student seems to be comprehending directions, is able to complete the test, and is able to follow the standard start/discontinue procedure for each subtest administered (Tr. pp. 179-80). He stated that it is standard professional practice to administer the test in that manner (*id.*). The district psychologist opined that the student's test results were accurate and were based on the administration and scoring of the tests used as part of the evaluation (Tr. p. 180).

Contrary to the impartial hearing officer's statement that the district psychologist did not respond to the issues raised by the director of the Bridge Program, the district psychologist, who testified approximately three weeks after the director testified, answered all questions asked of him by both the parties' attorneys and the impartial hearing officer (Tr. pp. 170-221). When asked how he reconciled the student's verbal comprehension index standard score of 79 and the WJ-III ACH reading comprehension subtest instructional level score of 7.7, the district psychologist explained that the tests were "not directly tapping . . . into identical skill sets," and that the most notable difference between them was that except for the vocabulary subtest, which contains a written list of words, all of the subtests that comprised the verbal comprehension subtest of the WISC-IV were "orally presented in spoken words," without any presentation of written questions or passages, and required only verbal responses from the student (Tr. pp. 182, 184-85). The district psychologist explained that conversely, the directions for the passage comprehension subtest of the WJ-III ACH are presented to the student verbally, but the actual subtest items are written on a page that the student reads to himself and then provides a spoken response to the examiner (Tr. pp. 182-83). No assistance is allowed to be provided to the student

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<sup>12</sup> The student was reportedly held over to repeat the second grade (Tr. p. 65).

in reading the test items as the student is required to read the test by himself (Tr. p. 183). On cross-examination, and in reference to the narrative on the IEP about the student's present levels of performance specific to reading skills, the district psychologist was asked how he rationalized an instructional level score of 7.7 on the WJ-III ACH passage comprehension subtest and a goal on the IEP for the student to demonstrate the ability to understand eighth grade level texts by answering comprehensive questions regarding the texts given that the student was functioning at a fifth grade level (Tr. p. 200; Dist. Ex. 1 at p. 6). In response, the district psychologist stated that an overall reading level is based on a composite of sub-abilities, but that the goal and the reading estimate of 7.7 are based on the specific ability of reading comprehension (Tr. p. 203). He further clarified that the goal was for reading comprehension solely, not for an overall reading level (id.). Additionally, the district psychologist stated that a goal for overall reading ability would be "meaningless" because reading is a multifaceted ability (id.). When questioned about the student's other scores relating to reading as noted on the IEP, the district psychologist testified that there are many individuals who can comprehend text regardless of having difficulties such as decoding words (Tr. pp. 205-06). He explained that in scoring a student's performance on the letter-word identification subtest of the WJ-III ACH, a subtest that involves word pronunciation, no credit would be received for an item if the student's pronunciation of the word was not perfect (Tr. p. 206).<sup>13</sup> He also explained that basing a student's reading comprehension on how he or she pronounces words might lead to false assumptions regarding reading comprehension, especially if the student had expressive language difficulties (id.). The district psychologist testified that the reading comprehension goal was appropriate for the student because testing results reflected that his reading comprehension was at a seventh grade level and that it would be appropriate for him to work toward an eighth grade reading comprehension level during the 2007-08 school year (Tr. pp. 200-01).

After full consideration of the above, I find that the goals and objectives included on the June 6, 2007 IEP appropriately addressed the student's needs and were reasonably calculated to provide the student with an opportunity to obtain educational benefit.

In considering the appropriateness of the recommended 13:1 CTT placement with related services of speech-language therapy and counseling, the district representative testified that the placement, which was a more restrictive placement than the general education class with SETSS offered the prior year, was offered because the CSE concluded that the student was progressing in his program at Bay Ridge (Tr. pp. 25-26) and, it wanted to continue the student in a general education environment where he could have exposure to the mainstream environment while benefiting from the support of two teachers rather than from one in a pull-out program (Tr. p. 26). To address the student's difficulties in reading and math, the CSE determined that the student would receive benefit from the support of a full-time regular education teacher and a full-time special education teacher throughout the day in a mainstream environment, with speech-language therapy and counseling services, offered by the district's proposed program (Tr. pp. 26, 34).

An English language arts (ELA) special education teacher, who taught at the school site offered in the FNR dated July 2, 2007, testified that the school consisted of approximately 170

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<sup>13</sup> As an example, the district psychologist indicated that pronouncing the suffix "ing" as "in" would result in a wrong answer on the test (Tr. p. 206).

students and was housed within a larger school (Tr. pp. 120-22, 125, 153). She stated that the proposed school "feels like its own entity because we're on our own floor and there is no interaction between the two schools" (Tr. p. 154). The students in the larger school reportedly arrive about 45 minutes after the students in the offered program arrive, and leave after the students in the proposed school leave (id.). Almost every class in the proposed school, with the exception of art and one self-contained class, was a CTT class (Tr. p. 122).

Contrary to the parent's description of the CTT class in her October 11, 2007 letter to the CSE rejecting the proposed placement, the district representative indicated that there were approximately 24 students in the CTT class, the permitted percentage of general education students to special education students in the CTT class was 60:40, and the special education student to teacher ratio of 13:1 falls within that range (Tr. pp. 40, 42-43). The district representative also noted that the proposed program was in the student's neighborhood school (Tr. p. 45). Testimony by the CTT ELA special education teacher detailed that, when she was working with one small group of students, the other teacher in the classroom might be working with another small group of students (Tr. p. 155). Each student's instruction would be differentiated so that every student's needs were met for each level of instruction (id.). Upon being questioned as to whether some students might work independently and without supervision when other students were working in small groups, the special education teacher replied, "I hope so" (Tr. p. 156). She indicated that

[e]very class is CTT. Every single classroom has two teachers in it. So there is two math teachers, one general ed[ucation], one special ed[ucation]. There's two social studies teachers, one general ed[ucation], one special ed[ucation]. There's two science teachers one general ed[ucation] and one special ed[ucation]. So if the kids move from class to class, they're always entering a classroom with two teachers (Tr. p. 158).

The special education teacher also stated that the entire proposed CTT class travels together to each subject area CTT classroom throughout the day, except when special education or general education students get pulled out for programs such as music and math intervention (Tr. pp. 158-59). According to the special education teacher, each CTT classroom is comprised of one special education teacher and one regular education teacher who is a content specialist in the subject area (Tr. p. 159).

The special education teacher testified that she held a license in special education for adolescents, she was trained in the Struggling Adolescent Learners Program (SAL),<sup>14</sup> and she was trained in a decoding and reading program called the "rewards program"<sup>15</sup> (Tr. p. 122). The

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<sup>14</sup> The special education teacher defined SAL as a reading program for students that are behind in both decoding and in reading comprehension (Tr. p. 123). Program work occurred in her classroom either individually or in small groups (id.). The program consisted of 40 hours of intensive lessons that have been proven to show gains of up to a year within the school year (id.).

<sup>15</sup> The "rewards program" is a decoding program that breaks down syllables, teaches prefixes, teaches suffixes, and teaches how to build multisyllabic words once a strong list of prefixes, suffixes and root words are acquired (Tr. p. 124).

district special education teacher reported that she taught special education ELA in two of the three CTT classes for the student's grade at the proposed school (Tr. p. 126). Based on her review of the student's June 6, 2007 IEP, she stated that it was feasible that the student might be placed in her class if he attended the proposed school (Tr. pp. 126-27). Her class was comprised of 24 students, a regular education teacher, a special education teacher, and a paraprofessional who was assigned to one of the students but who was not limited to working only with that particular student (Tr. pp. 128-29, 138). Seven of the 24 students in the class had IEPs (Tr. p. 127). Six students were classified as students with learning disabilities and one was classified as a student with an emotional disturbance (Tr. pp. 162-63). Two of the seven students received speech-language therapy services (Tr. p. 163). The special education teacher explained that she planned jointly with the regular education teacher and taught with him all day (Tr. pp. 129-33). She also detailed how she differentiated lessons to meet the needs of the students in her class so that they could access content (*id.*). Both teachers in the CTT class reportedly met with the students about reading two to three times per week (Tr. pp. 133-34). The special education teacher stated that students in her class were comprehensively assessed from "day one" (Tr. pp. 135-36). She noted that she maintained a copy of all of her students' IEP goals and her assessments of her students, and that all IEP goals were routinely reviewed as a team before students came into class (Tr. pp. 136-37). When asked if there were other students in her class that functioned at the fifth grade level in reading, the special education teacher reported that there were six or seven students with which the student could be grouped, but that she never grouped more than three or four at a time (Tr. p. 141).

Based on a review of the student's June 6, 2007 IEP, the special education teacher testified that the student's needs could be addressed by the proposed school, and that the school had an adequate support staff to help the student with any academic or emotional needs (Tr. pp. 153-54). The special education teacher also stated that based on the student's "levels" he would be able to handle the curriculum in her class (Tr. p. 153). The special education teacher also testified that comprehension appeared to be one of the student's strengths, but if he entered her class and his comprehension was not as high as she thought it was, then she would make changes in how she differentiated reading instruction for the student in order to meet his needs (Tr. pp. 138-39). For example, the special education teacher stated that she would "immediately change the text" that had been presented to the student (Tr. p. 139). Additionally, class work was presented through small group instruction based on the students' strengths, weaknesses and interests (Tr. p. 140). She noted that if any of her students were below level in reading, she met with them more frequently, two to four times per week as opposed to once or twice a week, to address their needs, as well as assisted them during instructional time when specifically practicing comprehension skills (Tr. pp. 140-41). If the student's reading comprehension level was low, or if he was struggling, the teacher would also group him with several other students to practice comprehension during independent reading time (*id.*).

The special education teacher testified that the June 6, 2007 IEP provided her with information on how to address the student's needs related to decoding skills (Tr. pp. 141-42). She explained that the "short-term goals" in the IEP addressed the student's need to decode lists of words; that the proposed class did a lot of work involving lists of random words that the students in her class need to read; that the students in her class independently found words from the list; that she taught strategies to break words down into smaller syllables, look at letter combinations and sounds, and rebuild words into larger words; and that it was easy to test the

students' ability to read word lists and to measure progress (Tr. p. 142; Dist. Ex. 1 at p. 6). Regarding the recommended academic management needs delineated in the June 6, 2007 IEP, the special education teacher indicated that the students in her class are provided with repetition and review with feedback through "constant conversations," "going over what [students are] doing at the moment," verbal checks with notes, student review of letters, multiple planning and drafts of writing pieces with feedback from their teachers, and practice and teacher feedback regarding writing on demand tasks (Tr. pp. 143-44). In addition, outlines and graphic organizers are used throughout the proposed school (Tr. p. 144). The special education teacher conducted a unit at the beginning of the school year on "creating your own graphic organizers" so that students could work toward independence at their own pace (Tr. pp. 144-45). She also indicated that she used a multisensory approach in the classroom to address and differentiate the tactile, kinesthetic, visual, and auditory learning styles of the students in the class, and she described the materials and technology used in the classroom to implement multisensory instruction (Tr. pp. 145-46).<sup>16</sup>

Reading is also addressed outside of the classroom by an "academic intervention teacher," a service the special education teacher may recommend for students (Tr. p. 147). The special education teacher runs the SAL program during her free period (id.). The school also offers the Wilson program, a decoding program that the special education teacher defined as a multisensory approach to word attack; a math pull-out program run by a math coach; a literacy pull-out program run by a literacy coach; and speech-language therapy (Tr. pp. 147-48). The special education teacher indicated that, based on his IEP and his decoding needs, the student would have been recommended for the Wilson program (Tr. p. 148). After the Wilson program is completed, students move on to the Great Leaps Program to address larger words with more syllables and apply their knowledge to context to address verbal comprehension (Tr. pp. 148-49). The literacy coach conducts small guided reading groups in which students read a book together and practice comprehension and fluency skills (Tr. p. 149). The special education teacher testified that all students are eligible for all of these services (id.).

Testimony by the district representative reflected that counseling was recommended by the June 6, 2007 CSE because the student was having some difficulty with anxiety throughout the school day, and that there were some concerns at home that were affecting the student in the classroom (Tr. p. 28). The CSE determined that individual counseling would be helpful to the student (id.). The district psychologist clarified that the purpose of counseling as a related service on the IEP was to work on school related problems rather than to address any type of discord that might be occurring within the student's home, and it was not intended to serve as therapeutic counseling or psychotherapy (Tr. pp. 208-09). The district special education teacher indicated that she was familiar with the speech-language and the counseling service providers (Tr. p. 150). She stated that she coordinated with the speech-language provider weekly during grade meetings (Tr. pp. 150-51). She described the counseling provider as "wonderful," and testified that the counselor met with the students regularly and was "also always available for emergencies" (Tr. p. 152). The counselor focused solely on students in the student's grade, pushed into classrooms and interacted with the students (id.).

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<sup>16</sup> The special education teacher described a "smart board," whereby words and images can be touched and physically moved around to address students' needs in comprehension, reading, writing, and focus (Tr. p. 146).

Although the parents' October 11, 2007 letter rejecting the recommended placement, as well as the student's mother's testimony at the time of the impartial hearing, indicated that the mother had witnessed a student at the proposed school site going through the hallway and ripping papers off the wall, the October 2, 2007 due process complaint notice made no mention of behavioral concerns in the proposed placement (Tr. p. 229; Parent Exs. B; C). Additionally, when briefly questioned by the parents' attorney if the behavior of a student in the CTT classroom who has an intervention paraprofessional assigned to him was distracting to the class, the district special education teacher stated, "rarely because we have systems in place" and support staff available to address those difficulties (Tr. p. 156). The special education teacher also stated that some students have behavioral rubrics or behavior contracts to address their inappropriate behaviors (Tr. p. 157).

The parent testified that she attended the June 6, 2007 CSE, but that she was not afforded an opportunity to present her position at the meeting (Tr. pp. 226-27). However, she also testified that upon receiving a copy of the IEP, she "looked it over" and, although she "didn't understand much of it," she did not contact the CSE "that [she] kn[e]w of" to complain about it or discuss it (Tr. pp. 233-34). Additionally, the hearing record contains no indication that the parents attempted to communicate with the district about their dissatisfaction with the goals on the IEP.

The student's mother testified that she visited the proposed program in September 2007 because the school was closed when she received the FNR in July 2007 (Tr. p. 227). She stated that she "assume[d]" that the classroom she visited was a CTT class (Tr. p. 228). She also stated that she was "overwhelmed" by the proposed school and that the student would not do well in it, opining that he would be scared of the school, would not be able to concentrate; would not know where he was going, would be confused, and would "never do well" in a program like the one proposed by the district (Tr. pp. 227-28). She further stated that she could "never accept" her son being in the proposed program (Tr. p. 229). However, the hearing record does not sufficiently or objectively support the parents' stated concerns, particularly given that the counseling report from Bay Ridge described the student as pleasant, cooperative, motivated, well-adjusted, friendly, well-liked by his peers, and as having many leadership qualities (Dist. Ex. 9 at p. 1).

In summary, I find that the parents did not meet their burden of proving that the district failed to offer the student a FAPE for the 2007-08 school year. The June 6, 2007 IEP reflects current evaluative data identifying the student's needs, and appropriate goals and objectives developed to address those needs. I also find that the hearing record, particularly with respect to the testimony of the district's CTT ELA special education teacher, provided sufficient specificity to reflect that the student's academic, speech-language, and counseling needs would have been appropriately addressed by the program proposed by the CSE. I conclude that the proposed CTT class and related services, as set forth in the June 6, 2007 IEP, were reasonably calculated to enable the student to receive educational benefit in the LRE for the 2007-08 school year.

Having determined that the parents did not meet their burden of proving that the district failed to offer the student a FAPE for the 2007-08 school year, I need not reach the issue of whether Bay Ridge was appropriate, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated August 14, 2008 is hereby annulled.

**Dated:**           **Albany, New York**  
                      **November 14, 2008**

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