



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-025

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

### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Randi Rothberg, 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') daughter and ordered the district to reimburse the parents for their daughter's tuition costs at the Parents for Torah for All Children (P'TACH) program at Yeshiva University High School for Girls for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student attended ninth grade at P'TACH in a 6:1 self-contained special class, and she received counseling as a related service (Tr. pp. 44, 47, 49-50, 258-60; Dist. Ex. 10; Parent Exs. J; L; W; AA).<sup>1</sup> The Commissioner of Education has not approved P'TACH as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

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<sup>1</sup> The district provided the parents with a Related Service Authorization (RSA) in or around March 2009 for the student's counseling services (see Tr. pp. 49-50).

In this case, the student began attending a "typical" preschool when she was two years old, and she continued to attend nonpublic, general education settings through the 2005-06 school year (Tr. pp. 372-76, 380).<sup>2</sup> The student initially exhibited educational difficulties toward the end of second grade (Dist. Ex. 7 at p. 2; see Tr. p. 372). Based upon the parents' testimony, the student received a diagnosis at that time of a "reading disability," which did not "manifest itself" in the classroom until fourth or fifth grade (Tr. pp. 374-76). For sixth grade, the parents placed the student in a nonpublic, general education setting that offered instruction in classes with no more than 12 students (Tr. pp. 373, 375-76). The parents chose that particular sixth grade program because it was the "closest bridge between a regular ed[ucation] program and a special ed[ucation] program" they could find (Tr. pp. 375-76). Upon moving into the district for the 2006-07 school year, the parents testified that the student "transitioned into a special education program" in a nonpublic school for seventh grade (Tr. pp. 372-75, 381).<sup>3</sup> For eighth grade during the 2007-08 school year, the district developed an individualized education program (IEP) for the student and recommended placement in a collaborative team teaching (CTT) classroom (Tr. pp. 380-86).<sup>4, 5</sup> The parents testified that they visited the proposed site location of the recommended CTT placement at that time, and they were told that "they couldn't help [the student], that she didn't belong there" (Tr. pp. 383-86, 395-96). As a result, the parents continued the student's placement for eighth grade (2007-08 school year) in the same nonpublic school that the student had attended during the 2006-07 school year for seventh grade (Tr. p. 381).

According to P'TACH's educational director, the parents in this case submitted the student's application for admission for the 2008-09 school year in either December 2007 or January 2008 (Tr. pp. 288-89).<sup>6</sup> P'TACH's intake process required the parents to submit psychoeducational reports and a school history (Tr. pp. 251, 254, 257-58).

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<sup>2</sup> The parents testified that the student has never attended a public school (Tr. p. 411).

<sup>3</sup> Although the parents testified that the district developed an individualized education program (IEP) for the 2006-07 school year, the hearing record does not contain the 2006-07 IEP (see Dist. Exs. 1; 3-12; Parent Exs. C-F; I-O; R; T; V-X; Z-AA; IHO Ex. I).

<sup>4</sup> State regulations incorporate "collaborative team teaching" services within its "Continuum of services" as "integrated co-teaching services," which is defined as the following: "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "integrated co-teaching class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>5</sup> The hearing record does not contain an IEP for the 2007-08 school year (see Dist. Exs. 1; 3-12; Parent Exs. C-F; I-O; R; T; V-X; Z-AA; IHO Ex. I).

<sup>6</sup> The parents testified that they first submitted an application for the student's admission to P'TACH in the "mid to end of eighth grade, sort of the spring" (Tr. pp. 401-02).

In January 2008, the parents privately obtained a psychoeducational evaluation of the student to determine her "current levels of neurocognitive efficiency, achievement levels, social-emotional and behavioral functioning" and to assist in "future educational planning" (Dist. Ex. 7 at p. 1; see Tr. pp. 386-89).<sup>7</sup> As noted in the social developmental history, the parents expressed their greatest concerns as the student's "inability to make 'good' social decisions, her reading skills, and [her] lack of self-esteem" (Dist. Ex. 7 at p. 2). The parents reported that although the student read "below her grade level," she was "independent in most of the work" she brought home (id.). The parents opined that the student's inability to make good social decisions arose from her inability to "read appropriate social cues" (id.). The parents did not, however, express any concerns about the student's social interaction skills, and further reported that the student had "four or more close friends at school and a few in her neighborhood" (id. at pp. 2-3). The psychologist noted that the student wore contact lenses, did not take any medications, and that she was in excellent health overall (id. at p. 3). She also noted that the student had received six months of counseling services to address self-esteem concerns, but that the student "did not want to go back" (id.). At that time, the student attended eighth grade in a nonpublic school, and the psychologist noted that she performed "somewhat below grade level" in all areas of academics, except for mathematics, where the student performed at "grade level" (id.).

The psychologist's behavioral observations of the student during the evaluation process indicated that she presented as "friendly," "engaging," and "cooperative" (Dist. Ex. 7 at p. 3). In informal conversation, the student demonstrated "average" expressive language and receptive language skills, and the psychologist described her speech as "normal" with respect to articulation variable, rate, tone, and pragmatics (id.). The student also demonstrated "good interpersonal skills," and she "communicated efficiently" (id.). The psychologist described the student's attention as "extremely variable," which resulted in an "inconsistent performance across test domains" (id.). She also noted that although student tended to "give up quickly when she encounter[ed] more challenging tasks," the student would attempt "more challenging tasks" with "prompting and encouragement," and that the student would then "respond correctly" (id.). Throughout the evaluation process, the student did not demonstrate any indications of an excessive level of anxiety or an atypically low threshold for frustration (id.).

To assess the student, the psychologist administered the following evaluative instruments: a psychodiagnostic interview with the parents; the Conner's Continuous Performance Test, Second Edition (CPT-II); the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV); the Peabody Picture Vocabulary Test—Fourth Edition (PPVT-IV); the Expressive Vocabulary Test—Second Edition (EVT-II); the Comprehensive Test of Phonological Processing (CTOPP); the Beery VMI Developmental Test of Visual Perception—Fifth Edition (DTVP-5); the Beery VMI Developmental Test of Motor Coordination—Fifth Edition (DTMC-5); the Beery-Buktenica Developmental Test of Visual-Motor Integration—Fifth Edition (VMI); the Woodcock-Johnson Tests of Cognitive Ability—Third Edition (WJ-III COG); the Wide Range Assessment for Memory and Learning—Second Edition (WRAML-2); the Woodcock-Johnson Tests of Academic Achievement—Third Edition (WJ-III ACH); the Behavior Assessment System for Children—Second Edition (BASC-2) (Parent Rating); and the Behavior Assessment System for Children—Second Edition (BASC-2) (Self Rating) (Dist. Ex. 7 at pp. 1, 4-25). According to the psychologist, the student participated in 3 to 3.5 hours of

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<sup>7</sup> The psychologist identified the evaluation report date as February 11, 2008 (Dist. Ex. 7 at p. 1).

testing per day on two consecutive days with no more than one 5-minute to 10-minute break per hour (Tr. pp. 359-60; see Dist. Ex. 7 at pp. 1, 3).<sup>8</sup>

To measure the student's attentional control, the psychologist administered the CPT-II (Dist. Ex. 7 at pp. 4-5). The psychologist noted that the student "experienced difficulty" with the test (id. at p. 5). The psychologist interpreted the CPT-II results as being "indicative of attention difficulties" and noted that the student's "profile matche[d] a clinical population of children with Attention Deficit Disorder" (ADD) (id.). However, the psychologist cautioned against viewing the student's performance in "isolation" and further noted that the results would be "integrated into the final results" of the report (id.).

Assessing the student's general intellectual abilities, an administration of the WISC-IV yielded the following standard scores: full-scale IQ, 100 (average range); verbal comprehension index, 96 (average range); perceptual reasoning index, 110 (high average range); working memory index, 97 (average range); and processing speed index, 94 (average range) (Dist. Ex. 7 at pp. 5-6, 8). With respect to the selected subtests used to generate the index scores, the student's performance fell primarily in the average to high average range (id. at pp. 6-8). However, on the vocabulary subtest and the symbol search subtest, the student's performance fell within the low average range (id.). The psychologist characterized the student's performance on the vocabulary subtest as an area of relative weakness and her overall perceptual reasoning skills as an area of relative strength (id. at p. 8). Interpreting the results of the WISC-IV, the psychologist indicated that the student demonstrated average verbal cognitive abilities and high average nonverbal cognitive abilities when compared to the student's same-age peers (id. at pp. 8, 25). The psychologist reported that the student's working memory index—which measured the ability to maintain attention, concentration, and exert mental control—was within the average range (id. at pp. 8-9, 25-26). Although the psychologist reported that the student's processing speed index—which measured the ability to process simple or routine visual material—fell within the average range when compared to her same-age peers, the psychologist characterized the student's ability to process visual material "quickly" as "an area of weakness relative to [the student's] nonverbal reasoning ability" (id.). The psychologist opined that a "relative weakness in the speed of processing routine information may make the task of comprehending novel information more time-consuming and difficult" for the student (id. at pp. 9, 25-26).

The psychologist administered the PPVT-IV and the EVT-II to further assess the student's vocabulary skills, which had been identified as an area of weakness in the WISC-IV results (Dist. Ex. 7 at pp. 9-10). The PPVT-IV measured the student's "receptive (comprehension) vocabulary" and also provided "insight" into her verbal reasoning skills, while the EVT-I measured the student's "expressive (speaking) vocabulary" (id.). The psychologist noted that the student's PPVT-IV score (low average range) and EVT-I score (average range) were both consistent with the WISC-IV results (id. at pp. 9-10). The psychologist indicated that a "weakness in vocabulary development" could affect the student's "academic performance particularly in reading comprehension" (id. at p. 26).

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<sup>8</sup> For the purpose of interpreting the student's reported standard scores, the psychologist provided the following guideline: "[s]cores below 69 reflect deficient skills; 70 to 79 borderline skills; 80 to 89 low average skills; 90 to 109 average skills; 110 to 119 high average skills; 120 to 129 superior skills; and 130 and higher very superior skills" (Dist. Ex. 7 at p. 4).

An administration of the CTOPP to measure the student's phonological processing and related skills yielded the following standard scores: phonological awareness composite, 106 (average range); phonological memory composite, 82 (low average range); and rapid naming composite, 79 (borderline range) (Dist. Ex. 7 at pp. 10-11). With respect to the selected subtests used to generate the composite scores, the student's performance varied from the borderline range (memory for digits, rapid letter naming) to the high average range (elision) (id. at p. 11). Overall, the psychologist characterized the student's phonological memory skills and rapid naming skills as areas of relative weakness, affecting her decoding skills and her ability to rapidly access verbal information in long-term memory (id. at p. 12). She also concluded that the student's "weakness in phonemic memory" supported an "identified weakness in rote auditory memory" and further, that the student's difficulty with rapid retrieval would "significantly impact[] her academic fluency" and result in a "level of frustration" (id. at p. 26). The psychologist noted that the student's performance improved "significantly" when she was provided with a word bank or multiple choice questions (id.). In addition, the student's performance improved within the memory domain when "auditory and visual information" was presented within a contextual framework (id.).

To assess the student's visual spatial awareness, the psychologist administered the DTVP-5, which yielded a standard score of 92 (average range) (Dist. Ex. 7 at p. 12). The psychologist noted that the student's "lack of attention to visual details and impulsivity" affected her performance and that she required "prompting to work slowly and attend to visual details" (id. at pp. 12, 26). To assess the student's graphomotor coordination, the psychologist administered the DTMC-5, which yielded a standard score of 97 (average range) (id. at p. 13). The psychologist noted, again, that the student required "prompting to work slowly and carefully" (id.). On the VMI, which measured visual-motor integrations skills, the student earned a standard score of 82 (low average range) (id.). The psychologist indicated that a "weakness in visual motor integration skills" would affect the student's ability to "copy information from the board," "record notes efficiently," and write efficiently (id. at pp. 13, 26).

An administration of the WRAML-2 yielded the following standard scores: verbal memory index, 102 (average range); visual memory index, 91 (average range); and attention and concentration index, 82 (low average range) (Dist. Ex. 7 at pp. 14-15). On selected subtests used to generate the index scores, the student performed primarily within the average range, with the exception of her performance on the design memory subtest, the finger windows subtest, and the number/letter subtest, which all fell within the low average range (id.). Interpreting these scores, the psychologist characterized the student's attention and concentration index score as an area of relative weakness (id. at pp. 15-16).

As an additional measure of the student's cognitive abilities, the psychologist administered the WJ-III COG, which yielded the following standard scores: verbal ability scale, 94 (average range); auditory processing, 102 (average range); long-term retrieval scale, 94 (average range); and processing speed, 89 (low average range) (Dist. Ex. 7 at pp. 16-19). With respect to the nine subtests used to generate the scale scores, the student performed within the average range on all of the subtests, with the exception of the rapid picture naming subtest, which fell within the borderline range (id. at pp. 17-18). Based upon these results, the

psychologist opined that the student experienced "difficulty with the integration of visual and auditory stimuli in memory" (id. at p. 19).

Turning to the student's academic skills, the psychologist administered the WJ-III ACH to measure the student's academic achievement in reading (reading decoding, reading speed, and reading comprehension), mathematics (problem solving, automaticity, and reasoning), written language (spelling of single-word responses, quality of expression, and fluency of production), and academic fluency (reading fluency, mathematics fluency, and writing fluency) (Dist. Ex. 7 at pp. 19-23). The WJ-III ACH yielded the following cluster standard scores: broad reading, 92 (average range); broad mathematics, 97 (average range); broad written language, 106 (average range); and academic fluency, 88 (low average range) (id.). The administration of the WJ-III ACH included nine subtests (id. at pp. 19-21). The student's performance fell primarily within the average range, with the exception of her performance on the reading fluency subtest (low average range) and the mathematics fluency subtest (borderline range) (id.). Overall, the psychologist reported that the student's reading skills (decoding skills and reading comprehension), mathematics skills (including arithmetic computations and applied problems), and written language skills all fell within the average range when compared to her same-age peers (id. at pp. 22-23). She also noted, however, that student displayed weaknesses in both reading fluency and mathematics fluency (id. at p. 22). The psychologist indicated that due to the student's fluency weaknesses, she would require more time to complete class work, homework assignments, and tests (id. at p. 27). She also indicated that the student experienced greater difficulty in mathematics with the increased language demands of this task, and that the student experienced difficulty with the "automaticity of basic math facts and rapid retrieval" (id.). With respect to writing, the student displayed "creativity when provided time to develop her thoughts," and she benefited from "visual prompts for structure" during the writing fluency subtest (id.). The psychologist further concluded that the student's "identified processing delays impact[ed] her academic achievement," and thus, the student met the diagnostic criteria for a learning disorder—not otherwise specified (NOS) (id.).

To assess the student's behavioral/social/emotional functioning, the psychologist administered the BASC-2 to the student and to both of the parents (Dist. Ex. 7 at pp. 1, 23-25, 30). The psychologist noted that the student demonstrated the "ability to initiate and maintain appropriate peer relationships," that she felt "confident in her social relationships," and that she reported a "positive self-concept outside of academic challenges" (id. at pp. 24-25). However, the student endorsed "feelings of low self-esteem and sadness" related to her academic difficulties (id. at p. 25). The psychologist further noted that the student "often" responded "without considering the consequences of her behavior" due to a "high level of impulsivity" and that she "may demonstrate poor self-control" (id.). After the event, however, the student would provide "more appropriate responses" (id.). The psychologist indicated that although the student could easily lose her temper, "this pattern of responding [was] more evident in the home environment and [did] not manifest within the school environment" (id.).

According to the psychologist, the parents' rating scales reflected "attention problems and hyperactivity," which further affected the student's academic performance (Dist. Ex. 7 at p. 25). The parents reported that the student was "often easily distracted," she had a "short attention span," she failed to give "close attention to details," and she often avoided tasks that required

"sustained mental effort" (id.). The psychologist further indicated that the parents expressed concern about the student's "social judgment due to a high level of impulsivity" (id.). Based upon the "current standardized testing, observations, and rating scales," the psychologist concluded that the student met the diagnostic criteria for an attention deficit hyperactivity disorder—combined type (ADHD) (id.). She also noted that the student's "processing delays" compounded her attentional difficulties and that the student experienced "greater difficulty attending when presented academic tasks highly dependent on processing delays" (id.).

Finally, the psychologist summarized her diagnostic impressions, conclusions, and recommendations based upon the student's test results (Dist. Ex. 7 at pp. 25-29). In addition to reiterating much of the information noted above, the psychologist also noted that the student's ability to work within time constraints became compromised when her "cognitive weaknesses" encountered tasks "highly dependent on [her] processing weaknesses (attention vigilance, processing speed, and rapid retrieval)" (id. at p. 27). The psychologist indicated that the student's "[d]ifficulty sustaining focused attention, organizational difficulties, and heightened levels of distractibility and impulsivity" further affected her academic performance (id.). Moreover, the psychologist noted that the student's difficulty with "sustained attention, maintaining attention over an extended period of time, and with selective attention, focusing on relevant information while ignoring irrelevant information" became "particularly relevant when [the student was] faced with material to learn and remember that she [found] less meaningful to her" (id.). Based upon her findings and conclusions, the psychologist opined that the student would benefit from specific accommodations and recommended the following academic strategies to address the student's identified areas of need: to sensitize all teachers regarding the student's learning style in order to make the appropriate accommodations; extended time (50 percent) for all exams and standardized testing to accommodate her diagnosis of a learning disorder—NOS; preferential seating to maximize her attention; use of a computer or laptop for writing assignments to assist with the student's visual-motor integration skills; to accommodate the student's difficulty working under time constraints, provide additional time to complete written assignments and modification of assignments should be considered; due to difficulties identified in attentional vigilance, testing sessions should be conducted in a quiet environment with minimal distractions; due to identified weaknesses in retrieval, provide a word bank for tests whenever deemed appropriate by school personnel; due to identified weaknesses in visual-motor integration skills, provide the student with a copy of notes from a peer or teacher during oral lectures; and as reading demands increased, the student may benefit from books on tape to maximize her retention of information (id. at p. 28).

To enhance the student's rapid recall, the psychologist recommended the following strategies: intensive review, repetition, and "over learning" at each step; frequent opportunities for practice and review; systematic review within a few hours of learning and the review of previous information; and use of mnemonic aids or strategies for retention (i.e., verbal rehearsal, verbal mediation) (Dist. Ex. 7 at p. 28). To assist with planning and organization, the psychologist recommended the following: the student should "stop and plan before starting a task;" guiding the student in stating the goals of each assignment; teaching the student to underline, circle, place asterisks, or highlight important ideas while reading; dividing tasks into parts or stages and estimate the amount of time needed for each task; and teaching the student how to schedule appropriate breaks during longer assignments (id. at p. 29). To assist with the

student's selective attention or saliency, the psychologist recommended the following: keeping the student's work area free of unnecessary materials; minimizing the student's distractions at home and at school; and encouraging the student to use her underlining and highlighting skills while reading (id.). The psychologist also included recommendations for the student to implement to enhance her rapid recall, as well as strategies for the parents to use at home to improve the student's planning and organization (id. at pp. 28-29; see Tr. pp. 353-54).

On March 11, 2008, the parents privately obtained a speech-language evaluation of the student due to "concerns regarding her academic difficulties" (Dist. Ex. 8 at p. 1; see Tr. p. 388). At that time, the parents reported that the student "demonstrated increasing difficulty with curricular materials," noting that while the student had "excellent" decoding skills, she experienced difficulty and frustration with "processing and comprehension of materials read" (Dist. Ex. 8 at p. 1). Upon observation, the student "maintained appropriate eye contact," and if she encountered difficulty understanding the subtest directions, the student asked for clarification and then "followed the directions well" (id.). The speech-language pathologist assessed the student's auditory skills, oral mechanism, phonation, fluency, and articulation, which were all judged to be within normal limits (id. at pp. 1-2).

The speech-language pathologist assessed the student's language skills through the administration of the Comprehensive Assessment of Spoken Language (CASL), and she assessed the student's vocabulary skills through the administration of the Receptive One-Word Picture Vocabulary Test (ROWPVT) and the Expressive One-Word Picture Vocabulary Test (EOWPVT) (Dist. Ex. 8 at pp. 1, 4-6).<sup>9</sup> Results of the CASL indicated that the student's scores fell within the average range of functioning in the following subtest areas: antonyms (ability to identify words opposite in meaning), syntax construction (ability to generate sentences using morphosyntactic rules), nonliteral language (ability to comprehend spoken utterances when the literal meaning was not conveyed in the message), and sentence completion (assessed the student's word retrieval, knowledge, and expression within a linguistic context) (id. at pp. 2, 4). Results of the ROWPVT and EOWPVT indicated that the student's receptive and expressive vocabulary skills fell within the "very low range" (id. at pp. 2-3, 5-6). Based upon the evaluation results, the speech-language pathologist recommended the initiation of speech-language therapy services to address the student's "receptive language (processing difficulties) as well as her overall vocabulary and memory delays" (id. at p. 3).<sup>10</sup> She recommended three 45-minute sessions per week of speech-language therapy services in a 3:1 setting to improve the student's language and academic needs in the following areas: receptive and expressive vocabulary skills, inferencing skills, comprehension of idiomatic language, and long-term memory storage and retrieval skills (id.).

On March 25, 2008, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop her IEP for the 2008-09 school year (Dist. Ex. 4 at p. 1). The following individuals attended the CSE meeting: a district school psychologist (who also

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<sup>9</sup> The speech-language pathologist administered the CASL, the ROWPVT, and the EOWPVT in one afternoon session after the student finished school (Dist. Ex. 8 at p. 1)

<sup>10</sup> The speech-language pathologist noted that although the student had never received speech-language therapy services, she had previously received articulation therapy as a toddler (Dist. Ex. 8 at p. 1).

acted as the district representative); a regular education teacher; an additional parent member; the student's then-current special education teacher from the nonpublic school via telephone; the nonpublic school's director of special education via telephone; and the student's mother (*id.* at p. 2; *see* Tr. pp. 61, 104-05). The CSE reviewed the student's privately obtained speech-language evaluation report and privately obtained psychoeducational evaluation report, as well as the annual goals and short-term objectives, and the transition plan and associated goals (Dist. Exs. 7-8; *see* Tr. pp. 61-62).<sup>11</sup> After reviewing the information presented, the CSE recommended placing the student in a 13:1 CTT class with related services of one 45-minute session per week of 1:1 speech-language therapy and one 45-minute session per week of 1:1 counseling (Dist. Ex. 4 at pp. 1-2, 14).<sup>12</sup>

In April 2008, P'TACH offered an acceptance to the student for the 2008-09 school year (Tr. pp. 251, 257-58, 288-89). P'TACH's educational director testified that although P'TACH received the student's application in December 2007 or January 2008, P'TACH could not offer an acceptance to the student until April 2008 because they needed to make sure that "all" of the student's records had been received and to ensure that P'TACH had an "appropriate class" for the student (Tr. p. 289). On May 21, 2008, the parents paid a deposit to P'TACH for the 2008-09 school year (Parent Exs. M; N; *see* Tr. pp. 292-93, 402). By Final Notice of Recommendation (FNR) dated June 19, 2008, the district identified a specific site location for the student's 2008-09 school year (Dist. Ex. 6; *see* Tr. p. 394).<sup>13</sup> On August 1, 2008, the parents executed an enrollment contract for the student to attend P'TACH for the 2008-09 school year (Parent Ex. M).

By amended due process complaint notice, dated April 13, 2009, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 school year (IHO Ex. I at pp. 1-2). The parents alleged that the student's 2008-09 IEP was procedurally and substantively defective in the following respects: the district failed to identify a site location on the student's IEP; the district's recommended 13:1 CTT classroom with related services failed to offer the student sufficient support and instruction to meet her individual educational needs; the district recommended a CTT classroom with an improper and impermissible 13:1 student-to-teacher ratio; the district recommended a site location without parental input and outside the IEP development process, depriving the parents of full and meaningful participation at the CSE meeting; the district failed to offer the student any special education transportation; the district failed to sufficiently evaluate the student and impermissibly relied upon teacher reports that predated the IEP and informal assessments/ observations; the

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<sup>11</sup> The parents provided the CSE with copies of both the privately obtained psychoeducational evaluation report and privately obtained speech-language evaluation report prior to and at the CSE meeting held on March 25, 2008 (Tr. pp. 388-89).

<sup>12</sup> This CSE meeting occurred prior to the July 1, 2008 effective date of the newly adopted regulation pertaining to integrated co-teaching services (or CTT classes), which limited the maximum number of special education students in such a setting to no more than 12 students (8 NYCRR 200.6[g][1]; *see* <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>13</sup> The site location of the CTT classroom recommended for the student's 2008-09 school year was not the same site location of the CTT classroom recommended for the student's 2007-08 school year that was previously rejected by the parents (Tr. pp. 395-97; *see* Tr. p. 385; Dist. Ex. 6).

district failed to rely upon the student's most recent evaluations and thus, could not develop an IEP that was reasonably calculated to enable the student to make meaningful educational growth; the IEP failed to contain the student's present levels of behavioral support; the management needs on the IEP failed to sufficiently meet the student's actual needs; the IEP failed to indicate that the student had vision difficulties (i.e., wears eyeglasses); the district failed to consider the parents' request to place the student at P'TACH and provide written notice of the reason for rejecting this placement; the district failed to meaningfully consider the recommendations in the privately obtained evaluations and from the student's then-current educational providers; the district impermissibly predetermined the student's special education programs and services and failed to consider the student's unique needs; the IEP contained vague, insufficient, and inappropriate annual goals and objectives that were not measureable; the IEP failed to identify a method for measuring the student's progress toward her annual goals and objectives; the annual goals and objectives would not propel the student toward meaningful educational growth; the IEP failed to contain a statement of the student's needs, strengths, preferences, and interests in the present levels of performance related to the student's transition to post-school endeavors; the IEP contained a vague, inaccurate, and insufficient transition plan that did not consider the student's preferences and interests; the IEP contained vague and inappropriate transition goals that were not objectively measureable or based upon age-appropriate transition assessments; the IEP failed to contain a transition plan or sufficient supports and services to assist the student's transfer from her current educational setting to the district; the IEP failed to offer sufficient related services and supports (i.e., speech-language therapy services); the IEP failed to offer parent counseling or training; the district altered the student's promotional criteria from modified to standard without explanation; and the IEP was not tailored to meet the student's individual educational needs (id. at pp. 1-4).<sup>14</sup>

As a proposed remedy, the parents sought reimbursement for the costs of the student's tuition at P'TACH for the 2008-09 school year, reimbursement for the costs of counseling services, and reimbursement for the costs associated with transporting the student to P'TACH (IHO Ex. I at p. 5). The parents also requested that the district provide RSAs for the student's speech-language therapy services and counseling services (id.).

The parties proceeded to impartial hearing, which began on April 20, 2009, and concluded on October 15, 2009, after five days of testimony (Tr. pp. 1, 22, 157, 323, 419). Both parties presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 1-437; Dist. Exs. 1; 3-12; Parent Exs. C-F; I-O; R; T; V-X; Z-AA; IHO Ex. I). In his decision dated February 2, 2010, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2008-09 school year, the parents sustained their burden to establish the appropriateness of the student's unilateral placement at P'TACH, and thus, he ordered the district to reimburse the parents for the costs of the student's tuition at P'TACH for the 2008-09 school year and for transportation costs associated with the student's attendance at P'TACH (IHO Decision at pp. 9-16). The impartial hearing officer concluded that the district failed to offer the student a FAPE because the IEP did not contain any information about the student's "attentional issues, distractibility issues, or symptoms of ADHD or ADD;" the recommended academic management needs in the IEP were not "yoked to attentional concerns;" the IEP did not contain

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<sup>14</sup> The parents' initial due process complaint notice, dated November 24, 2008, alleged similar procedural and substantive violations (compare Dist. Ex. 1 at pp. 2-3, with IHO Ex. I at pp. 1-4).

all of the recommended accommodations contained in the private psychoeducational evaluation report; the IEP did not contain any information about the student's processing issues; the IEP did not recommend the same frequency of speech-language therapy as recommended in the private speech-language evaluation report; the proposed CTT classroom was too large for the student; the student required a small classroom; and the CSE failed to have an "open mind" in developing the student's IEP by failing to "incorporate virtually all the suggestions from the [privately obtained evaluation reports] notwithstanding the lack of contrary documentation" (id. at pp. 9-12).

With respect to the appropriateness of the parents' unilateral placement at P'TACH, the impartial hearing officer concluded that the program offered small classes required by the student to address her attentional and academic issues; although the P'TACH program did not provide speech-language therapy services, the program incorporated "work on vocabulary and memory;" the P'TACH program allowed contact with the student's nondisabled peers; and the student's class at P'TACH contained students who functioned at "about the same functioning level" as the student (IHO Decision at pp. 12-14). Finally, the impartial hearing officer determined that the parents met their obligations with respect to equitable considerations, and thus, he directed the district to reimburse the parents for the student's tuition costs at P'TACH for the 2008-09 school year and to reimburse the parents for the costs of transportation (id. at pp. 14-16).

On appeal, the district contends that the impartial hearing officer erred in his determination that the district failed to offer the student a FAPE for the 2008-09 school year. In particular, the district asserts that the 2008-09 IEP developed by the CSE fulfilled the district's substantive obligations to develop an IEP that was likely to produce progress and not regression, and that the 2008-09 IEP was reasonably calculated to enable the student to receive meaningful education benefits in the least restrictive environment (LRE), thus, the district offered the student a FAPE in the LRE. The district alleges that the impartial hearing officer's finding that the student's academic management needs were not "yoked" to the student's attentional issues does not constitute a proper basis upon which to conclude that the district failed to offer the student a FAPE. In addition, the district asserts that the CSE adequately considered the privately obtained evaluations and that any deviations from the recommendations contained within the private evaluations were properly based upon considerations of the student's individual needs and did not constitute a denial of a FAPE. The district also contends that the impartial hearing officer's concerns about the size of the recommended CTT classroom is without merit, as the hearing record indicates that the CTT class was further broken down into smaller groups for instructional purposes and that the students were grouped according to their individual functional levels and needs. With regard to the appropriateness of the parents' unilateral placement at P'TACH, the district argues that the parents failed to sustain their burden to establish that the P'TACH program and the private transportation were specifically designed to meet the student's unique special education needs. In addition, the district contends that even assuming *arguendo* that the parents sustained their burden, the parents are not entitled as a matter of law to reimbursement for 100 percent of the costs of the P'TACH program because approximately 27 percent of the school week is comprised of religious instruction. Finally, the district argues that the impartial hearing officer erred in awarding reimbursement for the costs of "Dinner and Scrip fees" paid by the parents to P'TACH, as such items are not reimbursable as a matter of law. The district seeks to

annul the impartial hearing officer's decision in its entirety, or in the alternative, to reduce the tuition reimbursement award commensurate with the religious instruction provided and to annul the impartial hearing officer's reimbursement award for transportation, dinner, and scrip fees.

In their answer, the parents contend that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE, the parents sustained their burden to establish the appropriateness of the parents' unilateral placement at P'TACH, the parents were entitled to reimbursement for transportation costs, the reimbursement for tuition costs should not be reduced due to religious instruction or for dinner and scrip fees, and equitable considerations do not bar reimbursement in this matter. The parents seek to uphold the impartial hearing officer's decision in its entirety and to dismiss the district's petition.

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]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A student's recommended program must 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, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any

potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal

No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

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).

In this case, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2008-09 school year because the IEP did not contain any information about the student's "attentional issues, distractibility issues, or symptoms of ADHD or ADD;" the recommended academic management needs in the IEP were not "yoked to attentional concerns;" the IEP did not contain all of the recommended accommodations contained in the private psychoeducational evaluation report; the IEP did not contain any information about the student's processing issues; the IEP did not recommend the same frequency of speech-language therapy as recommended in the private speech-language evaluation report; the proposed CTT classroom was too large for the student; the student required a small classroom; and the CSE failed to have an "open mind" in developing the student's IEP by failing to "incorporate virtually all the suggestions from the [privately obtained evaluation reports] notwithstanding the lack of contrary documentation" (IHO Decision at pp. 9-12). Upon independent review and due consideration of the entire hearing record, however, the weight of the evidence does not support the impartial hearing officer's conclusions, but rather, the evidence supports a determination that the district offered the student a FAPE in the LRE. As detailed below, the evidence demonstrates that the district developed the student's 2008-09 IEP based upon the information available to the CSE at that time, which included the student's privately obtained psychoeducational evaluation report and privately obtained speech-language evaluation report, as well as information obtained from the student's then-current teachers and her parents. In addition, the evidence also demonstrates that the CSE properly concluded that the student's academic, social/emotional, and speech-language needs could be appropriately met in the recommended CTT classroom with the provision of speech-language therapy and counseling as related services.

With regard to the district's proposed IEP and placement for the 2008-09 school year, the student's present levels of academic achievement indicated that the student presented with early seventh grade to early eighth grade skill levels in the areas of reading, writing, and mathematics (Dist. Ex. 4 at p. 3). The IEP indicated that the student had satisfactory phonological awareness and decoding skills, as well as adequate reading comprehension skills (id.). In addition, the IEP indicated that the student engaged in the writing activities and followed capitalization and punctuation rules; however, she did not edit her written work and lacked grade level knowledge related to grammar and spelling (id.). With regard to mathematics, the present levels of performance indicated that the student could solve two step algebraic questions; however, she did not always remember the rules and applications of sign integers (id.). Regarding the student's language skills, the IEP noted that although the student exhibited age-appropriate informal conversational exchanges, she presented with receptive and expressive language delays (id.). With regard to social/emotional development, the IEP reflected that although the student exhibited a weak self-concept, she was described as happy, well-liked, respectful, compliant, and capable of leadership (Dist. Ex. 4 at p. 4). The student's social/emotional management needs were identified in the IEP as counseling individually for 30 minutes per week (id.). In the area of health and physical development, the IEP indicated that the student was a healthy child (id. at p. 5).

To address the student's delays involving attention and processing speed, the CSE recommended she be provided with additional time for student responses; instructions "broken down;" and questions clarified, repeated and rephrased, which was consistent with the private psychologist's recommendations (Tr. pp. 65, 68, 73-75; compare Dist. Ex. 4 at pp. 3, 14, with Dist. Ex. 7 at pp. 28-29).<sup>15</sup> Based upon the student's attention difficulties and distractibility and as noted in the IEP, the CSE also recommended testing accommodations for the student including a separate location, extended time, directions read and reread, and questions read and reread (except during reading tests), which would have been provided at the recommended site location (Tr. pp. 81-83, 85-86, 90, 188; Dist. Ex. 4 at p. 14).<sup>16</sup>

The IEP also contained 9 annual goals and 40 corresponding short-term objectives to address the student's identified needs in the areas of mathematics, reading, writing, self-esteem, and problem-solving skills, as well as receptive, expressive, and pragmatic language skills (Dist. Ex. 4 at pp. 6-11). The hearing record shows that, consistent with the description of the student's present levels of performance, the annual goals and short-term objectives addressed solving algebraic equations involving addition, subtraction, multiplication, and division, as well as solving equations involving signed numbers (id. at p. 6). Additionally, the annual goals and short-term objectives addressed the student's ability to draw conclusions, respond to questions, and identify characters in a passage read, editing of written work, solving mathematical multistep word problems, strengthening of self concept, problem solving, and developing receptive, expressive, and pragmatic language skills (id. at pp. 7-11). In addition, the assistant principal (AP) of the recommended site location testified that the student's annual goals could be revised as needed to address the student's needs and level of progress (Tr. p. 196).

At the impartial hearing, the district's school psychologist testified that all CSE members had an opportunity to participate and all of the concerns of the CSE participants were addressed during the one hour meeting (Tr. pp. 60-61, 104, 115-16, 389-90).<sup>17</sup> As part of her responsibilities at the CSE meeting, the school psychologist testified that she presented the results of the privately obtained psychoeducational evaluation report and privately obtained speech-language evaluation report; she listened to "all of the professionals who participated and

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<sup>15</sup> A CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student. For such purposes, a CSE may rely upon a private evaluation in lieu of conducting its own evaluation (Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87; Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

<sup>16</sup> The private psychologist testified that extended time would be an "optimal recommendation to meet [the student's] deficit in terms of the processing speed weaknesses" (Tr. p. 367).

<sup>17</sup> At the impartial hearing, the student's mother testified that she participated in the CSE meeting throughout the entire length of the CSE meeting (Tr. p. 389).

who presented information" about the student; she "maintained focus for the participants;" and she ensured that any and all concerns raised at the meeting were addressed (Tr. p. 60).<sup>18, 19</sup> In particular, she testified that the CSE addressed all of the concerns that were raised by the CSE members related to the student's attention, processing speed, and self-esteem issues (Tr. pp. 121-22). She also testified that the student's mother, the student's nonpublic school special education teacher, and the nonpublic school's director participated throughout the entire CSE meeting (Tr. pp. 104-05, 389-90). In particular, the school psychologist testified that the two nonpublic school participants at the CSE meeting listened to the CSE's discussions and offered opinions during the meeting (*id.*). The school psychologist further testified that the CSE relied upon the information contained in the two private evaluation reports to develop the student's present levels of performance (Tr. p. 120). The student's mother acknowledged in her testimony at the impartial hearing that the CSE discussed the present levels of performance in the IEP, and further, that the CSE added information to the IEP "as needed" at the meeting (Tr. pp. 391-92).

With respect to the annual goals and short-term objectives in the IEP, the school psychologist testified that the regular education teacher and the student's nonpublic school special education teacher—who both attended the CSE meeting—developed the goals and short-term objectives (Tr. pp. 115-16, 118-19; *see* Dist. Ex. 7 at p. 2). The school psychologist further testified that the CSE reviewed and discussed in detail each annual goal and modified the goals as needed (Tr. pp. 115-16, 118-19, 151-52).<sup>20</sup> During the CSE meeting, all of the participants had the opportunity to express either agreement or disagreement as to the proposed goals and objectives (Tr. p. 116).

The CSE also recommended counseling as a related service on the student's 2008-09 IEP to address the student's low self-esteem as identified in the private psychoeducational report (Tr. pp. 70-71, 93; Dist. Ex. 7). Although the student's mother testified that the nonpublic school CSE participants stated at the CSE meeting that the student required more than one session of counseling per week, the district's school psychologist testified that the nonpublic school CSE participants agreed that once weekly 45-minute session was adequate for the student and would have been beneficial, given the student's self-esteem concerns (Tr. pp. 141-42, 186, 393). To address the student's delays in vocabulary, expressive language, and receptive language identified in the private evaluation report, the CSE incorporated annual goals and short-term objectives to meet the student's needs (Tr. pp. 70-71, 79-80, 96-98; Dist. Exs. 4 at p. 10; 7; 8 at

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<sup>18</sup> The school psychologist testified that at CSE meetings, it was generally her practice to ask parents who provided private evaluation reports to the CSE whether the parents wanted her to go over the evaluation reports and if they had any questions about the information contained in the private evaluation reports (Tr. p. 116). In this case, the school psychologist followed her general practice and based upon her recollection, she testified that the parents "probably" had responded that they had already been informed of the results of the evaluation (*id.*; *see* Tr. pp. 132-33). Although the parents were not directly questioned about conversations with the evaluating psychologist regarding the test results, the parents' testimony indicates that they spoke to the evaluating psychologist "after the testing" and that the evaluating psychologist told them about the student's vocabulary deficits (Tr. p. 388; *see* Tr. pp. 356, 358-59). In addition, the parents' testimony further indicates that they also knew about the student's "word retrieval issues" and "processing issues" (Tr. p. 388).

<sup>19</sup> The student's mother testified at the impartial hearing that the CSE "glazed over" the two private evaluation reports in "one minute" (Tr. p. 390).

<sup>20</sup> The student's mother disputed that the CSE discussed the annual goals and short-term objectives (Tr. p. 392).

pp. 2-3). The school psychologist testified that the CSE recommended speech-language therapy on an individual basis, as opposed to in a small group, for the student in order to address her individual needs in a more efficient manner (Tr. pp. 98-99). The school psychologist stated that the student's transition goals were sufficient to address her needs and were also made flexible to allow the student's counselor to modify the transition goals as the student's needs changed (Tr. pp. 100-01).<sup>21</sup> According to the school psychologist, the nonpublic school participants at the CSE did not request additional or different services than those proposed by the CSE (Tr. pp. 121-22, 137-38).

To address the student's special education needs and implement the annual goals and short-term objectives, the CSE recommended placing the student in a CTT class (Dist. Ex. 4).<sup>22</sup> The IEP reflected that the CSE also considered placing the student in a regular education classroom with related services, but rejected this option due to the student's language and academic delays, which needed to be addressed by a special education teacher (*id.* at p. 13). The school psychologist stated that the CSE considered a special class placement for the student that offered a smaller class size, but the CSE rejected a smaller class in a special class placement because the students within a special class were far lower functioning than the student in question (Tr. p. 134). The school psychologist also stated that the student did not need a smaller class size because she had approximately grade level academic skills (Tr. pp. 65-66). In addition, the school psychologist testified that the student had the capability to navigate a CTT program in a district school setting and that the CTT program offered additional support to the student in her areas of need by providing both a special education teacher and a regular education teacher (Tr. pp. 66, 70-71, 78, 103). Moreover, based upon the results of the private psychoeducational evaluation, the student's average cognitive abilities did not warrant placement in a more restrictive environment, such as a special class (Tr. pp. 70-71, 78).

Notwithstanding the parents' claim that the student required a small class to meet her individual needs, the hearing record reveals that such evidence was not before the March 2008 CSE and therefore, was not a relevant factor in developing a program for the student at that time (*J.A. v. East Ramapo Cent. Sch. Dist.*, 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]). Here, the psychologist who performed the student's private evaluation testified at the impartial hearing that a "smaller class size environment" constituted the "most important" accommodation in order for this student to learn (Tr. p. 343). Yet despite the professed importance of this accommodation, the evaluating psychologist did not include it in her 30-page evaluation report, which was available to the March 2008 CSE (*see* Dist. Ex. 7). As noted above, the March 2008 CSE developed an individualized program for the student based on information that was before it at the time of the meeting (*see North Colonie*, 586 F. Supp. 2d at 84 citing *J.R. v. Bd. of Educ. of City of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]) [holding that a determination of whether an IEP is reasonably calculated to enable a student to receive educational benefits is a necessarily prospective approach and courts must refrain from engaging in "Monday morning quarterbacking"]. Accordingly, retrospective information should not be considered because it

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<sup>21</sup> The student's mother disputed that the CSE discussed the transition plan or goals (Tr. p. 394).

<sup>22</sup> The student's mother testified that both she and the nonpublic school participants at the CSE meeting voiced concerns about the size of the recommended CTT class; however, the hearing record does not provide any evidence regarding the basis for their objections to the proposed class size (Tr. pp. 392-93).

has no bearing on whether the IEP was reasonably calculated to benefit the student at the time that it was developed (Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]); but see D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 (2d Cir. 2005) [noting that there may be value in distinguishing between IDEA claims that dispute the validity of a proposed IEP, on one hand, and suits that question whether an existing IEP should have been modified in light of changed circumstances, new information or proof of failure]; see also Application of the Bd. of Educ., Appeal No. 06-017 [finding a denial of a FAPE, where the district failed to timely revise a student's IEP, given the change in the student's educational needs]). Additionally, as to the parents' preference for the small class size available at P'TACH, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (Application of a Student with a Disability, Appeal No. 08-043; see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at \*8 [S.D.N.Y. 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054).

With respect to the recommended CTT classroom, the AP testified that the proposed ninth grade CTT class consisted of 12 special education students and 18 general education students, who ranged in age between 14 and 16 years old (Tr. pp. 161, 169, 195). The AP also testified that the majority of the 12 special education students in the CTT class had classifications of learning disability, in addition to three students with a speech or language impairment and one student with a hearing impairment (Tr. p. 169). Academically, the students in the CTT class exhibited delays in the areas of reading and writing, and the students' reading abilities ranged between a fourth grade level and a seventh grade level (Tr. pp. 202, 215-217). Socially and emotionally, the students in the recommended CTT class demonstrated needs related to self-esteem and low frustration tolerance (Tr. pp. 217-18).

According to the AP, the CTT class offered instruction from both a special education teacher and regular education teacher (Tr. p. 170). The AP conducted formal training of all of the CTT teachers every one to two weeks (Tr. p. 200). In addition, the district's school psychologist testified that the special education and regular education teachers of the ninth grade CTT class engaged in "co-team preparation," in which lesson plans and activities were developed based on the needs of the students (Tr. pp. 114-15). The ninth grade CTT class followed the New York State learning standards and had access to the general education curriculum, and further, the recommended site location offered related services of counseling, speech-language therapy, physical therapy, "hearing services" and "paraprofessional services" and could have provided the recommended counseling and speech-language therapy services to the student (Tr. pp. 172-73, 178, 186-87; see Tr. p. 63). The AP further testified that the CTT program would have been able to address the student's transition goals (Tr. p. 195).

Had the student attended the CTT class, the student would have received instruction in English, mathematics, science, and social studies in the CTT class (Tr. pp. 176-86). In addition, the CTT classes offered a "remedial learning" instructional program during core academic courses for the special education students (Tr. pp. 170-72). The special education teacher in the CTT class was responsible for providing the special education students with support and "management" and to "deal with the differences" (Tr. p. 170).

Within the CTT classroom, the teachers differentiated instruction by implementation of different strategies and presentation methods (Tr. p. 178). Specifically, the CTT teachers utilized visual aids, projects, group work, literacy strategies, and an instructional pace that addressed the individual needs of the students (Tr. pp. 178-79). In addition, the CTT teachers provided individual reading instruction and guided reading instruction, and the students read aloud, discussed text, and edited their work on the computer (Tr. p. 179). According to the AP, the recommended CTT class was a literacy based program, which provided additional support to special education students including the implementation of a workshop model where students learned from their classmates (Tr. pp. 177, 185-86, 221-22). The AP further testified that the CTT teachers provided differentiated instruction through the use of direct learning, hands on activities, presentations, testing accommodations, structure, and modeling (Tr. pp. 181-86). In the classroom, the CTT teachers also utilized learning stations that included small group work and assignment of responsibilities to each student to complete a particular task (*id.*). The AP also testified that the students in the CTT class were placed in instructional groups based on their needs in the areas of language and literacy, and that the instructional pace was modified to address the student's individual needs (Tr. pp. 187, 225-26, 235).

Noting that the student's difficulties in writing related to grammar and punctuation, the AP testified that the CTT teachers would address such deficits through the implementation of a collective editing strategy that included peer editing, work stations, teacher instruction, proofreading, and the use of technology to address grammar and spelling (Tr. pp. 189-90, 191-93, 222-23). With respect to the reading and mathematics skills, the AP testified that the student's skills were "quite strong" (Tr. pp. 179-80). To address the student's difficulties in mathematics related to sign integers, the CTT teachers implemented a workshop model, visual aids, small group work, discussion and individual teacher instruction (Tr. pp. 193-94). To address the student's difficulties with mathematics word problems, the CTT teachers implemented literacy instruction, vocabulary instruction, and peer tutoring (Tr. p. 194). The CTT class also provided behavioral support to students with attention difficulties based on individual student needs, and the CTT program offered an advisory class to provide support related to social skills, behavior, a positive attitude, and access to school resources (Tr. pp. 171, 234-35).

In addition to the foregoing, the recommended site location of the CTT class offered after-school tutoring on an individual and small group basis, as well as a weekly instructional program on Saturdays wherein students had an opportunity to gain credit for a failed class, receive support related to Regents examinations, or receive academic tutoring (Tr. p. 230). A community tutoring program also existed to provide additional support for the students (Tr. pp. 230-31).

In conclusion, the hearing record shows that the proposed special education program offered to the student for the 2008-09 school year was appropriate to address the student's needs. The 2008-09 IEP accurately reflected the student's needs in the areas of academics; receptive, expressive, and pragmatic language; attention; and self-concept, as identified in the private psychoeducational evaluation and private speech-language evaluation. Given the student's cognitive and academic abilities, the CSE properly recommended a CTT placement with related

services of speech-language therapy and counseling, and the hearing record demonstrates that the recommended program and services would have offered appropriate support for the student in accordance with her average to high average cognitive abilities, average academic abilities, delays in receptive and expressive language abilities, as well as her self-esteem and attention difficulties.

Based on the above, the hearing record demonstrates that the district's recommended program for the 2008-09 school year offered the student a FAPE because it offered an individualized educational program designed to meet the unique needs of the student and was reasonably calculated to confer educational benefits in the LRE. Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether P'TACH was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 10-026; Application of a Student with Disability, Appeal No. 08-158; Application of the Dept. of Educ., Appeal No. 08-095; Application of a Child with a Disability, Appeal No. 05-038).

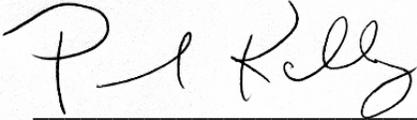
I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that he determined that the district failed to offer the student a FAPE for the 2008-09 school year; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision is annulled to the extent that he directed the district to reimburse the parents for the costs of the student's tuition at P'TACH for the 2008-09 school year and for transportation costs associated with the student's attendance at P'TACH for the 2008-09 school year.

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

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