



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-111

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

### Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2007-08 school year was appropriate, that the parents' unilateral private placement was not appropriate, and which denied the parents' request for tuition reimbursement. The appeal must be dismissed.

I will first address several procedural matters. As an affirmative defense, the district asserts that the parents failed to effectuate timely service of the petition, and that consequently, it should be dismissed. State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the regulations (8 NYCRR 279.13; Application of a Child with a Disability, Appeal No. 08-114; Application of a Child with a Disability, Appeal No. 08-113). To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2).<sup>1</sup> If the decision has been served by mail upon petitioner, the date of mailing and the four

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<sup>1</sup> The impartial hearing officer's decision provided notice to the parties of their right to appeal to a State Review Officer and the timelines for initiating an appeal (IHO Decision at p. 5). The decision also advised the parties that directions and sample forms were available at the Office of State Review website (id.; see <http://www.sro.nysed.gov/>).

days subsequent thereto shall be excluded in computing the period (*id.*). If the last day for service of a notice of intention to seek review, a petition for review, an answer or a response to an answer falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (*id.*).

In the instant case, the impartial hearing officer's decision is dated August 18, 2008. Thirty-five days from the date of the impartial hearing officer's decision, factoring in the five days excluded due to mailing, was Saturday September 27, 2008.<sup>2</sup> The parents served the petition for review on September 29, 2008, the following Monday, in compliance with the timelines specified in section 279.2 and section 279.11 of the State regulations (8 NYCRR 279.13). In light of the foregoing, I decline to dismiss the petition on grounds of untimeliness.

The district next contends that the petition be dismissed as insufficient for the following reasons: (1) it fails to specify what relief is sought; (2) the paragraphs contained in the petition are unnumbered; and (3) it does not contain specific factual allegations from which it can be inferred that the district failed to comply with the Individuals with Disabilities Education Act (IDEA), Article 89 of the Education Law or the attendant federal or State regulations. A petition for review must comply with State regulations, which provide in pertinent part, that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). A review of the petition shows that the parents have indicated the impartial hearing officer's findings to which they object, and as relief, they have requested a new impartial hearing. Moreover, notwithstanding the parents' failure to number the paragraphs in the petition as required by State regulation (8 NYCRR 279.8[a][3]), the district was not precluded from formulating a responsive answer. Therefore, in the exercise of my discretion, I will accept the petition.

The district also requests that the parents' reply to its answer not be considered due to non-compliance with the requirements of 8 NYCRR 279.6. In the exercise of my discretion I have considered the reply. A reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district did not serve any additional evidence with its answer. Accordingly, I have considered the reply only to the extent that it responded to the procedural defenses interposed by the district (8 NYCRR 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 08-036; Application of a Student Suspected of Having a Disability, Appeal No. 08-002).

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<sup>2</sup> In calculating the timeliness of the service of a petition where the exclusionary period applies due to the mailing of an impartial hearing officer's decision, State Review Officers have presumed, absent contrary evidence, that the date of mailing is the day after the date of the decision.

At the time of the impartial hearing in June 2008, the student was attending the third grade in the private program where he was enrolled in a 12:1+2 classroom (Tr. p. 133; Dist. Ex. 13 at p. 1; Parent Exs. F; G).<sup>3</sup> The student is attending a private school that the Commissioner of Education has not approved as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student reportedly has a diagnosis of apraxia and has demonstrated weaknesses in his verbal abilities and abstract reasoning skills (Tr. p. 159; Dist. Ex. 13 at p. 3). He has also exhibited difficulty in reading comprehension and speech-language delays which have reportedly affected his academic skills (Tr. p. 22; Dist. Ex. 13 at p. 3). In addition, the student has exhibited some social/emotional needs and behavioral difficulties that have reportedly interfered with his learning (Tr. p. 100; Parent Ex. G). 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. 73, 105, 120; Dist. Ex. 13 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Prior to attending school, the student received home-based speech-language therapy in addition to home-based occupational therapy (OT) and special instruction (Dist. Ex. 6 at p. 2).<sup>4</sup> For preschool, the student was enrolled in a District 75 school, where, according to his mother, he initially progressed well and did "amazing things" (Tr. p. 160; Dist. Ex. 5 at p. 1). As the student progressed in the district school, the student's mother indicated that things became difficult for him, and eventually, he refused to attend the school (Dist. Ex. 5 at p. 1). Consequently, for the 2005-06 school year (first grade) the student's mother unilaterally enrolled him in a self-contained class in a private program (Dist. Exs. 6 at p. 2; 5 at p. 2).<sup>5</sup> He remained in the private program for the 2006-07 school year and the hearing record indicates that the parents received tuition reimbursement pursuant to a settlement agreement with the district (Tr. p. 164).

On March 1, 2007, when the student was enrolled at the private placement, as part of his triennial review, the district's social worker conducted a psycho-social assessment of the student with the student's mother acting as respondent (Dist. Ex. 5). According to the social worker, the student was receiving three sessions per week of speech-language therapy and OT (id. at p. 2).<sup>6</sup> The student's mother reported to the social worker that she believed that her son had made progress in both speech-language and OT (id. at p. 2). The social worker stated that the student's speech was clear and that he could hold a cohesive conversation (id.). The social worker also noted that the student had become more socially adept with his peers inside and outside of school

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<sup>3</sup> The hearing record describes the private program that the student attended during the 2007-08 school year as a "yeshiva-based program of self-contained classes for children with learning disabilities, language impairments, and/or attention deficit disorders from kindergarten through high school" (Parent Ex. D at p. 1).

<sup>4</sup> The hearing record does not indicate the frequency or duration of the speech-language therapy or the frequency of the OT that the student received at home, nor does the hearing record reveal at what age the student began to receive home-based services. Moreover, the hearing record does not describe the nature, frequency or duration of the home-based special instruction that the student received at that time.

<sup>5</sup> The parents brought an impartial hearing and as a result, obtained tuition reimbursement from the district for the private program for the 2005-06 school year (Tr. p. 164).

<sup>6</sup> The hearing record does not specify where the speech-language therapy or OT was administered to the student or whether it was delivered in a group or individual setting, nor does it indicate the length of the sessions.

(id.). In addition, the student could easily ride a two-wheel bike, as well as climb and descend stairs (id.). The student's mother requested counseling for the student to address his "silly" behaviors (id. at pp. 2-3). The social worker described the student's health as "good," and she reported that the student slept and ate well and that he had mastered most age appropriate self-help skills (id. at p. 3). The social worker further commented that the student's familial circumstances had not changed in any significant manner (id.).

Also on March 1, 2007, a school psychologist from the district conducted a psychoeducational evaluation of the student as part of his triennial review (Dist. Ex. 6). Administration of selected subtests of the Weschler Intelligence Scale for Children, Fourth Edition (WISC-IV) revealed that the student had made significant improvement in his overall cognitive functioning which was estimated to be in the average range (id. at p. 4).<sup>7</sup> The student's mother advised the evaluator that her son had made "good academic progress," and that she would like for him to "just receive [special education teacher support services] (SETSS)" (id. at p. 2). The student achieved scores in the "slightly below average" range in the similarities and vocabulary subtests, demonstrating difficulty with abstract items (id.). The evaluator determined the student's perceptual or nonverbal reasoning abilities were in the average range; however, she noted that the student's relatively weak score on the abstract reasoning subtest was possibly due to impulsive responses (id. at p. 4). The evaluator reported that the student demonstrated "good short-term auditory recall" and "significant strength" in processing speed (id. at pp. 3-4). Administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) yielded standard (percentile) subtest scores of 96 (39) in word reading, 93 (32) in reading comprehension, 97 (42) in pseudoword decoding, 86 (18) in numerical operations, and 106 (66) in math reasoning, all within the average range (id. at p. 5). The student achieved standard composite scores of 93 (32) in reading and 95 (37) in math (id.). According to the evaluator, the student demonstrated good word recognition and decoding skills, with reading comprehension skills approximately "a year below his age" (id. at p. 4). In the area of mathematics, the student demonstrated difficulty with addition and subtraction of two or more digit numbers (id. at p. 3). He demonstrated good ability to solve word problems that involved money, time, patterns, and graphs when the problems were read to him (id.). The student's performance on the Bender-Gestalt Test of Visual-Motor Integration yielded an age equivalent score of 7.0-7.5, approximately one year below his chronological age (id. at p. 5). Regarding the student's social/emotional skills, the evaluator noted that despite some immaturity, difficulty with social skills and self-esteem, the student had made good progress (id. at p. 4). Based on the results of the evaluation, the evaluator concluded that the student was progressing well, but that he continued to require some special education services to address his academic, speech-language, fine motor and social/emotional deficits (id.). She indicated that final recommendations would be made for the student by the CSE upon review of all of the material (id.).

A March 28, 2007 report from the student's occupational therapist revealed that the student had significantly improved in all OT domains (Dist. Ex. 7). According to the therapist, the student's ability to write all letters and words was age appropriate and he could do so with appropriate spacing and speed (id.). The therapist also reported that the student could copy from near and from far and that his visual-perceptual and visual-motor skills were age appropriate

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<sup>7</sup> The evaluation report indicated that due to limited time, "complete cognitive testing" was not completed (Dist. Ex. 6 at p. 2).

(id.). The student could also copy all pattern designs and demonstrated an age appropriate ability to complete puzzles (id.). Nevertheless, the therapist indicated that the student was resistant to come to therapy and to follow through on instructions (id.). The therapist reported that the student had met all of his OT goals and as a result, she recommended that the student's OT services be terminated (id.).

On April 24, 2007, a special education teacher from the district conducted a classroom observation of the student at the private program (Dist. Ex. 8). The student's teacher reported to the district's special education teacher that despite the student's complaints about his general education math class, the student was doing well there (id. at p. 1). The student's teacher stated that the student's reading skills were weaker, and that the student exhibited a lot of difficulty decoding words (id.). The teacher further reported that the student's sight vocabulary and listening comprehension were "better" (id.). In spite of the student's expressive language delays, the student's teacher stated that the student could write his thoughts down on paper (id.). The student's teacher described the student as "moody" at times, and further noted that at times, the student could be "silly" in order to get attention (id.). The district's special education teacher also observed the student during playtime and library period (id.). She found that the student sat down appropriately and waited for the teacher's instructions (id.). During playtime, the district's special education teacher noted that the student played nicely with the other children (id.). During the library period, the student sat appropriately on the floor and listened attentively to the story, which the district's special education teacher found that he seemed to enjoy (id.). Overall, the district's special education teacher observed that the student was well-behaved and that he followed the teacher's directives (id.).

A May 2007 report from the student's teacher at the private program indicated that although the student understood the rules for decoding words, he could not generalize them into everyday reading activities (Dist. Ex. 8 at p. 2). She described his decoding skills as inconsistent and noted that he had difficulty breaking down multi-syllabic words (id.). The teacher also stated that the student could answer basic comprehension questions, including detail and sequencing questions (id.). She also explained that the student used a graphic organizer to help break down literal questions and to organize his writing (id. at pp. 2-3). According to the student's teacher, he exhibited difficulty with inferencing, compare/contrast or opinion questions, and that when reading or writing, the student reversed the sounds of the letters "p" and "b" (id. at p. 2). With regard to math, the student demonstrated a good understanding of the number facts for addition and subtraction in his mainstream math class (id.). The student's teacher also described the student's work in science and social studies as "satisfactory" (id. at p. 3). Additionally, the student's teacher stated that with respect to the student's speech-language skills, the student had difficulty with articulation, grammar and syntax and that he demonstrated expressive and receptive delays (id.). With respect to the student's conduct and work habits, the student's teacher described him "usually motivated to do his work," and further stated that the student could focus and concentrate during all class activities (id.). The student's teacher also noted that despite his need for a great deal of repetition and practice, the student had the ability to retain information (id.). She recommended that concepts be "explicitly taught" to the student and reviewed to enable him to retain the concepts taught in class (id.). Although the student's teacher found that the student could follow directions, she noted that the student could become disinterested at times, and therefore, he required 1:1 teacher support to complete an assignment

(id. at p. 4). According to the teacher, the student required frequent monitoring to complete an assignment (id.). The student's teacher also stated that although he could work independently, the student often asked her for help due to a lack of confidence (id.). Regarding the student's behaviors, the teacher described the student's ability to exercise self-control as "inconsistent," and that at times, the student could become disrespectful (id.). In the social domain, the student's teacher stated that although he usually got along with his peers, the student occasionally got angry and could become physical (id.). Next, the teacher described the student's responsiveness to new tasks and the pace of his work as inconsistent (id.). Lastly, the student's teacher noted that the student demonstrated difficulty with his organizational skills, and that his books and desk were usually messy (id.). The student's teacher commented that the student's speech-language delays impacted his academic progress and that the student also had some behavioral difficulties which should be addressed in school-based counseling (id. at pp. 4-5).

By letter dated May 7, 2007, the district's Committee on Special Education (CSE) chairperson advised the parents that the student's annual review meeting was scheduled to take place on May 31, 2007 (Dist. Ex. 10 at p. 1).<sup>8</sup>

A May 28, 2007 progress report from the student's speech-language therapist revealed that the student demonstrated delays in speech intelligibility, fluency and language (Dist. Ex. 12). The student also exhibited part-word hesitations and whole-word repetitions at the beginning of sentences, primarily with moderate levels of tensions (id.). The student's speech therapist developed annual and short-term goals related to speech-language (id.). With respect to the student's progress in meeting the goals listed his individualized education program (IEP); the speech therapist noted that due to numerous behavioral concerns, the student did not maximize his ability to achieve his treatment goals (id.). Nevertheless, the speech therapist noted improvement in the student's fluency with reduced tension and part-word repetition at the beginning of sentences (id.). The speech therapist recommended continued twice weekly 1:1 30-minute therapy sessions (id.).

The district's CSE convened on May 31, 2007 for the student's annual review and to develop his program for the 2007-08 school year (third grade) (Dist. Exs. 13; 14). The student's mother, a district representative, a school psychologist, an additional parent member and a representative from the student's private placement attended the CSE meeting (Dist. Ex. 13 at p. 1). The student's regular and special education teachers also participated in the meeting by telephone (id.). The May 2007 CSE reviewed reports from the student's speech-language and occupational therapist and in making its recommendations; the hearing record reflects that the CSE considered the results of the March 2007 psychoeducational evaluation, and classroom observation (Dist. Exs. 13 at p. 3; 14 at p. 1). The May 2007 CSE determined that the student's speech-language delays and his social/emotional difficulties precluded participation in the regular education environment (Dist. Ex. 13 at p. 17). The May 2007 IEP recommended that the student be placed in a 12:1+1 special class with related services consisting of one weekly 30-minute session of counseling in a group of two, one weekly 30-minute session of speech-language therapy in a group of three, and two 1:1 30-minute sessions of speech-language therapy per week (id. at pp. 1, 9). The CSE further proposed that the student be mainstreamed for math,

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<sup>8</sup> The hearing record shows that the parents and a representative from the private program were notified of the May 2007 CSE meeting by certified mailing (Dist. Ex. 11).

social studies and science (*id.* at p. 2). A "Conference Agenda Sheet" indicated that the program recommendation was formulated in consideration of the student's academic progress, and the student's mother's "report" that the student had "greater potential," and in order to help transition the student back to the general education environment (Dist. Ex. 15 at p. 1). The student was also afforded the following testing modifications on the IEP: directions read/reread, extended time, and tests to be given in a special location (Dist. Ex. 13 at p. 9). Prompting, visual cues and positive reinforcement were recommended with respect to the student's academic management needs (*id.* at p. 4). With respect to the student's social/emotional development, the May 2007 CSE characterized the student as "pleasant," in the IEP and noted that he had made progress in this area; however, the IEP also noted that in light of the student's communication deficits, he had difficulty with peer relations (*id.* at p. 7). Although the student's motivation was described as adequate, he was further characterized as "somewhat immature," and the May 2007 IEP noted that he lacked "adequate self-esteem" (*id.*). Annual goals and short-term objectives were developed related to counseling, academics and speech-language needs (*id.* at pp. 11-16). The conference agenda sheet revealed that the student's mother advised the May 2007 CSE of her "significant" concerns that the student's self-esteem had been affected by his placement in a special education classroom and that the student also exhibited difficulty relating to his classmates and forming social relations (Dist. Ex. 15 at pp. 1-2). In response to the student's mother's concerns, counseling was added to the student's IEP as a related service (Tr. p. 100; Dist. Ex. 15 at p. 2). The May 2007 CSE also advised the student's mother and representatives from the student's private program that if the student transitioned well into the proposed program, strong consideration should be made for his attendance in a general education program with support services (Dist. Ex. 15 at p. 2). The hearing record also reveals that the student's mother was "very vocal" during the May 2007 CSE meeting and the private program staff members in attendance were also afforded an opportunity to raise concerns and participate (Tr. p. 77). Meeting participants agreed that the student "require[d] more than general education" (Tr. p. 73). Nevertheless, the student's mother indicated her desire to see the student in a general education classroom (*id.*). Notwithstanding the student's mother's wishes, the student's special education teacher from his private placement and the representative from the private placement "felt very strongly that [the student] could not manage and that he would be set up for failure" should he be placed in regular education classroom (Tr. p. 74).

By letter dated July 31, 2007, the student's mother advised the CSE chairperson that for the 2007-08 school year, she planned to unilaterally place her son in the private school that he had attended the previous year (Parent Ex. A).

On August 14, 2007, the district sent the parents a final notice of recommendation (FNR) recommending placement in 12:1+1 class in a specific district school (Dist. Ex. 16). By letter dated August 25, 2007, through their attorney, the parents advised the district that they rejected the proposed program alleging in general terms, and without identifying any factual basis, that the May 2007 IEP was "procedurally and substantively" deficient (Dist. Ex. 18 at p. 1).<sup>9</sup> The parents further advised the district that they planned to place their son in the private program and of their intent to seek public funding for their unilateral placement (*id.* at p. 2). On August 27,

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<sup>9</sup> The hearing record demonstrates that at the time of this correspondence, the parents were represented by an attorney. However, at the time of the impartial hearing in June 2008, pursuant to an off-the-record discussion, the impartial hearing officer stated that the student's mother decided to appear pro se (Tr. p. 5).

2007, the student's mother entered into a tuition agreement with the private program (Parent Ex. I).

By due process complaint notice dated April 18, 2008, through their attorney, the parents requested an impartial hearing seeking payment for the student's tuition costs for the 2007-08 school year (Dist. Ex. 20). The parents alleged, among other things, that the recommended placement failed to provide the student with an opportunity to progress in the general curriculum, meet appropriate annual goals and/or achieve any educational growth and that the May 2007 CSE did not afford them meaningful parent participation in the development of the student's IEP (*id.* at p. 2). The parents noted that they unilaterally placed their son in the private program for the 2007-08 school year (*id.* at p. 5). On April 22, 2008, the district submitted an answer to the parents' due process complaint notice denying the parents' allegations (Dist. Ex. 21 at p. 1).

On June 3, 2008, an impartial hearing convened, and after two days of testimony concluded on August 1, 2008 (IHO Decision at pp. 1-2). By decision dated August 18, 2008, the impartial hearing officer concluded that the district had offered a free appropriate public education (FAPE) to the student (*id.* at p. 3). Specifically, the impartial hearing officer relied on the testimony from the district's IEP teacher who testified that the classroom teacher from the student's proposed placement would have used the "Balanced Literacy" program in order to support and address the student's academic weaknesses (*id.*). The impartial hearing officer stated in his decision that "the class would follow the general education fourth grade curriculum" (*id.*). The impartial hearing officer took into consideration the IEP teacher's testimony that based on her knowledge of the curriculum and her review of the student's May 2007 IEP, the proposed placement was appropriate for the student (*id.*).

Although the impartial hearing officer stated that an analysis of the parent's unilateral placement was unnecessary in light of his finding that a FAPE was offered to the student, he made the following findings of fact with regard to the private placement: (1) that the student was placed in a 12:1+1 classroom that consisted of eight students; (2) that the student was not mainstreamed for science or social studies in his private school; and (3) that the student was only mainstreamed for math (IHO Decision at pp. 3-4). Based on the foregoing, the impartial hearing officer found that the private placement was inappropriate, and accordingly, he denied the parents' request for funding for their son's tuition costs for the 2007-08 school year at the unilateral placement (*id.* at p. 4).

The parents appeal, arguing that the impartial hearing officer erred in his decision that the district had offered the student a FAPE. Specifically, the parents contend that the impartial hearing officer based his decision on a fourth grade "placement, curriculum and IEP," whereas the evidence adduced at the impartial hearing showed that the student attended the third grade at the private placement during the 2007-08 school year. The parents assert that this error constitutes more than a clerical or typographical error and, as relief, they request a new impartial hearing before a new impartial hearing officer.

In its answer, the district requests that the petition be dismissed in its entirety. The district asserts that the impartial hearing officer's decision was based on the evidence presented at the impartial hearing, and that his reference that the student attended the fourth grade was merely

an "oversight." Furthermore, the district argues that although the parents have seemingly abandoned their claim that the student was denied a FAPE during the 2007-08 school year on appeal, the hearing record reflects that the May 2007 IEP was both procedurally and substantively sound.

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

least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e]), whereby a district must provide special education and related services in accordance with the student's IEP and must make a good faith effort to assist the student to achieve the annual goals listed on the IEP (8 NYCRR 200.4[e][7]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

Turning to the instant case, the parents contend that the impartial hearing officer's decision should be invalidated because the impartial hearing officer erred to the extent that he stated in his decision that the student was enrolled in the fourth grade at the private program at the time of the impartial hearing (IHO Decision at p. 2). Although the district acknowledges in its answer that the impartial hearing officer's decision does incorrectly state as such, a review of the decision in its entirety reveals that the decision was otherwise supported by the hearing record. The hearing record shows that for the 2007-08 school year, the student was

recommended for placement in a combined third and fourth grade class that followed that same curriculum as the regular education students (Tr. pp. 20, 25; IHO Decision at p. 2).<sup>10</sup> Further review of the hearing record also establishes that the impartial hearing officer understood that the parents were seeking tuition reimbursement for the 2007-08 school year (Tr. p. 123). Moreover, the decision references the May 2007 CSE and the resultant challenged IEP, indicating that the impartial hearing officer properly based his findings on the 2007-08 school year, which was at issue during the impartial hearing (IHO Decision at pp. 2-4; see Dist. Ex. 20). Thus, I agree with the district that the impartial hearing officer's two references to the fourth grade were merely an oversight, and should not constitute a basis for invalidating an otherwise thorough and well-reasoned decision.

The impartial hearing officer's determination that the student was offered a FAPE is supported by the hearing record. A review of the hearing record shows that there are no procedural or substantive infirmities surrounding the creation of the May 2007 that rise to the level of the denial of a FAPE. The student's mother actively participated in the May 2007 CSE meeting and representatives from the student's private placement also attended by telephone and remained on the line throughout the meeting (Tr. p. 52; see Tr. p. 77). The student's speech-language therapist was also invited to attend the meeting, but was unable to do so (Tr. p. 106). According to the district representative, in making its program recommendation, the May 2007 CSE "talked a great deal about" other programs, in light of the student's mother's desire for her son to attend a general education class (Tr. p. 73). She further described the student's mother as "very vocal," during the CSE meeting and stated that representatives from the student's private placement were also afforded an opportunity to ask questions and voice concerns during the May 2007 CSE meeting. Moreover, the district representative testified that each person in attendance at the May 2007 CSE had copies of the student's evaluation reports and reports from the student's related service providers (Tr. pp. 53, 75). Under the circumstances, the hearing record reveals that the parents were afforded meaningful parent participation in the development of the student's May 2007 IEP (see Cerra, 427 F.3d at 194).

Additionally, the district correctly asserts that its proposed placement would have offered the student an appropriate program in the LRE. The IEP teacher from the proposed placement stated that the student would have been placed in a 12:1+1 classroom and she further described the teacher for that class as strong with excellent classroom management skills (Tr. pp. 20-21).<sup>11</sup> The IEP teacher also testified that the proposed placement's teacher was experienced in providing students with prompting, visual cues and positive reinforcement, which were academic management needs enumerated in the student's May 2007 IEP (Tr. p. 28; Dist Ex. 13). The IEP teacher opined that the district's placement could have met the mandates of the student's IEP, inasmuch as the classroom's curriculum matched the student's IEP, based on the student's grade level and his strengths and weaknesses listed in the May 2007 IEP (Tr. p. 38). Lastly, the IEP teacher further indicated that the proposed placement would have been able to meet the student's

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<sup>10</sup> The IEP teacher from the district testified as follows: "they definitely do the same curriculum as the general ed. students," in contrast to the impartial hearing officer's finding that the class followed the "general education fourth grade curriculum" (compare Tr. p. 25, with IHO Decision at p. 3).

<sup>11</sup> According to the hearing record, the IEP teacher reviews all the IEPs "that come in for new students and [she] makes sure that all their services are implemented with their appropriate service providers (Tr. p. 15).

mainstreaming requirements, and the hearing record reveals that the student's general and special education teachers would have convened on a monthly basis to discuss their concerns and observations regarding the student in the mainstream setting (Tr. pp. 31-33). Accordingly, the hearing record illustrates that the district offered the student a program that was reasonably calculated to enable the student to receive educational benefit in the LRE.

In conclusion, I find that the impartial hearing officer's determination that the district offered the student a FAPE during the 2007-08 school year is supported by the hearing record. Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether the private program 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).

In light of my decision, I need not address the parties' remaining contentions.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
December 7, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**