



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 10-022

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] [REDACTED] [REDACTED] [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:

Ingerman Smith, L.L.P., attorneys for petitioner, Jonathan Heidelberger, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the West Hills Montessori School (West Hills) for the 2008-09 school year. The appeal must be sustained.

The hearing record reflects that the student has received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Dist. Exs. 9 at p. 1; 14). The student's cognitive abilities, as measured by standardized testing, are in the superior range (Dist. Ex. 16 at p. 2; Parent Ex. 4 at p. 5). In addition, the student's scores on standardized measures of academic achievement are in the "high average" to "very superior" range (Dist. Ex. 16 at p. 6; 26 at p. 16). The student exhibits deficits in attention and organization, pragmatic language skills, and socialization skills (Dist. Exs. 6 at pp. 1-5; 9 at pp. 3-4; 16 at p. 3). The student also has difficulty with anxiety (Dist. Exs. 9 at pp. 3-4; 16 at pp. 3-6, 8). At the time of the impartial hearing, the student was attending West Hills where he had been unilaterally placed by his parents (Dist. Ex. 26 at pp. 15, 35). West Hills has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student was initially evaluated through early intervention (EI) in May and June of 2000 due to parental concerns regarding his speech and language development (Parent Ex. 3 at

pp. 14, 17, 21). The administration of speech-language, educational, and psychological evaluations revealed that the student had significant delays in communication and cognitive functioning, as well as delays in adaptive behavior (id. at pp. 16, 20, 23). In addition, the psychologist who evaluated the student reported that the student met the criteria for a "mild" PDD (id. at p. 23). The student received twenty hours per week of applied behavior analysis (ABA), which was later increased to thirty hours per week (id. at p. 27). He reportedly made a "great deal of progress" under EI (id.).

In March 2001, the student was reassessed in anticipation of his transition to the Committee on Preschool Special Education (CPSE) (Parent Ex. 3 at p. 27). The results of a psychological evaluation completed at that time indicated that the student's cognitive performance was in the average range and his adaptive behavior was in the moderately low range (id. at pp. 24-25, 29-30). In addition, the student's expressive and receptive language skills were judged to be age appropriate (id. at p. 34). In April 2001, a private neurological evaluation of the student was conducted (Tr. p. 52; see Parent Ex. 3 at pp. 45-48). The neurologist confirmed the student's PDD diagnosis and noted that the student had "apparently by history responded extremely well" to an ABA program and "it would seem that this [program] should continue" (Parent Ex. 3 at p. 48). Subsequently, the student received special education services through the CPSE including 10 hours of home based ABA services and the assistance of an aide in a private mainstream preschool (Tr. pp. 52-53; Dist. Exs. 13 at p. 4; 16 at pp. 2, 8; Parent Ex. 8 at p. 1).¹

The student was declassified upon transitioning into the district's kindergarten for the 2003-04 school year (Tr. pp. 53-54, 1094-95). In first grade (2004-05), the student was referred to the building level learning support team (LST) due to teacher concerns regarding his distractibility and organization (Tr. p. 263; Dist. Ex. 23 at p. 1). According to LST meeting minutes for the 2004-05 school year, the student had difficulty following class rules and directions, and was impulsive and "'dramatic'" (Dist. Ex. 23 at p. 1). LST meeting minutes for the 2004-05 school year further indicated that the student's teacher attempted to use behavior charts with the student, but that the charts worked for only two weeks (id.). Although the district conducted a speech-language evaluation of the student in February 2005, the student did not qualify for speech-language services (Dist. Exs. 16 at p. 3; 23 at pp. 1-2). In addition, the district assessed the student's behavior using the Conners' Teachers Rating Scale – Revised Long Form and Conners' Parent Rating Scale – Revised Short Form (Dist. Ex. 16 at p. 2). Completion of the scales by the student's teachers and mother indicated areas of concern relative to "hyperactivity" and the Conners' attention deficit hyperactivity disorder (ADHD) index (id.). As a result, the district referred the parents to a neurologist to rule out ADHD (id.). A psychological evaluation conducted by the district in May 2005 to determine the student's cognitive potential yielded a full scale IQ of 123 (94th percentile) and placed the student's cognitive abilities in the "superior" range (Dist. Ex. 16 at p. 2; Parent Ex. 4 at p. 5).

During the student's second grade school year (2005-06), the student was reportedly again referred to the LST due to concerns regarding his ability to attend and follow directions in

¹ Although the psychological report completed by the school psychologist indicated that the student attended a regular education preschool without support (see Dist. Ex. 16 at p. 25), the school psychologist later stated that the report was in error (Tr. p. 332).

the classroom (Dist. Ex. 16 at p. 2).² The student was described as "extremely disorganized" and "socially inappropriate," and was noted to overreact at times (*id.*). The student's second grade teacher attempted to implement several classroom strategies, including the use of behavior charts, but met with limited success (*id.* at p. 3). It was reported that the student's behavior did not significantly affect his classroom performance (Dist. Ex. 16 at p. 3; see Dist. Ex. 6 at p. 3).

During the student's third grade school year (2006-07), the student's mother contacted the school psychologist to express her concern regarding the student's difficulty attending, "tongue thrust," inability to follow directions, and increasing stress at home (Dist. Ex. 16 at p. 3; Parent Ex. 10 at p. 1). Subsequently, the student's teacher met with the school counselor to develop classroom interventions designed to address the student's inattention, social skills, body awareness, and comprehension (Dist. Ex. 16 at p. 3; see Dist. Ex. 11 at pp. 3-5). In May 2007, the student was again referred to the LST (Dist. Ex. 23 at p. 3). Although the student's third grade teacher noted that the student was having increasing difficulties following and understanding directions, the student was able to demonstrate proficiency in many academic areas (Dist. Exs. 6 at p. 4; 16 at p. 3). The LST recommended that the student's speech-language skills be evaluated in the fall and that the student be considered for possible indirect consultant teacher services (Tr. pp. 95-96, 269, 493-94; Dist. Ex. 23 at p. 3).³

On September 24, 2007, at the beginning of the student's fourth grade year (2007-08), the student's mother had a telephone conversation with the school psychologist, wherein she expressed concern that the student was "'getting worse'" (Parent Ex. 10 at p. 3). The student's mother was specifically concerned that the student was getting up a lot in class, that he was having difficulty with organization and academics, that he was having difficulty with socialization, and that he was being "'bullied'" (*id.*). Notes of the conversation with the student's mother taken by the school psychologist indicated that the student had an appointment scheduled with a pediatric developmental specialist (*id.*). The LST met on September 24, 2007 for the 2007-08 school year (Dist. Ex. 23 at p. 4). Minutes from the LST meeting indicated that the student was "very distracted," "inappropriate," and interrupted class (*id.*). The minutes further indicated that the student's teacher would consider using a behavior plan if the student's behavior worsened (*id.*). The LST decided to reconvene after receipt of a report from the pediatric developmental specialist (*id.*).

On October 11, 2007, the student's mother referred the student to the Committee on Special Education (CSE) for an initial evaluation (Dist. Ex. 22). In a letter dated October 12, 2007, the developmental and behavioral pediatrician who conducted the student's evaluation indicated that based on a detailed behavioral history and the student's score on an administration the Childhood Autism Rating Scale, the diagnosis of PDD-NOS continued to be appropriate for

² An unsigned and undated document, delineating a chronology of events and prepared as a "response to [the student's mother's] request for due process proceedings," indicated that no formal concerns were brought to the LST by the student's second grade teacher (Dist. Ex. 7 at p. 1).

³ The hearing record indicates that the school psychologist and the student's mother discussed pursuing a neurological evaluation of the student and that the school psychologist informed the student's mother that the district would not pay for the evaluation if the student was not classified (Parent Ex. 10 at p. 1).

the student (Dist. Ex. 14).⁴ The developmental and behavioral pediatrician "strongly recommend[ed]" that the student receive special education support through classification and suggested that the support be provided within the student's "current inclusion class" (id.). The developmental and behavioral pediatrician further recommended that the student receive autism consultant services, a functional behavioral analysis, a behavior intervention plan, and individual and group counseling (id.).

By letter to the student's regular education teacher dated October 18, 2007, the student's mother reported that the student was being teased "relentlessly" by another student in the class (Dist. Ex. 5 at p. 4). The student's mother requested that the teacher "keep an eye" on the students' interaction and also possibly keep them apart (id.). She further suggested that the school counselor might be able to help the student (id.). A handwritten note added to the document and initialed by the school counselor, indicated that the counselor saw the student and provided him with strategies to assert himself (id. at p. 5). In addition, the note indicated that the counselor had role played ways to get help from the teacher and that the teacher would keep the students seated away from each other in class (id.).

As part of the student's initial CSE evaluation, on November 14, 2007, the district administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) to assess the student's speech-language needs, which yielded a receptive language score of 105, an expressive language score of 95, a language memory score of 106, and a core language score of 100 (Dist. Ex. 19; Parent Ex. 4 at p. 8). The evaluator reported that the student's performance was indicative of overall average language skills (id.). However, she noted that the student displayed low average scores in recalling sentences and in expressive word classes (Dist. Ex. 19). On the Test of Pragmatic Language (TOPL) the student received a quotient of 70 (2nd percentile), which the evaluator reported was indicative of below average pragmatic language skills (id.; Parent Ex. 4 at p. 9). The evaluator noted that the student had difficulty with literal interpretation, sarcasm and answering questions, while "politeness markers" were a strength for the student (Dist. Ex. 19). According to the evaluator, the student's language scores revealed delays in pragmatic language functioning, with weaknesses in memory, processing, and verbal explanations (id.).

On November 20, 2007, the school psychologist prepared a psychological report, which included the student's background information, previous test results, recent tests administered and results, a classroom observation, teacher interview, review of records, and a summary and conclusion (Dist. Ex. 16). As part of the background information, the psychologist summarized the student's educational history and information obtained from the student's fourth grade classroom teacher (id. at pp. 1-4). According to the school psychologist, the student's teacher described the student as "a very bright and creative boy" with a few close friends in his class, but noted struggles with peer relations (id. at p. 3; see Dist. Ex. 17). The school psychologist reported that, according to the student's teacher, the student was very inattentive during instruction, easily distracted, called out frequently, and could be inappropriate at times (id.). In addition, the student demonstrated weak writing skills and disorganization (Dist. Ex. 16 at p. 3). The student was characterized as "very anxious" and he exhibited "rigid thinking," which could

⁴ Completion of the scale by the student's classroom teacher and a district special education teacher who worked in the student's classroom yielded a score of 32.5, which placed the student in the mildly to moderately autistic range (Dist. Ex. 14; Parent Ex. 4).

result in impulsivity and the disruption of instruction (id.). The psychologist noted that the student was consistently late for school and recently had been experiencing school avoidance (staying home from school or going home early due to somatic complaints) (id.). According to the psychologist, the district's elementary school counselor had been working with the student as needed in an attempt to teach the student coping mechanisms (id.). The psychologist noted that the student tried role play, social stories, and had learned strategies to keep him focused (id.). The psychologist noted that the student's classroom teacher and the school counselor had implemented several classroom interventions that had been unsuccessful in addressing the student's anxiety, literal and rigid thinking, attention, and social skills (Tr. p. 104; Dist. Exs. 14 at p. 2; 16 at p. 4). The psychologist reported that the student was sweet and sensitive, that he had "much difficulty" with appropriate peer interactions, and that he had difficulty with what he perceived as bullying in the classroom (Dist. Ex. 16 at p. 4).

To assess the student's behavior, the psychologist administered the Conners' Teachers Rating Scale – Revised Long Form and Conners' Parent Rating Scale – Revised Short Form, which were completed by the student's classroom teacher and mother (Dist. Exs. 15 at p. 2; 16 at pp. 4-5). According to the psychologist, the student's teacher indicated that the student was an emotional child who could be timid, shy, and easily frightened (Dist. Ex. 16 at pp. 5). In addition, behaviors exhibited by the student described as repeatedly checking things, restlessness, overactivity, and difficulty attending were noted (id.). The psychologist reported that the ratings by the student's teacher placed him in the clinically significant range for the following subscales: Anxious-Shy, Perfectionism, Conners' Global Index: Restless-Impulsive, Conners' Global Index: Total, and DSM-IV: Hyperactive-Impulsive (id.). The student's mother indicated that the student was often very timid and easily frightened (id.). Among other things the student's mother noted that the student did not know how to make friends and was afraid of being alone (id.). She also noted that he had difficulty with listening, organizing, and attention, and only attended when he was very interested (id.). The student's mother further noted that he often complained of aches or pains before school, and complained of being sick even when nothing was wrong (id.). The psychologist reported that based on the parent's report, the student rated in the "significant" range for the following subscales: Cognitive Problems/Inattention, Anxious-Shy, Social Problems, Psychosomatic, Conners' ADHD Index, DSM-IV: Inattentive; DSM-IV: Hyperactive-Impulsive; and DSM-IV: Total (id.). The psychologist concluded that, based on the results of the parent and teacher rating scales, the student displayed significant attentional, emotional, and behavioral difficulties at school and home (id.).

In addition, the psychologist reported that the Achenbach Child Behavior Checklist, completed by the student's mother, indicated areas of significant behavioral concern (Dist. Ex. 16 at p. 6). The student's Total Problems and Internalizing scores were both in the clinical range in comparison with same age peers (id.). According to the psychologist, the student's mother reported more problems than are typical with respect to anxiety or depression, somatic complaints, problems in social relationships, and attention problems (id.). As rated by the student's mother, the student's scores on the Anxious/Depressed, Somatic Complaints, and Attention problem syndromes were in the clinical range (id.). In addition, the student's scores on the Affective Problems, Anxiety Problems, and Attention Deficit/Hyperactivity Problems Scales were in the clinical range, and his scores on the Somatic Problems scale were in the borderline range (id.).

The school psychologist also reported on the results of an assessment conducted of the student's academic skills on November 16, 2007, using the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. 16 at pp. 6-7; see Dist. Exs. 20 at p. 1; 15 at p. 2).⁵ According to the test examiner, the student received the following WJ-III ACH cluster scores: broad reading 110 (74th percentile), broad math 111 (82nd percentile), and broad written language 127 (96th percentile) (Dist. Ex. 20 at p. 3). The school psychologist characterized the student's scores as "high average" to "superior" (Dist. Ex. 16 at p. 6). According to the examiner, the student's performance varied on different types of reading tasks (Dist. Ex. 20 at p. 1). The examiner opined that tasks requiring the student to attend to relevant details in written material were difficult for the student (passage comprehension, standard score 98, 44th percentile) (id.). With respect to mathematics, the examiner reported that the student's performance on tasks requiring him to rapidly and accurately solve simple addition, subtraction, and multiplication problems (math fluency) was at the 25th percentile, indicating that tasks requiring the student to focus and work quickly were difficult for him (id.). The examiner noted that at times during the testing session, the student seemed uncomfortable and preoccupied (id.). Additionally, she noted that the student was occasionally off task and needed to be redirected (id.). The examiner expressed that the student performed well despite his off-task behaviors, but noted that the student's academic performance could be compromised by the behaviors in a large group setting (id. at p. 2).

On November 20, 2007, the school psychologist conducted an observation of the student in his classroom (Dist. Ex. 16 at p. 7). The psychologist noted that the student expressed concern about not finishing his class work and later seemed to have anxiety related to a social studies test (id.). According to the psychologist, the students were allowed to use folders to create corrals for the test and the student spent much more time creating his corral than the other students (id.). The psychologist indicated that once settled, the student seemed to work appropriately on the test (id.). The psychologist noted that the student did not always seem focused on the test but that after twenty minutes he had completed it, as had most of the class (id.).

The psychologist concluded that the student's diagnosis of PDD-NOS and its affect on the student's academic functioning and behavior in the classroom warranted special education services (Dist. Ex. 16 at p. 10). The psychologist indicated that the student would benefit from speech-language therapy (with social skills), the assistance of an autism consultant, and indirect consultant teacher services to address his weaknesses in the areas of anxiety, social skills, pragmatic language, and literal and rigid thinking (id.).

The CSE convened on November 28, 2007, for an initial eligibility determination meeting (Dist. Ex. 13). Meeting participants included the CSE chairperson, a CSE psychologist, the school psychologist, the speech-language therapist who had evaluated the student, the student's regular education teacher, the school counselor, a special education teacher, the school principal, the student's mother, and an additional parent member (id. at p. 4). The CSE determined that the student was eligible for special education and related services as a student with an other health impairment and recommended that the student receive indirect consultant teacher services in a group of 5:1, three times per week for 40-minute sessions; an autism

⁵ The test was conducted in a 1:1 setting with test directions repeated and modified as often as needed (Dist. Exs. 16 at pp. 6-7; 20 at p. 1; 15 at p. 2).

consultant one time per month for two hours; and speech-language therapy in a group of 5:1, two times per week for 30-minute sessions (id. at p. 1). The resultant individualized education program (IEP) indicated that the student would continue to have access to the school counselor (id. at p. 4). According to the IEP, the student required some guidance in social situations, needed to communicate his frustration with academic tasks in an appropriate manner, and needed to decrease anxiety and access appropriate school personnel during stressful situations (id. at p. 3). The IEP further indicated that the student required the additional support of special education services to be successful in the general education classroom, and that he required a structured environment and a limited number of behavior management strategies (id.). The IEP detailed the following program modifications: short breaks between assignments (breaks as needed), check for understanding, and directions explained and repeated (id. at p. 2). In addition, the IEP afforded the student the following testing modifications: "flex" setting, directions explained, directions repeated, and extended time (1.5) (id.). The student's IEP included goals related to study skills, reading, speech-language development, and social/emotional/behavioral development (id. at pp. 5-7).

During the student's fourth grade school year (2007-08), a behavior plan was developed for the student by his regular and special education teachers (Tr. pp. 105-14; Dist. Ex. 11 at pp. 1, 2). The behavior plan identified three presenting concerns: (1) the student's difficulty maintaining on-task behavior; (2) the student's misperception of social situations; and (3) the student's need to develop strategies to deal with his anxiety (Dist. Ex. 11 at p. 1). In addition, the plan detailed interventions and strategies to address each concern (Dist. Ex. 11). To address the student's difficulty maintaining on-task behavior, the plan indicated that a break schedule would be implemented and that a color-coded system in which the student could earn drawing time would be utilized (id. at p. 1). Additional strategies included the use of preferential seating, verbal and nonverbal cues, use of a timer, tasks broken down, and visually guiding the student to work on one task at a time (id.). To address the student's misperception of social cues, the plan called for the use of social stories and a "power card," speech-language therapy, the use of peer models, whole class group lessons provided by the counselor to help generalize social skills and encourage understanding of the student's needs, use of role playing to help the student assert himself, and attendance in a small group social skills program (id.). To address the student's anxiety, the plan suggested the use of cognitive restructuring to teach the student to cope with his anxiety, visual/verbal cues to encourage coping skills and discourage perseveration, relaxation strategies, and social stories (id.).

In January 2008, the student's mother visited West Hills, and in February 2008, the student visited West Hills and participated in the program for one week (Tr. pp. 1114-15). On March 14, 2008, the parents signed an enrollment contract with West Hills for the 2008-09 school year (Dist. Ex. 28 at pp. 3-4). On or about March 25, 2008, the student's mother submitted a form to the school district requesting transportation for the student to West Hills for the 2008-09 school year (Dist. Ex. 29).

A subcommittee of the CSE reconvened on March 14, 2008 for the student's annual review (Dist. Ex. 25 at pp. 4-9). Meeting participants included the subcommittee chairperson, the school psychologist, the student's special education teacher, the student's regular education

teacher, the student's speech-language therapist, and a student teacher (*id.* at p. 7).⁶ The resultant IEP indicated that the student's cognitive functioning was in the superior range, that his rate of progress was above average, and that he had made steady progress (*id.* at p. 3). The IEP indicated that the student required a multisensory instructional approach, but noted that the student had "no cognitive or academic needs that should be addressed through special education at this time" (*id.*). With respect to social/emotional development, the IEP indicated that the student's classroom behavior "mildly interfere[d]" with instruction, as did his anxiety (*id.*). The IEP stated that the student had occasional problems relating to peers and was not able to effectively communicate in social situations (*id.*). However, the IEP also indicated that the student was able to work cooperatively with peers (*id.*). Included in the IEP were goals related to study skills, speech-language development, and social/emotional/behavioral development (*id.* at p. 6). The March 14, 2008 CSE subcommittee recommended that the student continue to be classified as having an other health impairment, and that he receive direct consultant teacher services three times per week for 40-minute sessions and speech-language therapy two times per week for 30-minute sessions (*id.* at p. 1). Program modifications included short breaks between assignments (breaks as needed), check for understanding, and directions explained and repeated (*id.* at p. 2). With regard to support for school personnel on behalf of the student, the CSE subcommittee recommended an autism consultant two times per month for the duration of one hour (*id.*). It further recommended the following testing accommodations for the student: "flex" setting and directions explained (*id.*).

On March 28, 2008, school staff and the student's mother met with the district's autism consultant (Parent Exs. 3 at p. 10; 10 at p. 5). According to meeting minutes, the student's classroom teacher indicated that the student was "doing well" and making progress (Parent Ex. 10 at p. 5). The minutes also reflected that the student continued to have difficulties with peer relationships and interpreting situations negatively and that he was displaying avoidant behavior (*id.*). The student's mother reported that the student hated school, especially music and physical education (*id.*). The autism consultant discussed the concept of "inertia" as it related to students with Asperger's Syndrome and the consultant expressed that he did not believe that the student's resistance towards attending school was based on anxiety, but instead viewed the student's resistance as a symptom of the student's disorder (Parent Ex. 3 at p. 1). He further expressed that the student might be demonstrating "perseverative" and "avoidant" behaviors as opposed to anxiety (*id.* at p. 11). The autism consultant discussed the strategy of ignoring the student's complaints when he engaged in avoidant behavior, noting that the student's feelings could be validated later (Dist. Exs. 3 at pp. 10-11; Parent Ex. 10 at p. 5).

As detailed in the meeting minutes, the student's mother discussed the different points of view between her and the student's father (Parent Ex. 10 at p. 5). The minutes indicated that the autism consultant offered to meet with the student's father to discuss some of the ways that he could help in handling the student in a more positive manner (Parent Ex. 3 at p. 11). The student's speech therapist stated that the student needed to come to speech more consistently in the morning (Parent Ex. 10 at p. 5). The meeting minutes further indicated that the student's mother was going to pursue outside counseling (*id.*). In addition, the student's mother indicated that she and her husband were looking into the possibility of sending the student to a Montessori

⁶ Although the March 2008 IEP indicated that the student's mother attended the CSE meeting (Dist. Ex. 25 at pp. 7, 20), the hearing record reflects that she did not attend the CSE meeting (Tr. pp. 515-517; 583).

program for Fall 2008 (Parent Ex. 3 at p. 11). It was expressed to the student's mother by district staff that the student was doing well in his then current district program and that he should continue in it with the supports in place (id.).

The student's fourth grade report card reflected that in English the student was exhibiting developing skills relevant to organizing and maintaining focus, using the writing process to produce well constructed texts, listening for information and understanding, and interpreting verbal information effectively (Dist. Ex. 6 at p. 5). According to the report card, the student was demonstrating proficiency in all other measured areas (id.). The report card indicated that the student needed to improve in the following areas: coming to school prepared with "appropriate/assigned materials," and completing homework assignments on time (id.). The student's report card revealed that he was absent for 13 days and late on 49 days during the 2007-08 school year (id.). The student's IEP progress report for the 2007-08 school year indicated that the student completed four out of six reading goals and one out of three social/emotional/behavioral goals (id. at pp. 6-8). The student was progressing satisfactorily toward his remaining IEP goals (id.). The student attained a performance level of "3" on the New York State fourth grade English language arts (ELA) and mathematics examinations, and a performance level of "4" on the New York State fourth grade science exam (Dist. Ex. 24 at pp. 35, 38).⁷

In a July 10, 2008 letter to the school principal, the student's mother expressed her disappointment with the student's program during the 2007-08 school year (Dist. Ex. 5 at pp. 2-3). Specifically, the student's mother stated that she had requested an occupational therapy (OT) evaluation of the student, but was told by the counselor that the counselor doubted the district would offer an evaluation based on the student's performance (id. at p. 2). In addition, the student's mother expressed that the student was repeatedly "bullied" and that when she raised the issue with school staff, she was told that the student must be receiving "false signals" from other students and that the other students were just trying to help her son (id.). The student's mother further expressed that when she complained about the student not wanting to go to music, she was told that he needed to learn to "just deal with it" (id.). In addition, the student's mother expressed that the student was developing an aversion to attending school on gym days, that the student was teased in gym, and that other students did not want him on their team (id. at p. 3). According to the student's mother, the student was developing "debilitating anxiety" due to all of the situations he was presented with at school (id.). The student's mother indicated that she did not agree with the student's then current IEP and requested a CSE meeting to discuss appropriate services and an appropriate setting for him (id.).

In response to the parent's request, the CSE reconvened on August 27, 2008 with the CSE chairperson, a regular education teacher, a special education teacher, the CSE psychologist, a speech-language pathologist, and the parents in attendance (Dist. Ex. 9 at pp. 1, 4; Parent Ex. 6).⁸ An additional parent member participated for part of the meeting by telephone (Parent Ex. 6; see Dist. Ex. 9 at p. 4). The student's mother expressed concern at the CSE meeting regarding issues that she believed went unresolved during the 2007-08 school year; specifically, that the student

⁷ Performance level 4 is described in the hearing record as "meeting standards with distinction," and performance level 3 is described as "meeting the standards" (Dist. Ex. 24 at p. 38).

⁸ Parent Ex. 6 includes a recording of the August 27, 2008 CSE meeting.

had been bullied and harassed, that his anxiety had increased, and that he continued to demonstrate a sensitivity to sound (Parent Ex. 6). CSE meeting minutes indicated that at the time of the meeting, the student was seeing a private therapist who reportedly recommended that the student be placed in a small class with no more than eight students due to his "attending" (Dist. Ex. 9 at pp. 1-2, 4; Parent Ex. 6). During the course of the CSE meeting, the student's mother informed the committee members that if the district did not change the recommended setting for the student, she would have to reject the proposed IEP (Parent Ex. 6). Following a discussion of the parents' concerns, the CSE modified the student's March 14, 2008 IEP by recommending the following additional services to address the student's anxiety: individual counseling one time per week for 30 minutes, a functional behavioral assessment (FBA), and the development of a behavioral intervention plan (BIP) (Dist. Ex. 9 at p. 4; Parent Ex. 6). In addition, to address the student's sensory weaknesses and reported difficulty with activities of daily living (ADLs), the CSE recommended an OT evaluation (*id.*). The August 27, 2008 CSE adopted the March 14, 2008 CSE recommendations for direct consultant teacher services, speech-language therapy, and an autism consultant, as well as the remainder of the student's March 14, 2008 IEP (compare Dist. Ex. 25 at pp. 4-9, with Dist. Ex. 9). In response to parental concerns regarding bullying, the parents were informed that they could request a variance to have the student attend a different elementary school within the district (Parent Ex. 6). At the conclusion of the August 27, 2008 CSE meeting, the student's mother indicated the parents' intent to unilaterally place the student at West Hills and seek tuition reimbursement from the district (*id.*).

In a due process complaint notice dated September 15, 2008, the student's mother asserted that the student was not classified by the district as a student eligible for special education services until November 2007, although the student displayed difficulties with pragmatic language, anxiety, social skills, and distractibility (Dist. Ex. 3 at pp. 2, 3). The student's mother further asserted that, although the student was unable to button a shirt, open a bag of chips or put on a pair of pants without an elastic waistband, the district did not conduct an OT evaluation (*id.*). In addition, the student's mother asserted that, due to the student's poor social skills, he had been "bullied" and experienced "debilitating anxiety," making it difficult to get him to school in the morning (*id.*). Also, the parent asserted that the student has "severe sensory issues," "panics" when he hears loud noise, and that the district's position is "that he just needs to deal with it" (*id.*). The parent asserted that the district has not sufficiently addressed the student's issues, that the autism consultant's hours were "woefully inadequate," that no social skills program was provided to the student, that no one had intervened to make the school a safe and nurturing environment, and that the student had "deteriorated" (*id.*). In addition, the parent asserted that, at the August 27, 2008 CSE meeting, the additional parent member was only available by phone and only participated for part of the meeting; and that none of the CSE members present at the August 2008 CSE meeting knew the student (*id.*). The parent further asserted that she advised the CSE at the August 2008 meeting that she disagreed with the IEP, that she was unilaterally placing the student at West Hills, and that she would be seeking tuition reimbursement (*id.*). As relief, the parent proposed that the district reimburse the cost of the West Hills, provide related services at West Hills or reimburse the cost of related services, provide transportation for the student to West Hills (*id.*).

The student began attending fifth grade at West Hills in September 2008 (Dist. Ex. 26 at pp. 15, 35; see Tr. p. 927). In October 2008, the student was referred to the CSE in the district in

which West Hills is located (Dist. Ex. 26 at p. 8).⁹ At that time, a social history was completed by the district where West Hills is located (*id.* at pp. 32-34). A November 2008 educational evaluation report prepared by the Gersh Academy¹⁰ reflected that the student attended a 5:1 integrated class where he received consultant teacher services three times per week for 40-minute sessions, group speech-language therapy two times per week for 30-minute sessions and individual counseling one time per week for 30-minute sessions (*id.* at p. 15). Administration of the Wechsler Individual Achievement Test - Second Edition (WIAT - II) resulted in the following composite standard scores (percentiles): reading 131 (96), mathematics 124 (98), written language 137 (95), and oral language 137 (99) (*id.* at pp. 15-16, 18). The evaluator indicated that the student's performance on the WIAT - II accurately assessed the student's academic abilities (*id.* at p. 17). The evaluator noted that the student liked independent work; was "quite smart;" "offer[ed] much to [the] class;" followed an hourly agenda; was able to complete assignments in a timely manner; was generally respectful and helpful to others; and appeared to enjoy coming to school as reflected in his class work (*id.*). According to the evaluator, the student was "doing beautifully in a small classroom setting" (*id.*). The evaluator opined that the student would benefit from continuing at West Hills and that the consultant teacher model worked for the student as he needed support with organizational skills, staying on topic, and staying focused during lessons (*id.*).

In a November 3, 2008 response to the parent's due process complaint notice, the district denied the student's mother's allegations and asserted that the district provided the student with a free appropriate public education (FAPE) for the 2007-08 school year and offered the student a FAPE for the 2008-09 school year (Dist. Ex. 2 at p. 1). The district's response further asserted that the parents' unilateral placement at West Hills did not provide the student with an appropriate program and that equitable considerations precluded an award of tuition reimbursement for the unilateral placement (*id.*).

An impartial hearing began on December 8, 2008 and ended on June 4, 2009, after six days of testimony (IHO Decision at pp. 1, 253, 465, 669, 879, 1015).

In a letter dated February 4, 2009, addressed "To Whom It May Concern," the student's private psychologist reported that he saw the student for five or six sessions between April and June 2008 (Parent Ex. 2 at p. 1). The student's private psychologist noted that he was aware of the impartial hearing, that he had not observed the student's school placements, that he was not "intimately familiar" with the student's school programs, and that his information had come from discussions with the student's family (*id.*). The February 4, 2009 letter briefly summarized the student's history, diagnoses, and educational interventions (*id.*). The student's private psychologist noted that upon initial referral, the student was struggling, appeared anxious, talked of being unhappy at school, and of being teased or bullied (*id.*). The psychologist concluded that

⁹ On February 5, 2009, the CSE from the district in which West Hills is located met for an initial eligibility determination meeting (Parent Ex. 1 at p. 2). That CSE recommended that the student be classified as a student with autism and receive direct consultant teacher services three times a week for 40-minute sessions, group speech-language therapy two times a week for 30-minute sessions, and individual counseling one time a week for 30 minutes (*id.* at pp. 2-3).

¹⁰ The hearing record reflects that West Hills is affiliated with the Gersh Academy, which is a non-approved private school (Tr. pp. 632, 896, 903, 938-940).

the student had social deficits which left him "somewhat vulnerable" (id.). The psychologist indicated that the student did not want to go to school; did not want to separate from his mother; refused to attend church; discontinued participation in martial arts training; was becoming increasingly withdrawn; complained of pain, headaches, and lightheadedness; and was eating more, gaining weight, and sneaking food (id.).

The student's private psychologist further indicated in the February 4, 2009 letter that he was "not privy" to the discussions between the district and the parents regarding the student's fifth grade placement, but that he was aware that the student had entered a Montessori program (Parent Ex. 2 at p. 1). The psychologist stated that he had been told that the student appeared to be comfortable at the school and noted that the student enjoyed going to school, was less anxious, and was not worried about being bullied or teased (id.). The psychologist expressed that the student's emotional and behavioral improvements were not surprising given the Montessori approach where, instead of a predetermined curriculum, the student helps determine the course of education (id.). The psychologist stated that the district "might raise the valid concern" that students need to learn to tolerate things that do not interest them or that they may not want to do (id.). He suggested that in a larger program, the student would be confronted by things he might not enjoy doing or by people whose company he did not desire, but that the student would benefit from learning to become more tolerant, and that a variety of social skills and personal adjustments could be fostered (id. at pp. 1-2). Conversely, the psychologist noted that the student's "inability to tolerate" was a symptom of his disability and opined that "we need to entertain solutions when he becomes emotionally distraught, recalcitrant or withdrawn due to his circumstances" (id. at p. 2). The psychologist noted that it was "not easy to tease out the factors which contributed to [the student's] difficulties in fourth grade, or the factors responsible for his current improvement" (id. at p. 1). He concluded that remaining at Montessori or returning to a district program might both offer certain benefits to the student (id. at p. 2).

In a corrected decision¹¹ dated January 19, 2010, the impartial hearing officer noted that although the parents requested a CSE meeting on July 10, 2008, it was not conducted until the last week of August, and the hearing record did not include an explanation for this (IHO Decision at p. 25). The impartial hearing officer further noted that the August 2008 CSE did not include any individuals who were familiar with the student; that there was no testimony regarding credentials of the regular education or special education teachers; that there was no testimony explaining whether teachers familiar with the student were available during the summer for a CSE meeting; and that there was no testimony that the district tried to contact the student's teachers for the CSE meeting (id.).

Addressing the substance of the student's recommended program, the impartial hearing officer found that the district did not demonstrate that its recommended placement for the 2008-09 school year was appropriate (IHO Decision at pp. 25-29). The impartial hearing officer stated that he was not "convinced" that the student's "overall educational performance was satisfactory" for the 2007-08 school year, noting that educational performance was not limited to academic achievement (id. at pp. 27-28). In making his determination, the impartial hearing officer cited the following examples of the student's behavior: the student was "overly literal," had difficulty understanding peers, "poke[d] others," rolled on the carpet, was off task, ran around the

¹¹ The original decision was not provided to the Office of State Review as part of the record on appeal.

classroom, overreacted to noise, had difficulty with transitions, and acted inappropriately (*id.* at p. 26). The impartial hearing officer added that the hearing record showed that the student was "targeted by others because of his behavior;" that the student "misperceived innocuous peer remarks as bullying or teasing;" that the student "perseverat[ed]" on comments by others; "begg[ed]" not to go to school; came to school late; displayed somatic symptoms in school; and that the student stated "on numerous occasions that he would rather die than go to school" (*id.*). The impartial hearing officer noted that, although interventions were tried for the student in the classroom including role playing, behavior plans, a reporting system and social stories; the student was late for school 49 times during the 2007-08 school year (*id.*).

While noting that the August 2008 CSE added counseling to the student's 2008-09 IEP and directed that an OT evaluation and an FBA be conducted for the 2008-09 school year, the impartial hearing officer stated that the CSE did not change the basic classroom or school recommendation (a general education classroom setting of 23 to 24 students) (IHO Decision at p. 27). The impartial hearing officer also determined that it was not clear how the setting proposed by the CSE (which included 120 minutes per week of direct consultant teacher services) would have produced a different result than the program that was designed the previous year (*id.*). The impartial hearing officer found that instead of delineating how the 2008-09 program was substantially different than the 2007-08 program and would have improved the student's educational performance, the district maintained that the student did well in the 2007-08 school year as a result of interventions from the staff including the counselor and autism consultant (*id.*). In finding the student's overall educational performance unsatisfactory for the 2007-08 school year, the impartial hearing officer stated that he was persuaded by the testimony of the parents and the student, who "convincingly indicated that the student was genuinely dreading going to school" during the 2007-08 school year; and that the student was "very anxious" to return home during the school day (*id.* at p. 28). The impartial hearing officer also referenced the student's recurrent lateness and found that the district did not present testimony to rebut an inference pertaining to the negative impact of such lateness on the student's education (*id.*).

The impartial hearing officer also noted a spring 2008 letter from the student's therapist, which indicated that the student was anxious at school, did not want to go to school, complained of "somatic symptoms," and began to refuse to go to after school activities (IHO Decision at p. 28). In addition, the impartial hearing officer noted testimony by district witnesses that the student went to the nurse's office frequently during the 2007-08 school year (*id.*). The impartial hearing officer further noted the testimony of the student's teacher for the 2007-08 school year that the student could benefit from a smaller class size and that an inclusion class "would be a good thing" (*id.*).¹² The impartial hearing officer also noted testimony by the district psychologist that a "Connors Scale of [the student]" conducted in November 2007 indicated that a neurological evaluation should be done for the student, but that one was not conducted (*id.* at p. 29).

¹² Although the student's August 2008 IEP did not indicate that the student was recommended to attend an inclusion class for the 2008-09 school year; according to the student's teachers, the IEP was changed from indirect to direct consultant teacher services to reflect his need for an inclusion classroom (Tr. pp. 405-06, 595, 598). The student's special education teacher stated that if the student did not have the direct consultant teacher services listed on his August 2008 IEP, he would not be placed in an inclusion class (Tr. pp. 596, 597-601, 614-621).

In determining that the parents' placement of the student at West Hills was appropriate, the impartial hearing officer noted the small class size and found that the student benefitted from the lack of noise and the additional individual attention in the classroom (IHO Decision at pp. 29-30). The impartial hearing officer also found that the school's Montessori approach, designed to work on the social and emotional development of students with neurobiological disorders, allowed the student to enjoy school more (id.). In addition, the impartial hearing officer noted that the students at West Hills ate lunch in the classroom, minimizing the chance of confrontations; that the student's educational performance improved significantly at West Hills; and that the student had no problem with bullying, teasing, or coming to school on time during the 2008-09 school year (id.). In addition, the impartial hearing officer found that academically, West Hills was appropriate and that it provided access to typically developing peers (id. at pp. 30-31).

In addressing the equities, the impartial hearing officer found that "the parents ha[d] done all they ha[d] been requested to do" (IHO Decision at p. 32). Specifically, he found that the parents allowed the student to be observed and evaluated, participated in CSE meetings, and sought the district's input regarding placement options (id.). Although the parents provided West Hills with a deposit in March, the impartial hearing officer determined that the parents were required to do so in order to secure a place for the student at the school (id.). Additionally, the impartial hearing officer found that the parents indicated that they were "open to a public school placement" by pursuing a second CSE review in July 2008 (id.). Based on the above, the impartial hearing officer ordered the district to reimburse the parents for the student's tuition and "related expenses" at West Hills for the 2008-09 school year (id. at p. 33).

On appeal, the district asserts that it offered a FAPE to the student for the 2008-09 school year. The district asserts that the impartial hearing officer improperly invalidated the program and services recommended for the student; that the finding that the district did not offer the student a FAPE was erroneous and contrary to law; and that the program and services offered to the student by the district were based upon appropriate evaluative information and experience with the student, provided sufficient supports and services and appropriate goals, and would have resulted in meaningful progress in the least restrictive environment (LRE). The district further asserts that the August 2008 IEP recommended a program that was the same as the one approved by the parents in March 2008, except for the following items requested by the parents: an OT evaluation; a formal FBA and BIP; and individual counseling one time per week for 30 minutes. The district contends that the August 2008 IEP provided the parents with their requested changes and further alleges that the parents did not provide consent for the OT evaluation. In addition, the district asserts that its autism consultant provided the parents with successful strategies to help get the student to school on time; that the parents only implemented the strategies for one week; and that the parents did not follow up on the offer by the autism consultant to help them at home.

The district further asserts that the impartial hearing officer improperly found that the program and services offered by West Hills were appropriate to meet the student's needs. The district specifically asserts that West Hills did not provide appropriately trained and qualified staff; that West Hills provided a program that did not permit the student to make appropriate progress; that the West Hills program was unduly restrictive, given the small setting and lack of sufficient access to typically developing peers; that West Hills did not provide an opportunity to

work on the student's main areas of weakness (social/pragmatic skills and dealing with frustration); and that West Hills did not provide appropriate role models or peer models in the student's age group. Asserting that the equities do not favor the parents, the district contends that the parents agreed to pay the entire tuition at West Hills while at the same time offering no objection to the district's IEP. Also, the district alleges that the first time the parents asked for an OT evaluation on June 8, 2008, they were advised that they should make the request to the CSE; however, the parents waited until summer vacation to request a CSE meeting. The district further notes that while the impartial hearing officer commented on the time it took to schedule the CSE meeting and the absence of testimony regarding why those most familiar with the student were not present, the principal testified regarding her efforts to schedule the CSE meeting and the unavailability of staff during the summer. The district further asserts that the parents' actions of approving the IEP in March 2008, while also committing themselves to the unilateral placement, and waiting to request additional services until the summer, prejudiced the district's efforts to meet its responsibilities to the student.

In an answer, the student's mother, proceeding pro se, asserts that the impartial hearing officer rendered a fair decision that took into consideration the student's special needs. The student's mother alleges, among other things, that the district did not offer the student a FAPE because the August 2008 CSE composition was not proper. Specifically, the student's mother asserts that no one at the August 2008 CSE meeting had met the student; that proper efforts were not made to find appropriate CSE members; that only two staff members were contacted who knew the student; and that the additional parent member was teleconferenced and did not participate for the entire meeting. In addition, the parent asserts that the district did not offer a FAPE because it did not conduct the resolution meeting properly and repeatedly withheld documents and files requested by the parent.

The student's mother further asserts that the district did not offer the student a FAPE because the district's recommended program was not appropriate. The student's mother specifically asserts, among other things, that the student's program for the 2007-08 school year as reflected in the IEP for that year was not appropriate and points to the student's lack of improvement during the year in academic areas and lower grades in writing and listening while at the district's school to support her claim. Also, the student's mother asserts that the student's absences increased significantly in the second quarter of the 2007-08 school year while the student attended the district's school; that teacher comments indicated that the student had social problems, including difficulty with focusing; and that the psychologist noted the student's increased anxiety and withdrawal. The student's mother further asserts that the district did not provide adequate social skills development; that the autism consultant did not fulfill his obligations during the 2007-08 school year; and that attendance logs and frequent visits by the student to the nurse support her contentions. The student's mother further asserts that the only solution offered by the district for the student's auditory sensitivity was for the student to wear earplugs; that the methods of eliminating bullying and the student's inability to handle the situations were not resolved by the district; that the student's statements that he would rather die than go back to school occurred when he was picked up from school, through the evening and in the morning; and that the student was developing more debilitating anxiety and school avoidance behaviors as the year progressed.

In addition, the student's mother asserts that West Hills was appropriate. In support of her claim, she asserts that the student made significant progress at West Hills; that his self esteem increased; and that his anxiety decreased. In addition, the student's mother asserts that the was able to focus more and learn many of the social skills that he could not master at the district's school and that the student was not late and had only two absences. She also asserts that the student received more individual attention at West Hills, had fewer auditory distractions, and the staff was well trained in autism spectrum disorders. As to the equities, the student's mother denies the allegations made by the district and asserts that the equitable considerations favor the parents.

The student's mother attaches two exhibits to her answer. Exhibit one consists of a copy of the parents' written closing argument and legal brief submitted to the impartial hearing officer; and Exhibit two consists of 11 pages of reports including an academic annual review, a social/emotional annual review, an FBA, a BIP, a speech-language annual review, and draft goals and objectives for the 2009-10 school year prepared by the Gersh Academy between February and April of 2009. In a letter responding to the parent's answer, the district asserts that the exhibits attached to the answer should not be considered on appeal because they existed at the time of the impartial hearing and were not admitted into evidence during the impartial hearing. The district requests that the answer be disregarded and that the parent be required to resubmit an answer without any reference to the exhibits, or in the alternative, that upon review of the appeal, references to the parent's exhibits be ignored. In response, the student's mother submits a letter indicating that she included on appeal her written closing argument, which was submitted below, because she believed it explained her position. The student's mother adds, in part, that she included the documents identified as Exhibit two to demonstrate the credentials of employees of the Gersh Academy.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the parent is not represented by counsel on appeal and she did not submit a memorandum of law with her appeal (8 NYCRR 279.5). I will accept the written closing argument as being submitted in lieu of a memorandum of law in support of the parent's answer. However, I will not accept the additional documents provided by the parent as Exhibit two because, based on my decision herein, the additional evidence is not necessary in order to render a decision.

Turning now to the merits of the appeal, two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students

are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

I will now address the procedural issues raised on appeal regarding the composition of the August 27, 2008 CSE. Pertaining to the contention by the parents that the student was denied a FAPE because the student's regular education teacher and special education teacher were not present at the August CSE meeting, federal and State regulations provide that "not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment" and "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" attend a student's CSE meeting (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R § 300.321[a][2-3]).

The hearing record reflects that a subcommittee of the CSE initially met on March 14, 2008 to develop the student's IEP for the 2008-09 school year; that it is undisputed that participants of the March 14, 2008 CSE knew the student, and included among others, the student's regular education teacher and the student's special education teacher; and that the composition of the March 14, 2008 CSE is not at issue (see Dist. Ex. 25 at pp. 4-9). The hearing record further reflects that at the time of the meeting, the March 2008 CSE reviewed a November 2007 educational evaluation report, a November 2007 speech/language evaluation report, and a May 2005 psychological evaluation (Dist. Ex. 25 at p. 7).¹³ The hearing record also reflects that the March 2008 CSE reviewed the student's standardized test results from November 2007 and May 2005, which were reported in the student's November 2007 psychological report (Dist. Exs. 25 at at p. 6; 16 at pp. 4-5). The hearing record further reflects that the school psychologist who prepared the November 2007 psychological report conducted the classroom observation of the student and was also a participant in the March 2008 CSE (Dist. Exs. 25 at p. 7; 16 at p. 7). In addition, the school psychologist was familiar with the student's background information, as she

¹³ The May 2005 psychological educational evaluation report was not provided as part of the record on appeal, although it is referenced and reported on in the November 2007 psychological report (see Dist. Ex. 17 at pp. 2, 4).

prepared a summary contained in a November 2007 psychological report from information obtained from the student's mother and previous social histories (Dist. Ex. 16 at pp. 1-4). The student's academic performance and learning characteristics and social/emotional needs, as reflected in the March 2008 IEP, are consistent with the student's needs as identified in the aforementioned documents reviewed by the CSE and accurately reflected, among other things, that the student had no cognitive or academic needs to be addressed at the time of the March 2008 CSE meeting through special education; that the student required some guidance in social situations; that the student needed to communicate frustration with academic tasks appropriately; that the student needed to increase his ability to think before reacting; that the student needed to decrease anxiety; that the student needed to get help from proper school personnel when feeling stress; and that the student needed to develop/demonstrate appropriate social interaction skills (see Dist. Ex. 25 at p. 6).

Upon review of the March 2008 IEP, I find that the CSE recommendation that the student receive direct consultant teacher services three times per week for 40-minute sessions and speech-language therapy two times per week for 30-minute sessions, in conjunction with program modifications, the support of an autism consultant, and testing accommodations for the student constituted an appropriate special education program for the student (see Dist. Ex. 25 at pp. 4-5). I find that the March 2008 IEP also included goals related to study skills, speech-language development, and social/emotional/behavioral development, and find that the goals addressed the student's identified deficits, which demonstrated the CSE's consideration of the information provided by the CSE members and the documentation the CSE had before it (*id.* at pp. 7-9).

Moreover, when the student's mother requested another CSE meeting after the 2007-08 school year had ended by letter dated July 10, 2008 (see Dist. Ex. 5 at pp. 2-3), the August 27, 2008 CSE meeting was held in response to the parent's request and the school principal indicated that the end of August was the earliest date that the CSE meeting could be scheduled (Tr. pp. 1116-17; see Dist. Ex. 9). According to the student's mother, she was "upset" and "very surprised" that no one at the August 27, 2008 CSE meeting knew the student (Tr. p. 1118). However, the school principal recalled a conversation with the student's mother in which she informed the student's mother that if the CSE meeting was held on August 27, 2008, the student's classroom staff, special education teacher, and school principal would be unable to attend (Tr. pp. 828-29).¹⁴ The principal further testified that she informed the student's mother that if the CSE meeting were held one week later everyone, including the student's regular and special education teacher, would be able to attend (*id.*). According to the school principal, the student's mother made it "quite clear" that she wanted to have the meeting regardless of staff attendance (Tr. pp. 829-30). The student's mother testified that she felt that she was under "time constraints" (Tr. p. 1129).

While it is undisputed that both a regular education teacher and a special education teacher attended the August 2008 CSE meeting, the hearing record shows that although one CSE member indicated that she worked at the student's school and had seen the student in the halls, the other CSE members, including the regular and special education teachers, did not appear to

¹⁴ The principal testified that she was in contact with the school counselor and regular education teacher but "did not go past that" (Tr. p. 829). The student's special education teacher testified that she was out of town at the time of the August 27, 2008 CSE meeting (Tr. p. 584).

be familiar with the student (Tr. p. 829; Dist. Ex. 9 at pp. 1, 4; Parent Ex. 6). Accordingly, the hearing record does not support a finding that the attendance of either teacher, in this circumstance, comported with the requirements of federal and State regulations (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R. § 300.321[a][2-3]; Application of the Dep't of Educ., Appeal No. 08-105). However, impartial hearing officers and State Review Officers are constrained by federal and State regulations from finding that a procedural violation rose to the level of a denial of a FAPE unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or 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]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Notwithstanding that a regular and/or special education teacher of the student were not present at the August 2008 CSE meeting and a finding that the CSE was not properly constituted, the hearing record does not support a finding that the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Although the student's mother asserted at the impartial hearing that "it was hard ... to explain [the student's] issues with people who have never met him" (Tr. p. 1118), the hearing record reflects that the student's mother meaningfully participated in the August 2008 CSE meeting (see Parent Exhibit 6). The hearing record also reflects that the student's mother explained the issues to the CSE in her July 10, 2008 request for the CSE meeting, as well as in person at the August 2008 CSE meeting (Dist. Ex. 5 at pp. 2-3; Parent Ex. 6).¹⁵ The August 2008 CSE incorporated into the IEP the recommendations made at the March 2008 CSE meeting, which was attended by members who knew the student, including his special and general education teachers (compare Dist. Ex. 25 at pp. 4-9, with Dist. Ex. 9). In addition, as indicated more fully below, the hearing record establishes that the program recommended by the CSE at the August 2008 meeting was reasonably calculated to confer educational benefits to the student. Therefore, I find that the hearing record does not support a finding that the failure to include a regular education teacher or a special education teacher who would implement the student's 2008-09 IEP at the August 2008 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419); see also Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 08-122; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). I caution the district, however, to ensure that it complies with the regulatory requirements pertaining to the

¹⁵ It is well settled that although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Perricelli, 2007 WL 465211, at *1). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

participation of the appropriate regular education and special education teacher members at CSE meetings.

I now turn to the parents' assertion that the student was denied a FAPE for the 2008-09 school year because the additional parent member participated telephonically and did not participate for the entire length of the CSE meeting.¹⁶ Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). In addition, State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]).¹⁷

The hearing record reflects that at the beginning of the August 27, 2008 CSE meeting, the CSE chairperson indicated that the district was unable to secure an additional parent member for the meeting (Parent Ex. 6). The CSE chairperson asked the parents whether they felt comfortable proceeding in the absence of an additional parent member and suggested that members of the CSE who were present could discuss the parents' concerns but not make any formal recommendations until the district could secure an additional parent member (*id.*). Shortly thereafter, the district contacted an additional parent member who participated in the CSE meeting by telephone (*id.*). The additional parent member remained on the phone for about 35 minutes (*id.*). Approximately 20 minutes before the CSE meeting ended, the additional parent member indicated that she needed to leave and her participation in the meeting ended (*id.*). The meeting lasted for about one hour (*id.*). The hearing record does not reflect that the parents objected to the additional parent member's participation by telephone at the time of the CSE meeting and the hearing record does not reflect that the parents objected when the additional parent member discontinued participation at the CSE meeting (*id.*). Furthermore, the hearing record reflects that the parents meaningfully participated in the CSE meeting (*id.*). In

¹⁶ The impartial hearing officer did not address this assertion in his decision.

¹⁷ Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129).

addition, as indicated more fully below, the hearing record establishes that the program recommended by the CSE at the August 2008 meeting was reasonably calculated to confer educational benefits to the student. Accordingly, I find that the hearing record does not support a finding that the additional parent member's participation by telephone for less than the entire CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Mills, 2005 WL 1618765, at *5; see also E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

I now turn to the district's assertion that it recommended an appropriate program for the student for the 2008-09 school year. The impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2008-09 school year was predicated, in part, on the student's educational performance during the 2007-08 school year and the similarity between the recommended 2008-09 program and the program provided to the student by the district during the 2007-08 school year (IHO Decision at pp. 27-28).

Initially, I find that the impartial hearing officer's determination that the student's "overall educational performance was not satisfactory" during the 2007-08 school year is not supported by the hearing record (see IHO Decision at p. 28). The hearing record reflects that the student performed well academically during the 2007-08 school year when he attended a general education classroom of 23-24 students with special education supports (Tr. pp. 409-11, 437). The student's special education teacher testified that despite the "indirect consultant teacher" designation on the student's fourth grade IEP (2007-08 school year), the student was not pulled out of the classroom for special education services during the 2007-08 school year because there was always a special education teacher in the fourth grade classroom (Tr. pp. 595-96, 614-15). The student attained passing grades, performed well on State assessments, and had completed or was progressing satisfactorily toward all of his IEP goals (Dist. Exs. 6 at pp. 5-8; 24 at pp. 5, 38). In addition, contrary to the findings of the impartial hearing officer, the hearing record reflects that the student made progress relative to his anxiety in school and social/emotional development (Tr. pp. 396-98, 411-12, 591-92). The school counselor testified that the student seemed calmer, asked for help, and participated in group projects (Tr. p. 151). She further stated that the student appeared happier, initiated play and conversation, was less annoyed by little things that would happen in group situations, became more of a group member, and volunteered more in class (Tr. pp. 156, 165). The school counselor also testified that the student had less somatic complaints (Tr. pp. 155-56, 222-23). The student's regular education teacher for the 2007-08 school year testified that the student was able to implement the strategies that staff taught him, which included "clearing his mind" and using a flip card to request a break (Tr. pp. 383-85). The teacher expressed that the student "progressed nicely" as the year went on, both academically and socially (Tr. pp. 387, 416). The regular education teacher testified that he saw the student making friends and playing on the playground (Tr. p. 436). He stated that in many ways, the student had learned to work with other children (Tr. p. 437). Additionally, the student's speech-language therapist testified that she thought the student had made "great progress" during the 2007-08 school year (Tr. pp. 520, 525). She testified that the student formulated friendships and seemed to generalize the social skills he was learning (Tr. pp. 520, 525, 547). The student's special education teacher testified that the student made "a lot" of progress during the 2007-08 school year (Tr. p. 574). She expressed that the student did not need her as much to "intercept a

problem" and hardly ever asked to go to the nurse at the end of the year (Tr. pp.575). She further noted that she did not hear the student complain of people bothering him and that he did not really need the special education teacher's assistance in a small group (*id.*). The special education teacher indicated that once the student was prompted or reminded of a strategy, "he was good" (Tr. pp. 576-77). She opined that by the end of the school year, the student exhibited less anxiety with respect to transitions (Tr. p. 592). The autism consultant testified that he observed the student interacting with other students in lunch and that he was "very interactive and engaged" when his class went outside (Tr. pp. 685-86, 691).

As to the student's attendance at school, the hearing record indicates that the student had attendance problems throughout elementary school (Dist. Ex. 6 at pp. 1-5). Despite the student's reported social/emotional progress, the student was late for school 49 times and absent from school on 13 days during the 2007-08 school year (Dist. Ex. 6 at p. 5).¹⁸ The hearing record does not indicate how late the student was or why he was absent. According to the student's mother, the student's tardiness was related to the student's anxiety and complaints about bullying (Tr. pp. 1104-10). District staff testified that the student did not appear anxious about coming to school and suggested that issues at home might be responsible for the student's tardiness (Tr. pp. 164-65, 414-15, 422-23, 569-70). During the 2007-08 school year, the student's tardiness caused him to miss some speech-language therapy sessions, but the student's speech-language therapist indicated that when the student was late she would work with him in another group (Tr. p. 507). The hearing record further indicates that the district attempted to assist the parents with getting the student to school (Tr. pp. 147-48, 657, 792). In third grade (2006-07), the school counselor developed a behavior modification plan to try to get the student to school on time (Tr. pp. 147-48). The school counselor reported that subsequently, the parents implemented the plan for a short time in fourth grade (2007-08), during which time the plan was successful (Tr. pp. 143-44, 147-48).

At a March 28, 2008 meeting with the parent, school staff and the autism consultant; the consultant discussed the student's anxiety and difficulty coming to school and recommended strategies for dealing with the student's behavior (Tr. pp. 683-85, 694; Parent Ex. 3 at pp. 10-11). As detailed in the meeting minutes, the student's mother discussed the different points of view between her and the student's father (Parent Ex. 10 at p. 5). The autism consultant reported that he offered to meet with the student's father to discuss some of the ways that he could help in handling the student in a more positive manner (Tr. pp. 685, 694, 696-97, 718; Parent Ex. 3 at p. 11). The student's mother confirmed that the autism consultant offered to speak with her husband (Tr. pp. 1111-12). Accordingly, a review of the hearing record reflects that while the student continued to exhibit tardiness, the district had attempted to assist the parents with getting the student to school by developing a behavior modification plan for the student and offering the assistance of the autism consultant. The parents made limited use of these resources.¹⁹ Moreover, the hearing record reflects that the student's academic performance was satisfactory for the 2007-08 school year; and a review of the student's academic performance while attending

¹⁸ The student's classroom teacher reported that the student left school for one week during the school year to visit West Hills (Tr. p. 412).

¹⁹ Moreover, the hearing record shows that during the resolution session for the instant matter (20 U.S.C. § 1415 [f][1][B]; 34 C.F.R. § 300.510[a][2]; see 8 NYCRR 200.5[j][2]), the district offered the parents additional support in the morning to facilitate the student's transition between home and school (Tr. pp. 833-34).

the district's school during the 2007-08 school year does not support a finding that the district did not offer the student a FAPE for the 2008-09 school year.

I will now further consider whether the program offered by the August 2008 CSE was appropriate for the student. For the 2008-09 school year, the student's August 2008 IEP indicates that the student would have received direct consultant teacher services three times per week for 40-minute sessions; speech-language therapy two times per week for 30-minute sessions and individual counseling one time per week for 30 minutes (Dist. Ex. 9 at p. 1). In addition, the CSE recommended that an autism specialist consult with school personnel on behalf of the student twice monthly for a one hour duration; that the district conduct an FBA and develop a BIP for the student to address his anxiety; and that the district conduct an OT evaluation of the student to determine if he had any ADL or sensory needs (*id.* at p. 2). The differences between the student's March 14, 2008 IEP and the August 27, 2008 IEP are reflected by the addition in the August 2008 IEP of counseling, and the recommendations to prepare an FBA/BIP and conduct an OT evaluation (Dist. Ex. 8). I note that the student's mother expressed in her letter dated July 10, 2008, requesting a CSE meeting, her concern that the student needed an OT evaluation (Dist. Ex. 5 at p. 1). I further note that the student's mother expressed concerns in the July 10, 2008 letter regarding the student's social and mental development (including bullying and anxiety) and sensitivity to auditory stimuli, and that the recommendations by the August 2008 CSE for counseling and a BIP address these concerns (*id.* at pp. 1-2; Dist. Ex. 9 at p. 4). Also, the comments in the August 2008 IEP indicated that the BIP was specifically recommended by the CSE to address the student's anxiety and sensory concerns (Dist. Ex. 9 at p. 4). Accordingly, upon review, the hearing record shows that the student demonstrated academic and social/emotional progress during the 2007-08 school year; that the program remained appropriate for the student for the 2008-09 school year; that the August 2008 CSE built upon and modified the March 2008 IEP to address parental concerns; and that the district added additional related services and supports.

Based on a review of the entire hearing record, I find that the alleged procedural inadequacies did not rise to the level of denying the student a FAPE and that the district's recommended program for the 2008-09 school year was reasonably calculated to enable the student to receive educational benefits; therefore, a FAPE was offered (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, the hearing record reflects that the program recommended by the August 2008 CSE was reasonably calculated to meet the student's needs 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, 489 F.3d at 108; Walczak, 142 F.3d at 132; E.G., 606 F. Supp. 2d at 388; Patskin, 583 F. Supp. 2d at 428).

I have examined the parties' remaining contentions and find that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's determination that the district failed to provide the student a FAPE for the 2008-09 school year and order that the district reimburse the parents' for their placement of the student at West Hills is hereby annulled.

Dated: **Albany, New York**
 May 14, 2010

A handwritten signature in black ink, appearing to read "Paul Kelly", written over a light gray rectangular background.

PAUL F. KELLY
STATE REVIEW OFFICER