



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-143

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

Appearances:

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

Law Offices of H. Jeffrey Marcus, P.C., attorneys for respondent, H. Jeffrey Marcus, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Hampshire Country School (HCS) for the 2006-07, 2007-08, and 2008-09 school years. The appeal must be sustained.

The student began attending HCS in January 2005 and the parent continued to enroll the student at HCS for all subsequent school years up to and including the 2008-09 school year, during which the impartial hearing in this case convened (Tr. p. 3; Joint Exs. 5 at p. 1; 8 at p. 1; 14 at p. 1; 25 at p. 1).¹ The student's educational history was discussed in Application of the Bd. of Educ., Appeal No. 06-052 (2006 Decision) and will not be repeated herein in detail. The 2006 Decision described the parties' prior dispute over whether the district offered the student a free appropriate public education (FAPE) during the 2004-05 and 2005-06 school years and the

¹ The parties jointly entered each volume of the transcript and several sets of exhibits from a prior impartial hearing into evidence as a series of consecutively numbered exhibits in the instant appeal. Accordingly, several of the citations in this decision refer to exhibits which, in turn, contain multiple lettered or numbered exhibits entered into evidence in the prior proceeding (e.g., Joint Ex. ___ at Ex. ___ at p. ___). In future proceedings, I urge the parties to avoid the practice of entering voluminous exhibits containing sub-exhibits into evidence, and instead identify each separately paginated document with a separate letter or number.

parent's claim for the costs of the student's tuition at HCS for that time period (Application of the Bd. of Educ., Appeal No. 06-052). HCS is an out-of-State private residential school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (Joint Exs. 8 at p. 1; 14 at p. 1; 25 at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

In preparation for developing the student's individualized education program (IEP) for the 2006-07 school year, the district conducted a reevaluation of the student in spring 2006, which included, among other things, a psychoeducational evaluation and a social history update (Tr. p. 21; Joint Exs. 4; 5). The social history update of the student was completed by the parent on March 14, 2006 (Tr. p. 101; Joint Ex. 4). The parent indicated that the student had improved in his social interaction skills, self-help skills, and had adjusted well to HCS (Joint Ex. 4 at p. 1). The parent further indicated that her perceptions of the student's problems included that the student exhibited poor self esteem, wanted to be accepted, was very adult oriented, immature, easily distracted, rule driven, and had poor frustration tolerance (id. at p. 3). With regard to academics, the parent indicated that the student was able to complete school work independently and was strongly motivated to do well (id.).

In April 2006, a district school psychologist conducted a psychoeducational evaluation of the student (Joint Ex. 5). The resulting evaluation report noted the student's previous diagnoses including, among other things a reactive attachment disorder (RAD), an attention deficit hyperactivity disorder (ADHD), a post traumatic stress disorder (PTSD), and obsessive-compulsive traits (id. at p. 1). The school psychologist summarized the student's March 2006 social history update, including the parent's remarks that the student was immature, easily distracted, rigid and rule driven, and that he exhibited poor frustration tolerance (Joint Exs. 4; 5 at p. 2). The parent also reported to the psychologist that the student was currently motivated to do well, achieve good grades, and please others, and that his ability to respond appropriately in difficult situations had improved (Joint Ex. 5 at p. 2).

As part of her evaluation, the school psychologist observed the student at HCS in April 2006 (Tr. p. 90). According to the psychologist, the student appeared happy, and he eagerly provided her with a tour of the campus, and she conducted a brief observation of the student in the classroom was completed (Tr. pp. 98-99; Joint Ex. 5 at pp. 2-3).

The school psychologist conducted a testing session with the student on April 19, 2006 while the student was on "break" from HCS (Tr. p. 102; Joint Ex. 5 at p. 3). The school psychologist noted that during testing, the student was cooperative and pleasant, worked for over one hour refusing offered breaks, and that he appeared focused and put forth good effort throughout the session (Joint Ex. 5 at p. 3). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded cognitive intelligence scores consistent with previous cognitive testing results (id.). The student's performance on the WASI yielded a verbal IQ score of 106, a performance IQ score of 95 and a full scale IQ score of 100, all in the average range (id.). The student's academic abilities were assessed using the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH), which indicated that the student's overall reading skills were in the

average range and that his overall math skills were slightly below average due to a weakness in math fluency (id. at p. 6). The student's written language skills fell within the average range although his handwriting continued to be difficult to read (id.). With regard to the 2005-06 school year, the school psychologist summarized the student's academic functioning as reflected in March 2006 teacher reports from HCS (id. at p. 5). The March 2006 teacher reports indicated that the student required assistance to start assignments, needed extra time to complete assignments, put forth good effort, and continued to have messy handwriting (id.). The HCS teachers reported that the student continued to be distracted by others, but his ability to stay on task had improved (id.).²

The Behavior Assessment System for Children, Second Edition (BASC-2) and the Conners' Rating Scales (CRS) were used by the school psychologist to estimate the student's behavioral functioning at home and school (Joint Ex. 5 at p. 7). The parent completed the BASC-2 Parent Rating Scales (BASC-2 PRS); the results of which yielded "[a]t-risk ratings" for hyperactivity, anxiety, atypicality, withdrawal, attention problems, and functional communication (id.). No clinically significant ratings were obtained as a result of the parent's responses (id.). According to the school psychologist, the parent's responses also suggested that the student had made great progress in his behavior at home including decreased occurrence of threatening to hurt others, hitting, bullying, overeating, and being easily annoyed by others (id. at pp. 7-8). On the Conners' Parent Rating Scale-Revised: Long Version (CPRS-R: L) the parent's responses yielded ratings of the student in the "markedly atypical range for [p]erfectionism" and in the "moderately atypical" range on the "[a]nxious-[s]hy subscale" (id. at p. 8).

Three of the student's current HCS teachers completed the BASC-2 Teacher Rating Scales (BASC-2 TRS), which yielded results including one t-score in the clinically significant range on both the conduct problems and withdrawal scales, two t-scores in the at-risk range on the atypicality scale, one t-score in the at-risk range on the anxiety scale, three t-scores in the at-risk range on the depression scale, with all other t-scores in the average range (Joint Ex. 5 at p. 8). Three of the student's teachers also completed the Conners' Teacher Ratings Scales-Revised: Long version (CTRS-R: L), which yielded three t-scores in the moderately or markedly atypical ranges on the anxious-shy subscale and one t-score in the moderately atypical range on both the Conners' Global Index: Restless-Impulsive and Conners' Global Index: Emotional Lability (id.). The student completed the BASC-2 Self Report of Personality (BASC-2 SRP), which yielded a t-score in the clinically significant range on the self esteem scale with all other t-scores in the average range with the exception of his "low" t-score on the attitude toward school scale (id.).

In the evaluation report, the school psychologist recommended continued program modifications that included a high level of adult intervention to facilitate attending, assistance with organizing materials (both prompts and checklists), and repetition and clarification of directions because the student continued to have difficulty focusing and staying on task, even while in a small class setting (Joint Ex. 5 at p. 10). The school psychologist opined that the student's difficulty focusing and maintaining attention to task were the primary factors interfering with his learning (id. at p. 11). The evaluation report reflected that if the student

² The hearing record reflects that the student participated in an ungraded elementary program at HCS during the 2006-07 school year (Tr. p. 102).

returned to the district, an updated functional behavioral assessment (FBA) and "Behavior Plan" should be completed to reflect the student's current behavioral functioning (id.).

On June 19, 2006, the Committee on Special Education (CSE) met for a "Reevaluation/Annual Review" (Joint Ex. 9 at p. 1). The CSE meeting was attended by a district administrator, the CSE chairperson, the school psychologist, a special education teacher, two regular education teachers, an additional parent member, the parent, the headmaster of HCS who participated via telephone, and a note taker (Tr. p. 21; Joint Exs. 8 at p. 5; 9 at p. 5).³ The resultant June 2006 IEP noted that the student would receive shared teaching assistant services for all mainstream classes, except when the special education teacher was in the class (Joint Ex. 8 at p. 1). The June 2006 CSE recommended that the student receive three 45-minute sessions per week of group (5:1) consultant teacher services in the general education science class;⁴ special class services of one hour 37 minutes per day in a group (5:1) for math and social studies, either in the general education classroom or in the special class setting, as needed; and a 12:1 special class for five 45-minute sessions per week for English instruction (id.). The June 2006 CSE also recommended related services including two 30-minute group counseling sessions per week, one 30-minute individual counseling session per week, and teaching assistant services of five one hour 40-minute group sessions per week (id.). One 30-minute monthly occupational therapy (OT) consult and one 45-minute annual team meeting with the parent were also recommended (id. at p. 2). The June 2006 IEP included program modifications and accommodations for the student's management needs including access to either an Alpha Smart or computer with a word processor; modifications of the curriculum for writing; preferential seating; additional time to complete tasks; use of an assignment notebook; graph paper for math computations; use of an erasable pen or pencil; daily handwriting tasks; directions repeated and clarified as needed; complex tasks broken down into small, sequential steps; organizational strategies provided for writing and projects; and guidance provided throughout tasks as needed (id. at pp. 2, 4). Recommended testing accommodations for the student included extended time, tests administered in a location with minimal distractions, answers recorded/student needs to dictate answers, and use of a calculator (id. at p. 2).

During the June 2006 CSE meeting the parent indicated that she believed that a residential placement would be appropriate for the student and that the student was not ready to return to a large group setting (Joint Exs. 8 at p. 5; 9 at p. 2). In a letter to the district dated August 18, 2006, the parent notified the district that she was placing the student in HCS for the 2006-07 school year "at public expense"(Joint Ex. 10).

On May 14, 2007, the CSE met to conduct an annual review of the student's IEP for the upcoming 2007-08 school year (Joint Ex. 14 at p. 1). The May 2007 CSE meeting was attended by the district administrator, the CSE chairperson, the school psychologist, a special education

³ The attendance sheet for the June 2006 CSE meeting does not contain a special education teacher's signature; however, the hearing record reveals that the district's special education teacher arrived at the CSE meeting late (Tr. p. 21; see Joint Ex. 9 at p. 5). Additionally, one regular education teacher left the CSE meeting early and was replaced by the other regular education teacher (Tr. p. 21).

⁴ The ratio refers to the number of students (5) per teacher (1).

teacher, a regular education teacher, an additional parent member, the HCS headmaster who participated by telephone, the parent, and a note taker (Joint Exs. 14 at p. 5; 15 at p. 4).

The May 2007 CSE formulated the student's present levels of academic performance using the results of the student's April 2006 cognitive and achievement testing and input provided by HCS that included teacher concerns identified in the March 2007 HCS academic reports (Tr. p. 35; Joint Exs. 11 at pp. 3, 4; 14 at p. 3). The student's present levels of social/emotional development were identified by the CSE using the results of the April 2006 Conners' Rating Scale and input provided by HCS that included teacher concerns identified in the November 2006 and March 2007 HCS progress reports (Tr. p. 35; Joint Ex. 14 at p. 4).

The May 2007 CSE recommended that, for the 2007-08 school year, the student attend the district's middle school and receive consultant teacher services for three 45-minute sessions per week in a group (15:1) in the general education science class, a special class for one hour 37 minutes per day in a group (15:1) for math and social studies, and a special class for five 45-minute sessions per week in a group (15:1) for English instruction (Joint Ex. 14 at p. 1). The May 2007 IEP also recommended related services including two 30-minute group counseling sessions per week, one 30-minute individual counseling session per week, and shared (5:1) paraprofessional support services for five one hour 40-minute group sessions per week (*id.*).⁵ The May 2007 IEP noted that the student would receive shared "teaching assistant" services for all mainstream classes, except when the special education teacher was in the student's class (*id.*).⁵ One 30-minute monthly OT consult and one 45-minute annual team meeting with the parent were also recommended as support for school personnel on behalf of the student (*id.* at p. 2). The May 2007 IEP continued the program modifications, accommodations, and management needs listed on the June 2006 IEP and added the provision of praise, positive reinforcement, and tangible rewards (compare Joint Ex. 8 at p. 2, with Joint Ex. 14 at pp. 2, 4, 5).

At the May 2007 CSE meeting, the parent expressed, among other things, that the district's middle school was not an appropriate placement, that small classes were best for the student, and that the public school would be too large for the student (Joint Ex. 15 at p. 8). In a letter dated August 29, 2007, the parent informed the district that she did not agree with the placement offered to the student for the 2007-08 school year and, therefore, she was unilaterally placing the student at HCS for the 2007-08 school year and seeking reimbursement from the district (Joint Ex. 34).

A reevaluation of the student was conducted by the district prior to the 2008-09 school year, which consisted of, among other things, a social history update and a psychoeducational evaluation (Tr. p. 150; see Joint Exs. 19; 21). The parent completed the social history update of the student on January 23, 2008 (Joint Ex. 19). The parent reported, among other things, that the student was rule driven and was becoming responsible for his studies (Joint Ex. 19 at p. 2). She described her perception of the student's difficulties as his emotional and social immaturity coupled with his inability to "get the big picture or draw the best conclusion" (*id.* at p. 3). The parent noted HCS's provision of small class size, adjustment of pace, and level of difficulty as assisting with the student's academic difficulties, and indicated that although his academic skills

⁵ It appears that the district used the terms "paraprofessional" and "teacher assistant" interchangeably (see Joint Ex. 14 at p. 1).

had greatly increased during the past three years, his performance relied on the supports and structure in his HCS environment (id.). The parent also indicated that the student continued to need small classes in a safe, predictable environment (id. at p. 4).

The student's second trimester grades for the 2007-08 school year were reflected in academic reports provided by HCS dated January 28 and March 7, 2008 (Joint Ex. 40 at pp. 5-9). The HCS reports reflected that the student had earned primarily "As" and "Bs" during the second trimester of the 2007-08 school year (id.).

The school psychologist conducted a psychoeducational evaluation during March and April 2008 (Joint Ex. 21 at p. 1). During assessments conducted on March 17, 19, and 20, 2008, the student was reportedly cooperative and appeared to put forth good effort and the school psychologist indicated that the assessment was an accurate reflection of the student's true potential (id. at p. 3). The Woodcock-Johnson Tests of Cognitive Ability-Third Edition (WJ-III COG) and select subtests of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) were administered to assess the student's cognitive functioning (id.). The testing results yielded skill levels (standard scores) ranging from significantly below average to above average as follows: thinking ability 112 (above average); general intellectual ability 102, verbal ability 106, auditory processing 109, and phonemic awareness 104 (average); cognitive efficiency 79, short-term memory 69, and working memory 73 (significantly below average) (id.).

The student's academic achievement was assessed using the WJ-III ACH, which revealed overall average reading skills (Joint Ex. 21 at pp. 6, 7). The student's standard scores in decoding (97), comprehension (102), and word attack (90) skills were in the average range and his reading fluency standard score (113) was significantly above average (id.). In math, the student achieved standard scores in the average range in calculation (104) and problem solving (97) skills, although his math fluency (71) skills were determined to be significantly below average (id.). In writing, the student's standard scores for editing skills fell in the average range (100), and his spelling (89) and writing fluency (82) scores fell in the low average range (id.). Administration of the Test of Written Language-Third Edition Form A (TOWL-3) yielded standard scores reflecting overall average contrived writing skills (93), although individual subtest scores ranged from significantly below average to average (id.). The student's ability to create sentences utilizing specific vocabulary, ability to change sentences so that they were logical, ability to combine sentences, and his spelling skills were average (id. at p. 6). His use of mechanics in writing was significantly below average and his handwriting was deemed illegible and was therefore not scored (id.).

In her evaluation report, the school psychologist also included information regarding the student's academic ability from his second trimester academic report, which indicated that the student was doing well in English at HCS (Joint Exs. 21 at p. 6; 40 at p. 5). According to the school psychologist, the HCS report indicated that the student was able to read and comprehend short fiction, write good paragraphs based on the fiction, contribute to class discussions, volunteer his own ideas and consistently do his homework assignments well (Joint Ex. 21 at p. 6). The student's HCS teachers indicated that although his effort to improve his handwriting appeared to have "fallen by the wayside," the student excelled in grammar, and that in math, he

worked at a slower pace, had trouble staying focused and had low test grades, although he "was great about doing his homework" and had improved in his class work (id.).

The psychoeducational evaluation report included a summary of the student's January 2008 social history update (Joint Ex. 21 at p. 2). The evaluation report indicated that the school psychologist toured the HCS campus with the student on April 8, 2008 and that the school psychologist briefly observed the student in his English class while he was working independently on a writing piece (id.). The school psychologist noted that the student appeared distracted by her presence and needed reminders to return to work (id. at pp. 2-3).

A "Level I Career Assessment" was completed in April 2008 by the student's HCS English teacher (Joint Ex. 21 at p. 15). The career assessment indicated that the student's strength was in his ability to recall facts and details that interested him and that he needed to improve his focus, organizational skills, and working memory in order to reach his goal of attending college (id.). The career assessment also reflected that the student needed to work on time management skills and considering others' point of view (id.).

The school psychologist recommended that the student's current classification of a student with an emotional disturbance continued to be appropriate based on the student's psychiatric diagnoses, although the psychologist opined once more that the student's difficulty focusing and maintaining attention to task were the primary factors interfering with his learning (Joint Ex. 21 at p. 15). She also recommended that an appropriate program to meet the student's needs may include general education classes with a variety of special education support, paraprofessional support, and counseling services (id.). The evaluation report included the school psychologist's testing and program modification recommendations for the student (id. at p. 8). The report also reflected that in the event the student returned to the district, an updated FBA and "Behavior Plan" should be completed to reflect his current functioning (id. at p. 15).

The CSE met on June 5, 2008 for a "Reevaluation/Annual Review" (Joint Exs. 25 at p. 1; 26 at p. 1). The June 2008 CSE meeting was attended by the CSE chairperson, the district administrator, the school psychologist, a special education teacher, a regular education teacher, an additional parent member, the headmaster of HCS who participated via telephone, the parent, and a note taker (Joint Exs. 25 at p. 7; 26 at p. 4).⁶ The June 2008 CSE recommended that for the 2008-09 school year, the student attend the district's high school with consultant teacher services for English language arts (ELA), social studies, and math one time every other day for one hour 18 minutes, and one time every other day for 39 minutes in math in a group of 12:1, resource room services one time every other day for one hour 18 minutes in a group of 5:1, one 30-minute individual and one 30-minute group counseling session per week, and paraprofessional support one time every other day for one hour 18 minutes and one time every other day for 39 minutes in science (Joint Ex. 25 at pp. 1-2). Additionally, the IEP recommended one 30-minute OT consult per month and one 45-minute team meeting with the parent per year (id. at p. 2). In addition to the program modifications, testing accommodations and management needs listed on the student's May 2007 IEP, the June 2008 CSE recommended

⁶ The attendance sheet for the June 2008 CSE meeting does not include the district administrator's name; however, he testified that he arrived at the June 2008 CSE meeting late and did not sign in (Tr. p. 79; see Joint Ex. 26 at p. 4).

that resource room support be provided to assist the student academically by facilitating attending, reteaching as necessary, organization of class and homework, and assisting in the completion of class work and homework, as well as providing feedback regarding behavior and implementing behavior management strategies (id. at p. 6). According to the June 2008 CSE meeting minutes, the parent expressed her concern that the environment recommended by the district would be overwhelming for the student and questioned whether the student should be in a less competitive environment (Joint Ex. 26 at p. 7).

In a letter to the district dated August 12, 2008, the parent stated that she was rejecting the district's recommended program for the student for the 2008-09 school year and was unilaterally placing him at HCS (Joint Ex. 27). She also informed the district that she would request tuition reimbursement from the district (id.).

In a due process complaint notice dated August 14, 2008, the parent, through her attorney, alleged that the June 2006 CSE "may" have been improperly composed due to the lack of a special education teacher, did not consider an FBA, and predetermined the student's recommended placement (Joint Ex. 1 at pp. 3-4). According to the parent, the June 2006 IEP did not reflect the results of the evaluations or the student's needs (id. at pp. 2-3). The parent contended that the present levels of performance in the June 2006 IEP were inadequate and that the IEP failed to describe the "effects of the student's impairments" (id. at p. 3). The parent further asserted that the goals and objectives in the June 2006 IEP were vague and not measurable and that the IEP failed to indicate whether consultant teacher services were direct or indirect. The parent alleged that the June 2006 CSE improperly proposed to place the student with students with dissimilar needs and did not plan for the student's transition from HCS to the district (id.). According to the parent, the student required a "predictable, structured environment" and the district's recommended general education placement with a special class that could be attended on a flexible basis was inappropriate for the student (id. at p. 2).

With respect to the 2007-08 school year, the parent alleged that the May 2007 IEP had "essentially the same" deficiencies as the June 2006 IEP (Joint Ex. 1 at pp. 4). According to the parent, the provision of consultant teacher services in a 15:1 setting in the May 2007 IEP was inappropriate for the student (id.). The parent "incorporated by reference" into her claims regarding the May 2007 CSE meeting, all complaints she had raised about the June 2006 CSE meeting procedures, resultant IEP, and recommended placement, with the exception of the lack of a special education teacher (id.).

With respect to the 2008-09 school year, the parent alleged that the June 2008 CSE was not properly composed because the district failed to include in the meeting a regular education teacher who would have taught the student during the 2008-09 school year in the district's high school if the student had returned (Joint Ex. 1 at p. 5). The parent further asserted that the June 2008 IEP had "most of the same deficiencies" as the two previous IEPs, but that the present levels of performance in the June 2008 IEP were "somewhat more detailed" and the June 2008 CSE did not lack a special education teacher (id.). According to the parent, the student had "intensive needs" and the goals and objectives in the June 2008 IEP were inadequate and failed to address those needs (id.). The parent also contended that the district's recommended placement for the 2008-09 school year was inappropriate because the student was incapable of

Regent's level coursework, could not learn in a large unstructured environment, and it was unclear how much individual support the student would have received (*id.* at p. 4). The parent further alleged that the district's transition plan from school to post-secondary activities was inappropriate and that the district failed to offer a plan for transitioning the student from HCS to the district (*id.* at p. 5).

Next, the parent asserted that HCS was an appropriate placement for the student and that the parent had cooperated at all times with the CSE during the three school years at issue (Joint Ex. 1 at p. 6). For relief, the parent sought, among other things, tuition reimbursement for "all costs and expenses" associated with the student's placement at HCS for the 2006-07, 2007-08, and 2008-09 school years (*id.* at p. 7).

In a response to the due process complaint notice dated August 27, 2008, the district described the special education and related services offered to the student for the 2006-07, 2007-08, and 2008-09 school years and asserted that the recommendations were reasonably calculated to enable the student to benefit from his education (Joint Ex. 2).

An impartial hearing was convened in November 2008 and concluded in February 2009, after three days of testimony (Tr. p. 3).⁷ After the conclusion of the impartial hearing but prior to issuance of the impartial hearing officer's decision, the United States District Court for the Northern District of New York (District Court) issued a decision determining that the district had offered the student a FAPE during the 2004-05 and 2005-06 school years and denying the parent's tuition reimbursement claims (*Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794 [N.D.N.Y. June 19, 2009]). In a decision dated November 11, 2009,⁸ the impartial hearing officer determined that with respect to formulation of the June 2006 IEP, the CSE had failed to consider the student's 2005-06 school year academic and progress reports from HCS (IHO Decision at p. 8). The impartial hearing officer also found that the June 2006 IEP did not indicate whether the consultant teacher services would be provided on a direct or indirect basis (*id.* at p. 9). According to the impartial hearing officer, the June 2006 CSE recognized the

⁷ The impartial hearing officer admitted and considered all of the testimonial and documentary evidence from the parties' prior impartial hearing that focused on events underlying the district's recommendations and the parent's unilateral placement of the student during the 2004-05 and 2005-06 school years; much of which is unduly repetitious or not relevant to the parties' disputes during subsequent school years (Joint Exs. 28-30; IHO Decision at p. 5). This point is underscored by a statement of the parent's counsel to the impartial hearing officer that the student's program "in 2004 is irrelevant or of marginal and diminishing relevance" to the issues presented in this case (IHO Ex. V). I remind the impartial hearing officer of her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

⁸ I note that although the impartial hearing concluded on February 12, 2009, after approximately 13-14 hours of testimony (Tr. pp. 1-405), the decision was issued over 270 days thereafter. Some of the delays included three months allowed for the submission of closing briefs (IHO Exs. X; XI; XII), approximately two months to consider the District Court's decision regarding the 2004-05 and 2005-06 school years (IHO Ex. XIII; XIV), and three months due to a computer failure and an "Extensive/Complex" hearing record. State and federal regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the adjusted or non-adjusted resolution period (8 NYCRR 200.5[j][5]; 34 C.F.R. § 300.515[a]), unless an extension has been granted at the request of either party (8 NYCRR 200.5[j][5][i]; 34 C.F.R. § 300.515[c]). "In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision" (*see* 8 NYCRR 200.5[j][5][v]).

student's need for individual support but inappropriately removed full-time 1:1 support from the student, and the student would not have received the level of support he required in the district's program (*id.* at p. 10). The impartial hearing officer determined that the 5:1 special class recommended in the student's June 2006 IEP was "illusory" and that the student would not have received it (*id.*). The impartial hearing officer further found that the June 2006 CSE predetermined the student's placement, deprived the parent of the opportunity to meaningfully participate in the development of the student's IEP, and failed to consider or discuss other possible programs or placements (*id.* at p. 11). As a result, the impartial hearing officer concluded that the district did not offer the student a FAPE for the 2006-07 school year (*id.* at p. 12).

With regard to the 2007-08 school year, the impartial hearing officer determined that the student continued to need "an intensive level of individual support throughout the school day" and that no assessments, evaluations or reports available to the May 2007 CSE warranted changing the 12:1 special class offered during the 2006-07 school year to a 15:1 special class or changing the consultant teacher services from the 5:1 ratio offered during the 2006-07 school year to a 15:1 ratio (IHO Decision at pp. 12-13). Similar to her 2006-07 school year findings, the impartial hearing officer decided that the special class recommended by the May 2007 CSE was "illusory" and would not have been implemented (*id.* at p. 13). According to the impartial hearing officer, the consultant teacher services recommended in the May 2007 IEP would not have provided the student with the level of support he needed to function in the general education environment in the district's middle school (*id.*). The impartial hearing officer determined that the district failed to offer the student a FAPE for the 2007-08 school year (*id.*).

The impartial hearing officer then addressed the 2008-09 school year, finding that the June 2008 IEP failed to describe whether the consultant teacher services recommended by the district were direct or indirect services (IHO Decision at p. 14). The impartial hearing officer also concluded that the goals in the June 2008 IEP were extremely limited, vague, and were not sufficient to meet the student's extensive special education needs (*id.* at p. 16). The impartial hearing officer determined that the district inappropriately eliminated the recommended special class for English and reduced the amount of consultant teacher and paraprofessional services that the student would have received (*id.* at p. 15). The impartial hearing officer concluded that the student required intense special education services each day and that the June 2008 CSE improperly reduced the level of services and would only have provided special education supports every other day (*id.*). The impartial hearing officer further found that the June 2008 CSE impeded the parent's opportunity to meaningfully participate in the development of the student's IEP and failed to consider or discuss the possibility of placement at a Board of Cooperative Educational Services (BOCES) program, a State-approved private school, a day treatment center, or a residential placement (*id.*). According to the impartial hearing officer, the district also failed to develop a plan that would assist the student with transitioning from HCS to the district (*id.* at p. 16). The impartial hearing officer determined that the district failed to offer the student a FAPE for the 2008-09 school year (*id.* at p. 17).

With regard to the parent's tuition reimbursement claims for HCS, the impartial hearing officer concluded that HCS was appropriate for the student for the 2006-07, 2007-08, and 2008-09 school years because, among other things, it offered instruction in a small, structured setting

and provided individualized attention during the school day and evening study hours (IHO Decision at pp. 19-24). The impartial hearing officer determined that HCS was not overly restrictive and that the student did not regress while attending HCS during the 2006-07, 2007-08, and 2008-09 school years (id. at pp. 24-26). The impartial hearing officer also found that equitable considerations supported the parent's request for tuition reimbursement (id. at p. 27). The impartial hearing officer awarded the parent tuition reimbursement for the 2006-07, 2007-08, and 2008-09 school years as well as transportation expenses for five round trips to HCS for each school year (id. at pp. 27-30).

The district appeals, contending that, with respect to the 2006-07 school year, the impartial hearing officer erred: (1) in finding that the June 2006 CSE did not consider progress reports from HCS; (2) in finding that the June 2006 IEP did not indicate whether consultant teacher services and teaching assistant support would be provided directly or indirectly; (3) in finding that the recommended program and placement were not sufficient to meet the student's needs; (4) in finding that there was a substantial reduction in the level of support; (5) in finding that the special class was illusory; and (6) in finding that the CSE's recommended placement was predetermined.

In addressing the 2007-08 school year, the district argues that the impartial hearing officer erred in finding that the 15:1 ratio in the special class was inappropriate and that the special class offered by the district was illusory. According to the district, the impartial hearing officer failed to recognize that the student would have had a shared teaching assistant when the student's special education teacher was not present.

With regard to the 2008-09 school year, the district asserts that the impartial hearing officer erred: (1) in finding that the goals in the June 2008 IEP were inappropriate; (2) in finding that the June 2008 CSE's recommendation was inappropriate because paraprofessional and consultant teacher support services were reduced to every other day (i.e. services provided only 1/2 of the time that the student attended a particular class); (3) in finding that the student would not have adequate support in the district's proposed placement; (4) in concluding that the CSE was required to explore more restrictive placements after concluding that the recommended placement was designed to provide educational benefits in the least restrictive environment (LRE); (5) in finding that that the student's IEP must include transitional support services for the student's return from the parental placement to the district's recommended placement; and (6) in failing to recognize that the student was offered paraprofessional support in the general education science topics course.

The district further alleges that the impartial hearing officer erred in determining, among other things, that: (1) HCS was appropriate for the student; (2) small class sizes and isolation at HCS constituted special education; (3) there was evidence in the hearing record to support the conclusion that the student received the individualized extra support that he needed; (4) there was evidence in the hearing record that supported the conclusion that specially designed instruction was offered by HCS for any of the school years in question; and (5) that the student required a residential placement. According to the district, the impartial hearing officer also erred in concluding that equitable considerations supported the parent's tuition reimbursement claims. For relief, the district seeks an order annulling the impartial hearing officer's decision.

In the answer, the parent denies the district's allegations of error on the part of the impartial hearing officer and asserts that her decision should be upheld.⁹ The parent also asserts that the district's petition for review is untimely and that good cause has not been asserted for the delay as required by State regulations. In a reply to the parent's procedural defense of untimeliness, the district asserts that the petition for review was served in a timely manner.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]; 8 NYCRR 200.5[j][4][ii]; 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

⁹ The impartial hearing officer did not address the parent's claims in her due process complaint notice regarding the June 2006 CSE meeting composition, the adequacy of the goals and objectives in the June 2006 IEP, or the student's need for an FBA (see Joint Ex. 1 at pp. 3-4). Furthermore, other than her findings regarding the student's class size and level/intensity of special education supports, the impartial hearing officer did not make any findings to support the conclusion that the district failed to offer student a FAPE for the 2007-08 school year (IHO Decision at pp. 12-13). With regard to the 2008-09 school year, the impartial hearing officer did not address the parent's claims that the June 2008 CSE was improperly composed, that the student's transition plan to post-secondary activities was inadequate, that the student was incapable of Regents level coursework, and the parent's claim that the June 2008 IEP contained "most of the same deficiencies" as the two previous IEPs (see Joint Ex. 1 at pp. 4-6). An impartial hearing officer's decision is final and binding upon a party unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). The parent did not cross-appeal any aspect of the impartial hearing officer's decision or her decision not to address certain issues presented in the due process complaint notice, and therefore, these issues are not properly before me and I will not address them.

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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a 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 (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning first to the parties' dispute over the timeliness of the petition for review, according to State regulations, the petition for review must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (*id.*). 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).

In this case, the impartial hearing officer's decision is dated November 11, 2009 (IHO Decision at p. 30). In a letter to the parties dated November 11, 2009, the impartial hearing officer indicated that her decision was sent to the attorneys for the district and the parent's and the district's representative by first class mail and e-mail on November 11, 2009 (Answer Ex. A at pp. 1-2). According to the November 11, 2009 letter, the impartial hearing officer's decision was sent to the parent by first class mail (*id.* at p. 2). The district served the petition for review upon the parent on December 17, 2009 (Dist. Aff. of Service).¹⁰ State regulations do not contain provisions that explicitly address the instance in which the hearing record shows that an impartial hearing officer's decision was both e-mailed and mailed to the petitioning party, and the parent has not cited any authority on that point. Under the circumstances presented herein, in which the impartial hearing officer's decision was in fact served on the petitioner by mail (Answer Ex. A at p. 2), I find that the district was afforded the exclusion for mailing in computing the time period in which to serve the petition for review (Application of a Student with a Disability, Appeal No. 09-056 [holding that the parent's petition for review was timely due to the four day exclusion where the decision was emailed to counsel and sent by first class mail to the parent]; Application of a Student with a Disability, Appeal No. 08-020 [holding that the parent's petition for review was timely when the hearing record was silent with respect to the method of delivery of the decision]; Application of the Bd. of Educ., Appeal No. 06-115; see Application of a Student with a Disability, Appeal No. 08-114 [holding that the parent's petition for review was untimely when the impartial hearing officer's decision was delivered by e-mail, there was no evidence of regular mailing, and the parent's did not claim the four-day exclusion for mailing]). Consequently, the district's petition for review was timely when it was served on December 17, 2009.

With regard to the parties' dispute over the June 2006 IEP and the CSE's recommendations for the 2006-07 school year, the hearing record reflects that the June 2006

¹⁰ The parent's counsel agreed to accept service of the petition for review by first class mail and e-mail and, while the timeliness of service is disputed, the method of service is not in dispute in this case.

CSE had before it, among other things, the April 2006 psychoeducational evaluation, a March 2006 social history completed by the parent, and the February 2006 physical examination (collectively, the 2006 triennial evaluation) (Joint Ex. 8 at p. 5). The triennial evaluation summarized the student's social history, the district's observation of the student at HCS, as well as March 2006 reports from the student's HCS teachers (Joint Ex. 5 at pp. 2, 5-6). The 2006 triennial evaluation also reflected the results of the student's then current cognitive and achievement testing and behavior rating scales that were completed by the parent, the student, and the student's HCS teachers and the hearing record reflects that this information was before the June 2006 CSE (see Joint Ex. 5 at pp. 2, 3, 5-10). The CSE meeting minutes also reflected that the headmaster from HCS participated in the April 2006 CSE meeting by telephone and provided information regarding the student's academic, social/emotional, and behavioral functional levels (Joint Ex. 9 at p. 2; see Tr. p. 25).

The June 2006 CSE considered the evaluative information before it and appropriately identified the student's present levels of performance (Joint Ex. 8 at pp. 3, 4). Consistent with the April 2006 administration of the WASI, the June 2006 IEP reflected that the student's cognitive functioning was within the average range (compare Joint Ex. 5 at p. 3, with Joint Ex. 8 at p. 3). The June 2006 IEP described the student's achievement levels, noting that the student's reading fluency, comprehension, writing skills, and problem solving skills in math were average; however, his math calculation skills were low average and his math fluency (speed of completing calculations) was weak (id.). Although the impartial hearing officer found that the June 2006 CSE failed to consider information in the student's academic and progress reports from HCS for the 2005-06 school year (IHO Decision at p. 8), I find that this conclusion is unsupported by the hearing record because the present levels of performance on the June 2006 IEP reflected input provided by HCS, including concerns that the student had good literal comprehension but had needs in comprehending inferences or critical thinking, starting writing assignments, organizing his thoughts, editing for spelling and punctuation, writing legibly, and improving his calculation skills and fluency (Joint Ex. 8 at p. 3). Additionally, the June 2006 IEP noted teacher concerns from the HCS March 2006 academic reports that the student's distractibility significantly affected his learning and that he required more staff support and extra time as a result (Joint Ex. 8 at p. 3; see Joint Ex. 6 at pp. 5-7).

With regard to the student's social/emotional development, the present levels of performance on the June 2006 IEP reflected the description of the student by the HCS staff and the parent including that the student had developed friendly relationships with several staff and students, was conscientious about his appearance, was socially immature, was a "rule follower," and exhibited low self esteem (Joint Exs. 4 at p. 3; 5 at pp. 2, 7, 8; 8 at p. 4). The present levels of performance also reflected results reported in the April 2006 triennial evaluation of the student, which indicated that responses from the student and his teachers on administered behavior scales resulted in ratings in the moderately to markedly atypical ranges for anxiousness, shyness, restlessness, and impulsivity and that the student was aware of his low self esteem (Joint Exs. 5 at p. 8; 8 at p. 4).

With regard to the student's management needs, the June 2006 IEP described his need for moderate to intensive supervision by a teacher or teaching assistant to provide academic and emotional support in educational settings, teacher redirection to stay on task, confirmation that

he was doing things correctly, and a structured environment either in the general education or special education classroom (Joint Ex. 8 at p. 4).¹¹

Turning to the impartial hearing officer's determination that the June 2006 CSE predetermined the student's placement and failed to consider other possible placements, and therefore denied the parent the opportunity to meaningfully participate in the development of the student's IEP, I find that this conclusion is not supported by the hearing record. The June 2006 IEP indicated that the CSE considered other placement recommendations for the student including a general education setting with related services and consultation services only, a self-contained class at a segregated day placement program, and a residential placement, and that the reasons the CSE rejected these options were noted in the IEP (Joint Ex. 8 at p. 5; see James D. v. Bd of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 2009 WL 2178431, at *9 [N.D. Ill. July 22, 2009] [holding that districts must have a continuum of alternative placements¹² available and select the appropriate placement, but are not required to offer parents a variety of placement options for their children and allow them to choose]). The evidence also shows that the June 2006 CSE considered the parent's opinion that a residential placement would be appropriate for the student, but rejected such a placement because the CSE believed that it would have been overly restrictive based upon the student's level of academic, social, emotional, and management needs (Joint Ex. 8 at p. 5). The CSE meeting minutes further reflected the parent's input into the process of developing the student's June 2006 IEP and her opinion that the student had made social/emotional progress, but was not able to function in a large group setting (Joint Ex. 9 at p. 2). Accordingly, I do not agree with the impartial hearing officer's determination that the June 2006 CSE predetermined the student's placement and denied the parent the opportunity to meaningfully participate in the development of the student's June 2006 IEP (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [holding that parental input must be considered by the district but that parents do not hold a veto power in the selection of a student's program]; T.P. and S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610-11 [6th Cir. 2006]; R.R. and D.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *8-*9 [S.D.N.Y. May 15, 2009]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]).

Although the impartial hearing officer concluded that the placement recommended by the June 2006 CSE was not sufficient to meet the student's needs, the hearing record indicates that the June 2006 IEP would have addressed the student's identified weaknesses on a daily basis in the student's English class, which was a segregated special class environment and would have addressed his difficulty putting his thoughts into writing, keeping himself organized, getting started on writing assignments, using a word processor, and editing for spelling and punctuation, all of which were noted by his teachers at HCS to be difficulties for the student (Tr. p. 30; Joint Ex. 8 at p. 3). The June 2006 CSE also recommended that the student receive 5:1 consultant teacher services in his science class three times per week for 45 minutes,¹³ and the hearing record

¹¹ Neither the parties nor the evaluative information in the hearing record suggests that the student had physical needs that needed to be addressed through special education services.

¹² The continuum of special education services in New York State is described in 8 NYCRR 200.6.

¹³ The impartial hearing officer's conclusion that the IEP did not indicate whether consultant teacher and teaching assistant support would be provided in an indirect or direct manner is inconsistent with the

shows this would have provided him with support in the class, helped him understand the topics being taught, and provided re-teaching or re-explaining as needed (Tr. p. 26; Joint Ex. 8 at p. 1). The district's administrator testified that the consultant teacher would have also assisted the student in group settings by helping him handle the social aspects of the classroom, for example, during a science lab (Tr. p. 26).

The hearing record further describes how the 5:1 special class would have addressed the student's needs during math and social studies by allowing the special education teacher to work with the student in the general education classroom or, if he was having difficulty, the special education teacher would have retained the flexibility to bring him to a special classroom and work with him in a small setting (Tr. p. 27). I also note that, contrary to the conclusion to of the impartial hearing officer that the district substantially reduced the level of support for the student in the June 2006 IEP which denied the student a FAPE (IHO Decision at p. 10), the hearing record reflects that the recommended program provided an appropriate level of support and would have addressed the student's significant attention difficulties by having either the special education teacher or a paraprofessional with the student to redirect him if his attention wandered (Tr. p. 33; Joint Ex. 8 at p. 1).

I also find that the hearing record does not support the impartial hearing officer's conclusion that the 5:1 special class offered in the June 2006 IEP was "illusory" (IHO Decision at p. 10). The district administrator, the parent, and a private psychologist who treated the student testified that the recommended program would have been implemented similarly to when the student last attended the district during the 2004-05 school year (Tr. pp. 27, 281, 382; see Joint Ex. 28 at Ex. 30 at p. 1). According to the district administrator, the student had been "successful in that model" and he believed that the student's success would continue (Tr. p. 29). He further testified that when the student attended the district, the student made adequate academic and social progress, seemed happy, and that the student "had the special class program because he needed it, but it was serving him well" (Tr. p. 32; see Joint Ex. 28 at Exs. 30 at p. 1; 62 at pp. 7-8). The district administrator testified that, at the time the parent placed the student at HCS, he was attending general education classes at the district middle school and was receiving special class support and related services (Tr. p. 19). The administrator further testified that the student's special class support consisted of a special English class for help with reading and writing, which met daily in a separate location (Tr. p. 20). The district administrator testified that otherwise the "plan was to have [the student] in the general class as much as possible" (Tr. p. 29). As such, when the student last attended the district, the student participated in social studies, math, and science classes in the general education setting and received support from either a special education teacher or a teaching assistant (Tr. p. 20). I also note that the district's actual implementation of an IEP placing the student in general education classes with a high level of support from either a teaching assistant or a special education teacher during a prior school year was also discussed in the 2006 Decision and subsequently reviewed and upheld by the District Court (Z.D., 2009 WL 1748794 at *4; Application of the Bd. of Educ., Appeal No. 06-052).

documentary evidence in the hearing record, which indicates these services would have been provided to the student in his classes (Joint Ex. 8 at p. 1; IHO Decision at p. 9).

The hearing record further reflects that the student left the general education class only when needed if he was noncompliant, disruptive, when he wasn't able to pay attention or at the point when he was not able to benefit from being in the general education classroom (see Tr. p. 271; Joint Ex. 28 at Ex. 62 at p. 6).¹⁴ The student would then be brought either to the resource room or to a small room near the principal's office for instruction (Tr. p. 271).¹⁵ In view of the quantity of evidence to the contrary, the hearing record does not support the impartial hearing officer's determination that the district's recommended 5:1 special class was "illusory".¹⁶ I note that the district's efforts to maximize the time that the student spent with his typically developing peers in the general education setting was consistent with the IDEA and State mandates that the student be educated in the LRE, which may include, where appropriate, "special class programs within the general education classroom" (8 NYCRR 200.6[a][1]; see 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]).

Furthermore, the hearing record reflects that the June 2006 IEP also recommended that the student's counseling services be increased to include an individual session in addition to the two 30-minute group sessions per week he had previously received (Joint Exs. 8 at pp. 1, 4; 9 at p. 2; 28 at Ex. 62 at p. 1). Additionally, the June 2006 IEP reflected that the student's social/emotional needs would have been further addressed in the special class setting, which would also have provided "conferencing" and instruction on communication skills such as eye contact, seeking attention appropriately, greetings, good conversation starters, conflict resolution, negotiating tools, and coping strategies (Joint Ex. 8 at p. 4). The IEP also provided for monthly OT consultation to address the student's long standing difficulty with handwriting (Tr. p. 32). Under the circumstances presented above, I find that the district offered the student a FAPE in the LRE for the 2006-07 school year and that the impartial hearing officer's conclusion that the district failed to meet its burden to prove that it offered the student a FAPE is not supported by the hearing record.

Turning next to the district's recommendations for the 2007-08 school year, in addition to the information that was considered at the June 2006 CSE meeting, the May 2007 CSE also had before it progress reports from HCS dated November 2006 and March 2007 and the student's academic report cards from the first, second, and third trimesters for the 2007-08 school year at HCS, as well as information provided by the headmaster of HCS during the May 2007 CSE meeting (Tr. p. 34). The district administrator testified that the CSE chairperson also "typically"

¹⁴ The hearing record describes the student's noncompliance as "refusal to comply with teacher and/or teaching assistant[']s requests to work in class, to follow directions and general resistance demonstrated by putting his head down on his desk" (Joint Ex. 28 at Ex. 62 at p. 6).

¹⁵ The hearing record reflects that during a 13-week period prior to leaving the district, the student left the general education setting due to noncompliance 0 to 2 times per week for 12 weeks and 5 times during one week, and for periods of time ranging primarily between 2 and 45 minutes (Joint Ex. 28 at Ex. 62 at pp. 24, 25). The student's noncompliant behaviors were described as "generally quiet and non-disruptive to other students" and the student did not display any aggressive behaviors in his sixth grade program at the district (*id.* at p. 6).

¹⁶ Much of the impartial hearing officer's analysis and findings lack supporting citations to the hearing record (see e.g., IHO Decision at pp. 10-11, 12-13, 15-16). State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

called the school and spoke to the student's teachers so that she would have some firsthand information regarding the student's progress (*id.*). The student's present levels of performance reflected on the May 2007 IEP were updated with input provided by HCS that included teacher concerns identified in the March 2007 HCS academic reports (Tr. p. 35; Joint Exs. 11 at pp. 3, 4; 14 at pp. 3-4).

The CSE's placement recommended in the May 2007 IEP consisted of consultant teacher services of three 45-minute sessions (15:1) in the general education science class;¹⁷ special class services of one hour 37 minutes per day in a group (15:1) for math and social studies, either in the general education classroom or in the special class setting; and special class services of five 45-minute sessions (15:1) per week for English instruction (Joint Ex. 14 at p. 1). The May 2007 CSE also recommended related services including two 30-minute group counseling sessions per week, one 30-minute individual counseling session per week, and 5:1 paraprofessional support services five times per week for one hour and 40 minutes each in the student's classroom (*id.*). One 30-minute monthly OT consult and one 45-minute annual team meeting with the parent were also recommended as support for school personnel on behalf of the student (*id.* at p. 2). The May 2007 IEP noted that the student would receive shared teaching assistant services for all mainstream classes, except when the special education teacher was in the class (*id.* at p. 1). In addition to the program modifications, accommodations, and management needs recommended in the June 2006 IEP, the May 2007 IEP also reflected that the student would benefit from praise and positive reinforcements and tangible rewards such as free time to play games, use the computer, draw, watch a movie or go to the media center (*id.* at p. 5).

With regard to the impartial hearing officer's determination that the student's 15:1 special class was "illusory" (IHO Decision at p. 13), I find that, similar to the 2006-07 school year, the hearing record reflects that the recommended program for the 2007-08 school year would have been implemented with the same flexible approach that was used when the student last attended the district and would have been appropriately designed to address the student's needs (Tr. pp. 38, 39, 40). The district's educational strategy for implementing the student's special class services in the general education environment was described in detail above in the discussion regarding the CSE's recommendations for the 2006-07 school year and there is no need to repeat that discussion here. The same rationale for deciding this issue with respect to the 2006-07 school year applies equally to the impartial hearing officer's determination for the 2007-08 school year and, therefore, I do not agree with the impartial hearing officer's decision that the student's 15:1 special class was "illusory" and would not have been implemented because it is not supported by the hearing record.

Turning next to the adequacy of special education support offered to the student in the May 2007 IEP, the hearing record reflects that the CSE appropriately continued to recommend addressing the student's weakest areas of writing and organization in a special class for English (Tr. p. 41; Joint Ex. 14 at p. 1). The hearing record reflects that similar to the June 2006 IEP, for math and social studies, it was recommended that the student participate in general education classes with either the special education teacher or a teaching assistant sitting with him and

¹⁷ The May 2007 IEP reflected that the CSE discussed that if the student did not ultimately need the specific level of support in science that was delineated on the May 2007 IEP, another CSE meeting could have been conducted to adjust the level of the support in the student's science class (Joint Ex. 15 at p. 8).

assisting him academically as needed, if the student had trouble understanding or needed something explained again (Tr. p. 39). Socially, if a conflict arose, the special education teacher or a teaching assistant could help the student work through the conflict (*id.*). Although the district administrator testified that the student would have either the special education teacher or a teaching assistant sitting with him in the general education classes, the "idea was to step back whenever possible and let the [the student] do for himself" with the special education teacher or teaching assistant standing nearby, as needed (Tr. p. 40). In view of the evidence above, I find that the high level of support for the student recommended by the May 2007 CSE was consistent with and would have appropriately addressed the student's attentional needs in the LRE.

With regard to the impartial hearing officer's finding that the change in recommended class size was inappropriate for the student, the hearing record reflects that the student-to-teacher ratio recommended for the student's special education programs changed from 5:1 in the previous school year to 15:1 for the 2007-08 school year (compare Joint Ex. 8 at p. 1, with Joint Ex. 14 at p. 1). The May 2007 CSE meeting minutes reflected that a discussion was conducted at the CSE meeting during which the student was described as maturing, showing signs of becoming a good student, more motivated to learn, seeking out extra help on his own, and wanting to be on the honor roll (Tr. p. 37; Joint Ex. 15 at pp. 1, 5, 6). The May 2007 CSE minutes also indicated that the student demonstrated increased self esteem and self control, was more stable emotionally and, that if he were in a large school, he could make connections (Joint Ex. 15 at pp. 5, 7). Under the circumstances, I find that contrary to the determination of the impartial hearing officer, the change in student-to-teacher ratio was a reasoned decision by the May 2007 CSE that is supported by the hearing record and took into account the needs of the student at that point in time. I note that the hearing record reflects that the recommended 15:1 ratio applied to the student's special class settings was not an increase in the student-to-staff ratio in his general education classes (Tr. p. 41). Furthermore, the May 2007 CSE meeting minutes indicated that the student was able to "[do] well in small groups" at HCS, which was a general education setting without special education support (Joint Ex. 15 at p. 8). Moreover, if the student had returned to attend the district's recommended placement, the district administrator testified that "[o]ver the years that we're speaking of, [the special education teacher] might have had as many as five students overall, but she never worked with . . . more than two or three students at a time" (Tr. p. 28), which suggests that an even higher level of special education support in a small environment was readily available to the student if it became necessary. In light of the evidence above, I find that the recommended special education and related services in the May 2007 IEP would have provided the student with supports that were reasonably calculated to enable the student to receive educational benefits in the LRE and, accordingly, the impartial hearing officer's conclusion that the district failed to offer the student a FAPE for the 2007-08 school year is not supported by the hearing record.

Turning next to the district's recommendations for the student for the 2008-09 school year, the student's present levels of performance on the June 2008 IEP were reflective of then current achievement testing results inasmuch as the student was described as having overall reading skills that were in the average range with reading fluency significantly above average and math calculation and problem solving skills that were in the average range, although he demonstrated weak math fluency (compare Joint Ex. 21 at pp. 6, 7, with Joint Ex. 25 at p. 4). In language, the student demonstrated average immediate recall of details or stories and average

ability to understand directions; while in writing, his editing skills were average, and spelling and writing fluency were in the low average range (id.). The student's scores on the March 2008 administration of the TOWL-3 indicated overall average contrived writing skills, but significant weakness with mechanics of writing (punctuation) (id.). The present levels of performance on the June 2008 IEP noted that the spontaneous writing section of the TOWL-3 was illegible and could not be scored, which was indicative of the student's need in handwriting skills (id.).

The present levels of performance on the June 2008 IEP also reflected information from the student's first trimester and mid-second trimester 2007-08 academic reports from HCS and a December 2007 HCS progress report, including comments from: (1) the student's history teacher indicating that he "continued to exhibit behavior and academic skills expected of those at his grade level;" (2) his English teacher reflecting that the student was "diligent in his class work and homework," read and comprehended the short fiction that was covered in class, was able to write good paragraphs based on it, contributed to class discussions, volunteered his own ideas, and that he excelled in grammar; and (3) his math teacher indicating that the student consistently completed homework and had improved somewhat in class work, but continued to have low test scores (compare Joint Exs. 22 at p. 2, and Joint Ex. 39 at p. 1, and Joint Ex. 40 at p. 5, with Joint Ex. 25 at p. 4). The student was also described as having difficulty staying focused and working slowly in math (compare Joint Ex. 25 at p. 4, with Joint Ex. 39 at p. 1).

Socially, the student's present levels of performance on the June 2008 IEP reflected information provided in the student's first trimester 2007-08 academic report and the December 2007 progress report from HCS, including that the student "correctly views himself as a good citizen, a conscientious student, and a person whom virtually everyone likes" and "[the student] enjoys people and he increasingly takes pride in his social successes, both here and at home" and that the student "interacts well with peers most of the time" (compare Joint Ex. 25 at p. 5, with Joint Ex. 39 at p. 1). The June 2008 IEP also reflected information from the HCS reports that the student occasionally "set up" another student to get into trouble and information from the parent that the student continued to be emotionally and socially immature and naive and that the student "interact[ed] well with peers most of the time" (compare Joint Ex. 22 at p. 2, with Joint Ex. 25 at p. 5). The administration of BASC-2 and BRIEF behavior rating scales yielded mixed results based upon the responses by the parent, teachers, and the student, and these results were also reflected in the June 2008 IEP (compare Joint Ex. 25 at p. 5, with Joint Ex. 21 at pp. 9-13).¹⁸

With regard to the impartial hearing officer's determination that the district "substantially" impeded the parent's right to participate in the development of the June 2008 IEP because the CSE "limited the continuum of special education placements" (IHO Decision at p. 15), the hearing record reveals the June 2008 CSE considered a general education setting with related services, but rejected it because the student's needs indicated that a more intensive setting with support was necessary and that the CSE considered a special class program in an integrated setting, but rejected it because the student's needs described above could be met in a less restrictive environment (Joint Ex. 25 at p. 7). The June 2008 CSE meeting minutes indicated

¹⁸ According to the hearing record, the parent completed the behavior rating scales but expressed concern with doing so (Joint Exs. 21 at pp. 8-9; 25 at p. 5). The parent indicated that she based her observations on a family weekend at HCS and during the time the student was home on Christmas vacation (Joint Ex. 21 at p. 8).

that the parent actively participated in the meeting and expressed her concern that the district's high school environment would be overwhelming for the student (Joint Ex. 26 at pp. 1, 7). The parent testified that she was "not aware of anything that would make it a successful experience for [the student] to come back into the [district] high school" (Tr. p. 325). The evidence described above establishes that the June 2008 CSE allowed the parent opportunity to participate in the development of the student's IEP and that the parent's input was heard and considered at the CSE meeting (Joint Ex. 26 at pp. 1, 6-8).¹⁹ Consequently, I find that the impartial hearing officer's determination that the district significantly impeded the parent's right to participate in the development of the June 2008 IEP is not supported by the hearing record (see E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009] [holding that the parent's participation in CSE meetings demonstrated that the district did not deny the parent the active role to which she was entitled]; Z.D., 2009 WL 1748794, at *3).

Turning next to the impartial hearing officer's conclusion that the goals in the June 2008 IEP were inadequate, the hearing record shows that, for the purpose of addressing the student's identified needs, the CSE included goals in the areas of writing, mathematics, study skills, and motor (written communication) skills (Joint Ex. 25 at pp. 8-9). Each of the goals was specifically linked to a deficit that had been reflected by then current test results and/or information shared at the CSE meeting and noted in the June 2008 IEP (see Joint Ex. 25 at pp. 4-6). For example, the student's writing goal specifically focused on his deficits in punctuation, which were revealed by the results of the March 2008 TOWL-3 and reflected in the present levels of performance on the IEP; the student's mathematics goals specifically focused on his deficits in math fluency, which were revealed by the results of the March 2008 achievement testing and reflected in the present levels of performance; the student's study skills goal addressed his deficits in attending skills (staying focused), which were also noted in the June 2008 IEP; the student's motor (written communication) goal addressed both the student's deficit in handwriting skills and his need to increase his ability to utilize the computer for writing tasks, which were revealed by March 2008 TOWL-3 results; and the social/emotional/behavioral goals addressed increasing the student's ability to appropriately interact with peers and increasing his ability to cope with conflict situations appropriately, which were revealed though information provided by HCS staff (Joint Exs. 21 at pp. 6-7; 22 at p. 2; 25 at pp. 4, 5, 8-9). Contrary to the parent's claim that the goals in the June 2008 IEP were limited, vague and insufficient, I find that the goals were measurable and contained sufficient specificity to guide instruction and to evaluate the student's progress (Joint Ex. 25 at pp. 8-9). Although the goals were not as numerous as in the student's previous IEPs, I note that each of the student's identified needs was addressed by a specific goal. The reduction in goals in the student's June 2008 IEP is consistent with the information in the hearing record, which indicates that the student's needs had decreased as evidenced by the change in his program, his then current test results, and reports from HCS staff (see Joint Exs. 20 at pp. 1, 2; 21 at pp. 2-4, 6-15; 24; 25 at pp. 1-6; 26 at pp. 1, 2, 5-8; 39; 40 at pp. 5-6).

¹⁹ As discussed previously with respect to the parent's claim for the 2006-07 school year, the district was not required to present the parent with multiple placement options and allow her to choose among them. However, the June 2008 CSE meeting minutes indicated that the district personnel wished to remain flexible and, in the event that the student returned to the district, they would be willing to explore additional options with the parent such as a smaller district or BOCES program (Joint Ex. 26 at pp. 1, 7).

The hearing record further reflects that the special class that was previously offered to the student during the 2006-07 and 2007-08 school years was not offered during the 2008-09 school year and that the recommended program for the 2008-09 school year was designed for a high school student rather than a middle school student because the student would have been entering high school (Tr. p. 74). The June 2008 IEP recommended that the resource room support offered to the student was amended from an "as needed" basis and instead was offered at a specific time (id.). The district administrator testified that the modification to the student's resource room support was made because the student had become older, more mature, and he needed resource room support to function at the high school (Tr. pp. 56, 74-75). The district administrator described the resource room as being a time for the student to work on his homework assignments in a small group of five or less, and for reteaching materials if the student had difficulty understanding information presented in class, and that the resource room would provide the student with a "teacher who ha[d] knowledge of the student as a person and [wa]s well acquainted with him" and a location "where he would feel comfortable" (Tr. p. 57). The district administrator further testified that the resource room teacher would consult with the regular education teachers regarding assignments, assist the student in organizing his work and obtaining packets or materials, and would implement program modifications and accommodations such as utilizing a graphic organizer, as needed (Tr. pp. 58-60).

The June 2008 IEP further reflected that the student would have received related services including counseling and paraprofessional support for science (Joint Ex. 25 at p. 2). The district administrator testified that the June 2008 CSE recommended paraprofessional support instead of a consultant teacher for science because it wanted to provide the student with the support as well as the opportunity to function in a less restrictive environment and, with regard to science, the June 2008 CSE reasoned that the student was more likely to do well with this level of support based on the student's interest in learning, curiosity, and his strong long-term memory skills (Tr. p. 55). The hearing record does not reflect the group size for counseling or the student-to-teacher ratio for the student's paraprofessional support in science.²⁰

The June 2008 IEP also recommended consultant teacher services for ELA, math, and social studies (Joint Ex. 25 at p. 1). The district administrator testified that, based on reports that the student had been successful at HCS and that he had matured, the June 2008 CSE believed the student was more likely to succeed than he had been in the past (Tr. pp. 55-56). The school psychologist testified that the consultant teacher services reflected on the student's June 2008 IEP would have been implemented in the district's "Integrated Regents Program" (IRP), which utilizes a co-teaching model whereby there is both a regular education and a special education teacher in the classroom (Tr. p. 143). The school psychologist's description of the IRP implementation reflected that the student's attentional deficits would have been addressed in the class; while one of the teachers presented information, the other teacher rotated throughout the room to assist students with organization and because the class changed activities, an extended amount of time is not spent on one activity (Tr. p. 143). For example, the students in a class may have taken some notes, then had an assignment modeled, and then the students may have worked

²⁰ State regulations provide that "[w]hen a related service is provided to a number of students at the same time, the number of students in the group shall not exceed five students per teacher or specialist" (8 NYCRR 200.6[e][3]).

independently (Tr. p. 144). The school psychologist testified that the IRP classes also utilized the computer lab frequently (id.).

With regard to the impartial hearing officer's conclusion that the recommended services in the June 2008 IEP were inappropriate because the student would only receive special education support "every other day," I find that this conclusion is not supported by the hearing record insofar as the district operates its classes on a "block schedule," meaning that the schedule and duration of the student's classes (and therefore, his accompanying special education supports) would have varied from day to day and would often have met on alternating days, which the June 2008 IEP reflects (Tr. pp. 57-58, 75; Joint Ex. 25 at pp. 1-2; IHO Decision at p. 15).²¹ The district administrator testified that block scheduling can be helpful for students with attentional deficits because it provides fewer transitions during the day, diminishes the frequency of distractions, and offers a greater opportunity to focus on classwork (Tr. pp. 57-58). Although the June 2008 IEP stated that the student would receive particular special education services "every other day" in reference to the student's specific classes, I find that this is consistent with the information in the hearing record regarding the block class scheduling that is employed by the district and the alternate day scheduling described by the parent in her due process complaint notice (Tr. pp. 57-58, 75; Joint Ex. 25 at pp. 1-2). Consequently, I find that the June 2008 IEP does not provide that the student would receive special education on only 1/2 of the days that the student's classes were in session (id.).

The hearing record further shows that the student was offered an appropriate level of support in the program recommended by the June 2008 CSE (Joint Ex. 25). With regard to the student's functioning at the time the June 2008 CSE formulated the student's IEP for the 2008-09 school year, the headmaster at HCS described the student as "on the scholastic side," and indicated that the student's "most important need is sort of what a general high school education for fairly pretty solid students is all about, which is sort of stretching the youngster" (Tr. pp. 178, 204). The headmaster testified that he believed that the student did not have a deficit that he considered to be a learning disability but rather, that the student needed repetition, reminders, and review (Tr. p. 212). The headmaster further testified that HCS does not offer special education services, does not individualize its program, and is not a therapeutic school (Tr. pp. 201, 220, 221). Reports from the student's teachers, test results and testimony by the headmaster of HCS reflect that the student was able to function in a program that did not provide special education supports and services similar to the district (Joint Exs. 20 at pp. 2, 4; 21 at pp. 2-4, 6-10; 22 at pp. 1-4; 24; 25 at pp. 3-5; 26 at pp. 1, 2, 5-7; 39 at pp. 1-2; 40 at pp. 5, 6). As noted above, the student's history teacher at HCS stated that the student continued to exhibit both behavior and academic skills that were expected of students at his grade level (Joint Ex. 25 at p. 4). Furthermore, in addition to the test results reflected in the April 2008 triennial evaluation, the hearing record reflects that the members of the CSE also had the student's May 2008 Stanford Achievement Test scores before them at the June 2008 CSE meeting (see Joint Ex. 26 at pp. 1-2, 6). The CSE meeting minutes indicated that the student had earned grade equivalent scores determined to be at the post-high school level on the Stanford Achievement Test in reading

²¹ I also note that the parent described this block scheduling with double class periods and alternating schedules in her due process complaint notice and although she did not agree with the block scheduling, none of her allegations suggest that she was claiming that the district's program was inappropriate because it only offered special education services on alternate days (Joint Ex. 1 at p. 4).

vocabulary and comprehension, total language, study skills, science, social science and listening skills, and that his academic skills were average or above average (Joint Ex. 24). Moreover, the parent's responses in the student's "Career Assessment" parent questionnaire, indicated that she hopes the student will pursue additional training after high school (Joint Ex. 20 at p. 9). The student's responses in the Career Assessment student interview also reflect that he would like to go on to college and that he knows that he has to do well in school to prepare for college (*id.* at p. 6).

The parent testified that for the past two summers, the student had participated in a three-day "mini career exploration" program at a university with his local 4-H group of eight to ten students that joined with other 4-H groups from throughout the State (Tr. pp. 346-47). The headmaster of HCS testified the student "look[ed] forward to the trip, seem[ed] to be quite independent, quite able to manage . . . with a group of what I would guess would be relative strangers" (Tr. p. 211). He further testified that the trip to the college had made the student very interested in what college he was going to attend (Tr. p. 239). The parent testified that the student had participated in a confirmation class at church for about three years in a group of ten to twelve students (Tr. pp. 347, 349). In addition to the confirmation activities, the student also participated in a group that assisted the church with minor construction tasks (Tr. p. 348). The headmaster from HCS testified that the student was currently taking a leadership position in his church when he was home during summer vacation (Tr. p. 211). I also note that the hearing record reveals the student attended a summer camp for two or three summers for six weeks at a local high school (Tr. p. 350). The parent reported that the summer camp was in session from 9:00AM to 3:00PM and was similar to a school routine with classes such as science, English, and music (*id.*).²² I note that the hearing record does not contain any information that would indicate that the student required any supports when he participated in these activities. In view of the foregoing evidence describing the student's functioning at the time of formulation of the June 2008 IEP, I find that the student was offered an appropriate level of special education supports for the 2008-09 school year in the LRE.

Turning next to the impartial hearing officer's determination that the student's June 2008 IEP failed to include a plan to transition the student from the residential placement back to the district (IHO Decision at p. 16), the June 2008 IEP reflected that if the student had returned to the district, assessments would have been performed in order to attain the student's then current academic standing (Joint Ex. 25 at p. 6). The district administrator testified that the school psychologist typically administered a screening test to students entering the district from other states or other school districts to determine what their academic standing was relative to the district curriculum and that she would possibly talk to their previous teachers to see how they were functioning (Tr. pp. 42-43). The district administrator also testified that there was a discussion at the June 2008 CSE meeting regarding concerns for the student's adjustment from being in "a kind of tutoring situation" to one where he would be in a class with 25 students (Tr. p. 53). He further testified that the June 2008 CSE discussed that, in the event that the student returned to the district, they would hold another meeting to plan in more detail how to make the transition work (*id.*). The hearing record also reflects that the June 2008 CSE discussed considering a BOCES program in a smaller district for the student (Tr. pp. 53-54; Joint Ex. 26 at pp. 2, 7). The CSE meeting minutes reflected that at the June 2008 CSE meeting, the district

²² The parent testified that the classes were not "remedial" (Tr. p. 350).

administrator stated that if the student returned to the district, he had the option to start summer school during the next school year at the high school, which the administrator opined is "the beginning of a transition plan" (Tr. 83). I also note that HCS is not a restrictive environment such as a residential school that segregates special education students from general education students or a therapeutic residential placement, but is instead described as a boarding school (Tr. pp. 201, 209, 221, 280). This evidence does not support the impartial hearing officer's conclusion the district was required to provide the student with a transition plan from the boarding school (HCS) to a placement in the public school setting in order for the student to benefit from the special education services in his proposed June 2008 IEP (Winkelman v. Parma City Sch. Dist. Bd. of Educ., 2009 WL 4456297 at *17-*18 [N.D.OH Nov. 30, 2009]). Assuming, without deciding, that the district was required to formalize the transition services in the student's June 2008 IEP, I find that, in view of the discussion of this issue at the June 2008 CSE and the evidence described above regarding the student's level of functioning across multiple educational and social environments, the alleged deficiency under the circumstances of this case would constitute a procedural inadequacy that did not result in a loss of educational opportunity for the student and did not rise to the level of a denial of a FAPE. Instead, the forgoing evidence with regard to the 2008-09 school year shows that the district offered the student an appropriate level of special education supports in its recommended placement and, therefore, the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2008-09 school year is not supported by the hearing record.

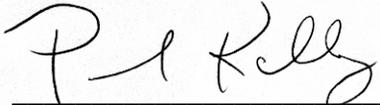
Having determined that the district offered the student a FAPE in the LRE for the 2006-07, 2007-08, and 2008-09 school years, the necessary inquiry is at an end and I need not reach the issues of whether HCS was an appropriate placement for the student or whether the parent should be awarded tuition reimbursement for HCS and transportation expenses (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. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have examined the parties' remaining contentions and find that it is unnecessary to address them herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated November 11, 2009 which determined that the district failed to offer the student a FAPE for the 2006-07, 2007-08, and 2008-09 school years and awarded tuition reimbursement to the parent for the student's unilateral placement at HCS and transportation expenses for the 2006-07, 2007-08, and 2008-09 school years are hereby annulled.

**Dated: Albany, New York
January 19, 2010**


**PAUL F. KELLY
STATE REVIEW OFFICER**