



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-018

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

Advocates for Children of New York, Inc., attorneys for respondent, Kimberly Madden, 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 the student and ordered it to pay for respondent's (the parent) daughter's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2007-08 school year. The parent cross-appeals from the impartial hearing officer's determination to the extent that the impartial hearing officer determined that the parent bore the burden of proving that the district failed to offer the student a free appropriate public education (FAPE). The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Cooke (Tr. pp. 17-18). The Commissioner of Education has not approved Cooke 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 services and classification as a student with a learning disability (LD) are not in dispute in this appeal (Tr. pp. 13, 15, 17; see 34 C.F.R. § 308[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record indicates that the student exhibits a severe phonological disorder and social, emotional and academic delays (Tr. pp. 111, 157; Parent Ex. R. at p. 21). As measured by standardized testing, the student's general cognitive ability falls in the borderline range of intellectual functioning (Parent Ex. R at p. 7). Academically, she demonstrates delays in decoding

and reading comprehension, as well as basic math skills (Parent Exs. P; R at p. 6). The student also exhibits moderate to severe receptive and expressive language delays (Parent Exs. N at p. 4; R at p. 21). With regard to motor development, the student demonstrates weaknesses in motor planning and delays in her self-help and fine motor skills, as well as delays in her visual motor skills and upper limb speed and dexterity (Parent Ex. R at p. 32). The hearing record also reveals that the student appears depressed and experiences anxiety related to school (Parent Exs. N at p. 4; R at pp. 9-10). An evaluation conducted in 2006 offered the following diagnoses: depressive disorder not otherwise specified (NOS), mixed receptive/expressive language disorder (moderate to severe), phonological disorder (severe), developmental coordination disorder, and borderline intellectual functioning (Parent Ex. R at p. 4).

The student attended a private school for kindergarten and first grade (Tr. p. 109; Parent Ex. R at p. 27). In May 2005, the parent sought an evaluation from the Kennedy Child Study Center (Kennedy Center) due to her concerns regarding the student's academic performance, as well as the student's difficulty focusing and retaining new information, test anxiety and fears related to attending school (Parent Ex. R at p. 6). The evaluation, which took place over a ten-month period, was conducted by a multidisciplinary team and included a psychological evaluation, a psychiatric evaluation, a speech-language evaluation, an educational evaluation, an occupational therapy (OT) evaluation and a pediatric report (Parent Ex. R). Administration of the Wechsler Preschool and Primary Scale of Intelligence - Third Edition (WPPSI-III) yielded the following standard (and percentile) scores: verbal IQ 70 (2nd percentile), performance IQ 75 (5th percentile) and full scale IQ 73 (4th percentile), placing the student's general cognitive ability in the borderline range of intellectual functioning (id. at p. 7). Completion of the Child Behavior Checklist (CBCL) by the parent resulted in scores in the clinical range on the anxious/depressed, somatic complaints, thought problems, and attention problems syndromes (id. at p. 9). The score on the social problems syndrome was in the borderline clinical range (id.). On the DSM-oriented scales, the parent's scores for the student on the affective problems, anxiety problems and somatic problems scales were in the clinical range, while the score on the attention deficit/hyperactivity problems scale was in the borderline clinical range (id. at pp. 9-10). The student's academic functioning was assessed using the Woodcock-Johnson III - Tests of Achievement (WJ III ACH) and the Developmental Test of Visual-Motor Integration (VMI) (id. at p. 22). The evaluating psychologist reported that the student's academic skills were age-appropriate (id. at p. 23). According to the psychologist, the student's math calculation skills were advanced; however, her applied math skills were mildly delayed, as were her oral language skills (id. at pp. 23-24). The student's speech and language skills were assessed using the Test of Language Development-Primary-Third Edition (TOLD-P:3), and subtests from the Test of Auditory-Perceptual Skills-Revised (TAPS-R) (id. at p. 18). According to the evaluating therapist, the student exhibited a severe phonological disorder, as well as moderate to severe receptive and expressive language delays (id. at p. 21). The therapist reported that the student demonstrated strengths with cooperation and listening skills, auditory number memory, word knowledge and use, and early interactive pragmatic behaviors (id.). The therapist identified weaknesses with the student's attention and distractibility, oral/motor/speech mobility and coordination, phonology and speech intelligibility, auditory word memory and processing skills, semantics and syntax (id. at pp. 3, 21). Results of an occupational therapy evaluation performed at the Kennedy Center revealed weaknesses in the student's motor planning and delays in her self-help and fine motor skills (id. at p. 32). Administration of the Bruininks-Oseretsky Test of Fine Motor Proficiency revealed delays in the student's visual motor skills and

upper limb speed and dexterity (id.). A mental status examination was conducted by a Kennedy Center psychiatrist who concluded that the student had a learning disorder, which had been worsened by what appeared to be depression, sadness, decreased sleep and appetite (id. at p. 17).

The Kennedy Center evaluators offered the following diagnoses: depressive disorder NOS, mixed receptive/expressive language disorder (moderate to severe), phonological disorder (severe), developmental coordination disorder, and borderline intellectual functioning (Parent Ex. R at p. 4). Among other things, the evaluation team recommended that the student be placed in a small structured classroom setting geared for children with communication disorders and learning difficulties, school counseling, speech-language therapy three times weekly in a group of two, and OT twice weekly (id.). The evaluators opined that the student should not be placed with children who have behavioral difficulties (id.).

The student repeated first grade at the private school, where she reportedly received remedial math and reading and attended an after-school program five days per week (Dist. Ex. 9 at p. 1; Parent Ex. R at pp. 16, 30). At the end of the student's repetition of first grade, the private school principal indicated that the student could not return the following year and told the parent that she needed to have her daughter evaluated (Tr. p. 110; Parent Ex. Q).

On or about May 17, 2006, the parent requested that the district evaluate her daughter (Tr. p. 110; Parent Ex. Q). In her request, the parent indicated that her daughter did not focus well and forgets very easily (Parent Ex. Q). She noted that the student had been left back, had very low self-esteem and that the private school would not allow her daughter to return in September (id.). The parent provided the district with a copy of the evaluation from the Kennedy Center (Tr. p. 110).

According to the parent, the district informed her that it would contact her within 30 days (id.). However, the parent testified that the district did not contact her until November 2006 (Tr. p. 111).<sup>1</sup> For the 2006-07 school year, the parent unilaterally placed her daughter in Cooke (Parent Ex. L at p. 3).

On October 31, 2006, the district conducted an educational evaluation of the student (Parent Ex. N). The student's May 2005 performance on WPPSI-III was recounted (id. at pp. 2-3).<sup>2</sup> Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) by the district's psychologist yielded the following subtest standard scores: word reading 85, listening comprehension 77, pseudoword decoding 74, spelling 94, numerical operations 88, math reasoning 45, listening comprehension 75, and oral expression 90 (id. at p. 3). The evaluating psychologist reported that the student was functioning below grade level relative to her ability to identify/decode and pronounce words correctly (id.). With regard to mathematical skills, the psychologist reported

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<sup>1</sup> Although the parent testified that the district did not contact her until November 2006, the hearing record indicates that the student was evaluated by the district on October 31, 2006 (Dist. Ex. 6 at p. 1).

<sup>2</sup> In its October 31, 2006 educational evaluation, the district alternately references the student's scores on the WISC-III and the WISC-IV when referring to the cognitive testing conducted in May 2005 (Parent Ex. N at p. 2). A review of the Kennedy Center evaluation indicates that the student's cognitive skills were assessed using the WPPSI-III (compare Parent Ex. N at p. 2, with Parent Ex. R at p. 7).

that the student was able to calculate the "right most" digits of a multi-digit addition or subtraction operation but she could not complete the operation (id. at p. 4). The student did not demonstrate automaticity with regard to math facts (id.). According to the psychologist, the student had difficulty solving simple verbal math problems (id.). In addition, she was performing below grade level relative to her ability to correctly write/spell words presented orally (id.). The psychologist noted that the student's receptive vocabulary, expressive vocabulary and sentence comprehension were weak (id.). He reported that projective data suggested the student had low self-esteem and that her mother reported that she seemed sad and depressed about going to school and showed major anxiety before taking school tests (id.).

On November 13, 2006, the district's Committee on Special Education (CSE) met for an initial review of the student (Parent Ex. M at p. 2). The resultant individualized education program (IEP) indicated that the student was below grade level in all academics and that she suffered from test anxiety and some degree of school phobia (id. at pp. 3-4). The November 2006 IEP stated that the student wore glasses for distance and her hearing was within normal limits (id. at p. 5). The November 2006 IEP also contained goals and objectives related to spelling, automaticity of math facts, and developing self-confidence related to academics (id. at pp. 6-8). The November 2006 CSE recommended that the student be classified as having a learning disability and placed in a 12:1+1 special class with related services of individual speech-language therapy one time per week, speech-language therapy two times per week in a dyad, individual OT two times per week and counseling one time per week in a dyad (id. at p. 11). Recommended testing accommodations included extended time (2x), separate location, questions read and re-read aloud except when measuring reading comprehension, and directions read and re-read (id.). The IEP indicated that the student would be mainstreamed for music, art and physical education (id. at p. 9). The hearing record indicates that a placement was not available for the student for the 2006-07 school year, therefore, the parent enrolled the student in Cooke (Tr. p. 112; Parent Ex. K at p. 1). The student's placement at Cooke was funded by the district for the 2006-07 school year by order of an impartial hearing officer (Parent Ex. L).

A March 2007 program review from Cooke indicated that the student was able to decode simple "c-v-c words," but she looked for teacher assistance with larger and more complex words (Parent Ex. P at p. 5). The student was learning to include details in her writing to better articulate her thoughts and was able to do so when provided with frequent teacher prompts (id.). With regard to math, the review indicated that the student was beginning to put together accurate number sentences without teacher assistance and was able to demonstrate understanding of the concepts of "one half" and "left" and "right" (id. at p. 6). With regard to speech and language, the Cooke review noted that the student continued to increase her vocabulary through categorical and descriptive language tasks, but that she struggled with word retrieval of the newly acquired words (id. at p. 7). The student required intermittent verbal prompting to attend to peer comments and/or grammatical forms in ongoing structured conversational speech (id.). She was able to tie her shoelaces independently utilizing adapted laces (id. at p. 9). According to the review, the student continued to write slower than expected for her age level which was secondary to visual perception, visual motor and fine motor coordination delays (id.). With regard to personal growth, the Cooke review indicated that there had been an increase in the student's confidence level with respect to verbalization and overall pro-social behaviors (id. at p. 10). The student's counselor indicated that as the student continued to get to know her peers and develop friendships, her initiation of

conversation increased slightly (*id.*). As of the March 2007 review, the student had mastered two objectives on her Cooke multidisciplinary service plan, the first relating to identifying the direction of the forces "push" and "pull" relative to herself, and the second related to throwing a ball (*id.* at p. 27).

On May 14, 2007, the district's CSE reconvened for the student's annual review (Parent Ex. J). Participants included the parent; the district representative, who was also a school psychologist; a CSE special education teacher; a school social worker; the student's special education teacher from Cooke; a site supervisor from Cooke; and an additional parent member (Tr. pp. 113, 146-48; Parent Ex. J at p. 2). The CSE conference summary indicated that the student had made "many improvements" in all academic areas (Parent Ex. K). The student was reportedly using word attack strategies and was working more independently (*id.*). According to the conference summary, she required some prompting to stay focused on classroom activities and benefited from prompting and support from teachers and teacher assistants (*id.*). The IEP generated by the May 2007 CSE indicated that the student had been learning decoding strategies to use while reading and that she was working on making predictions before reading a story (Parent Ex. J at p. 3). The May 2007 IEP further indicated that the student was having difficulty expressing her ideas in writing and that it was important for her to practice writing simple sentences (*id.*). She was able to recognize numbers 1-100 and was beginning to put together accurate number sentences without teacher assistance (*id.*). According to the May 2007 IEP, the student's doubts about being able to reach her goals resulted in high levels of anxiety which could negatively impact her functioning; however, the episodes had become much less frequent (*id.* at p. 4). Academic management needs included repetition, manipulatives for math, teacher prompts, visual cues and preferential seating (*id.* at p. 3). Social/emotional management needs included a visual schedule, modeling of appropriate behavior and verbal and visual prompting (*id.* at p. 4). The May 2007 IEP included goals and objectives related to developing social interaction skills; developing information and understanding, and literacy response and expression skills; developing number concepts, measurement, problem solving and analysis skills; developing fine motor and visual perceptual skills; and developing expressive language skills (*id.* at pp. 6-8).

The May 2007 CSE recommended that the student continue to be classified as having a learning disability and be placed in a 12:1+1 special class in a community school (Parent Ex. J at p. 1). Related service recommendations included individual speech-language therapy one time per week, speech-language therapy two times per week in a dyad, individual OT two times per week, and counseling one time per week in a dyad (*id.* at p. 11). Recommended testing accommodations included extended-double time, small group, separate location, questions read and re-read aloud except when measuring reading comprehension, and directions read, re-read and rephrased (*id.*). Conference summary notes indicated that the parent was concerned that the district offer a school that had a program available, as the program recommended for the previous school year had not been available (Parent Ex. K). The hearing record shows that the parent agreed with the recommendation for a 12:1+1 special class (Tr. p. 131).

A Final Notice of Recommendation (FNR), dated June 25, 2007, indicated that the student was recommended for placement in a 12:1+1 class at one of the district's schools (Dist. Ex. 5). The FNR identified the specific school by name (*id.*). The parent testified that she did not receive the document (Tr. pp. 116-17, 132-33). On June 26, 2007, the parent signed a contract enrolling

her daughter in Cooke for the 2007-08 school year (Parent Ex. V at pp. 1-2). The contract indicated in relevant part, that the parent would be released from the contract should she choose to accept a school placement recommended by the district or a New York State approved school, provided that Cooke was notified in writing of her daughter's withdrawal on or before September 30, 2007 (id. at p. 2).

The parent indicated that the district left a message for her by phone in August 2007 with an offer of placement for the student (Tr. pp. 114-15). The parent testified that she attempted to reach the district contact person whose name had been indicated in the message, but that the contact person was on vacation (id.). The parent testified that she left messages for the district's contact person (Tr. p. 115). The parent testified that the district's contact person returned her call and faxed her the recommended school placement on or about August 16, 2007 (Tr. pp. 115-16, 133-35; Parent Ex. G).

The parent sent two letters to the district's CSE dated August 20, 2007 (Dist. Ex. 15). In the first letter, she indicated that she received a call from the district claiming that a placement offer had been made for her daughter at a district school (id.). The parent stated that although she had never received a letter regarding placement, she called the recommended school to set up a time to visit but that there were no classes in session until September (Tr. pp. 117-18, 150-51; Dist. Ex. 15).

In her first letter dated August 20, 2007, the parent further indicated that she could not make a decision about the placement until she could view the classroom to determine whether the placement was appropriate for her daughter (Dist. Ex. 15). She posed numerous questions regarding the number of children in the class as well as their ages, gender and level of academic functioning; the disabilities of the other children in the classroom and their behavioral needs; whether the recommended school could provide the student with her related services on site; what mainstreaming opportunities were available; and the number of students in the school, their grade levels and the location of the proposed class in the school (id.).

The second letter dated August 20, 2007 was written by the parent's attorney to the district (Parent Ex. B). The letter stated that the district failed to offer the student an appropriate program for the 2007-08 school year and provided notice that the parent was unilaterally placing her daughter at Cooke and would seek tuition payment for the unilateral placement (id.). The letter also requested roundtrip transportation to and from the private school placement (id.).

In contrast to the August 20, 2007 letter from counsel, on or about August 24, 2007, the parent registered her daughter at the district's recommended school for the 2007-08 school year (Tr. p. 37). On or about September 4, 2007 (Tr. p. 37) the student attended the first day of school at the district's school (Tr. pp. 51-52, 121). The parent reported that there was no teacher assistant in the classroom, that the other students were much bigger than her daughter and that the student arrived home in tears because she did not understand the math lesson (Tr. pp. 122-23). The parent further indicated that she called Cooke and was advised that since the student was upset, the parent should return her daughter to Cooke (Tr. pp. 138, 142). According to the parent, Cooke's classes began on or about September 8, 2007 (Tr. pp. 144-45). The parent did not contact the district to discuss her concerns with the recommended district placement (Tr. p. 138). The district made

several attempts to contact the parent to verify the student's withdrawal and was eventually able to do so (Tr. pp. 25-26, 51-52, 139).<sup>3</sup>

By due process complaint notice dated September 4, 2007, the parent requested an impartial hearing (Parent Ex. A). The parent's due process complaint notice alleged that the district failed to make an official offer of placement for the student, although the parent received a phone call regarding a potential placement at one of the district's schools (*id.*). The parent further maintained that despite the district's failure to provide a written FNR, she visited the recommended placement and allowed her daughter to attend the first day of school (*id.*). In her due process complaint notice, the parent described the class as "unruly, chaotic, and rang[ing] widely in both age and academic levels" (*id.*). The parent's due process complaint notice characterized the student as "traumatized" by her experience in the district's class (*id.*). The due process complaint notice stated that the parent had unilaterally placed her daughter at Cooke for the 2007-08 school year and sought payment of the student's tuition at Cooke, as well as roundtrip transportation (*id.* at p. 2).

In response to the parent's due process complaint notice, the district indicated that an FNR was issued to the parent on June 25, 2007, in which a placement was offered (Dist. Ex. 2 at p. 3). The district asserted that the placement was reasonably calculated to enable the student to obtain meaningful educational benefit (*id.*). Additionally, the district indicated that based on the class profile, the student would be functionally grouped within the class and would fall within the mandated 36-month age range (*id.*).

An impartial hearing convened on November 26, 2007 and concluded on January 10, 2008, after two days of testimony. By decision dated February 1, 2008, the impartial hearing officer concluded that the parent met her burden of persuasion that the district did not offer the student a FAPE for the 2007-08 school year (IHO Decision at p. 11). Specifically, the impartial hearing officer found that the district failed to offer the student a placement in a timely manner, because there was no evidence that the June 25, 2007 FNR was actually mailed to the parent, who the impartial hearing officer opined credibly testified that she did not receive it (*id.* at p. 12). With respect to the parent's allegations that the student was denied a FAPE on procedural and substantive grounds, the impartial hearing officer first found that the May 2007 CSE was not validly composed because a regular education teacher was absent from the meeting, and the student's special education teacher from Cooke was only present for part of the meeting (*id.* at pp. 11-12). Lastly, the impartial hearing officer determined that the district's proposed placement was not appropriate to meet the student's educational needs (*id.*). Regarding the proposed placement, she found that the age range of the students in the classroom was in excess of the mandated 36-month age range, and that this "technical defect" would have caused problems for the student in light of the student's social and emotional delays (*id.* at p. 12). Moreover, the impartial hearing officer noted that it would be inappropriate for the student to be placed in a classroom where some of the older students exhibited disruptive behavior, given her demonstrated shyness and anxiety (*id.*). In addition, the impartial hearing officer found that the teacher of the recommended 12:1+1 classroom was not certified as a special education teacher and that he lacked experience teaching self-contained

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<sup>3</sup> The hearing record is unclear as to when the district learned that the parent had withdrawn the student from its school.

classrooms (*id.*). With respect to the student's placement at Cooke, the impartial hearing officer concluded that the parent established that it was appropriate to meet her daughter's educational needs (*id.* at pp. 12-13). Finally, the impartial hearing officer determined that equitable considerations weighed in the parent's favor, and accordingly, she ordered the district to pay for the student's placement at Cooke for the 2007-08 school year (*id.* at p. 13).

This appeal ensued. The district appeals the impartial hearing officer's decision to the extent that she determined that the recommended May 2007 IEP denied the student a FAPE. Specifically, the district contends that the impartial hearing officer erred in finding that it failed to offer the student a placement in a timely manner. The district further alleges that the impartial hearing officer erred by considering the issue of CSE composition because it was not raised in the parent's due process complaint notice. Assuming *arguendo* that the issue of CSE composition was properly raised by the parties, the district further maintains that a regular education teacher was not required to attend the May 2007 IEP meeting because everyone at the CSE meeting, including the parent, agreed that the student should be placed in a 12:1+1 classroom. With respect to the proposed placement, the district argues that it was appropriate to meet the student's special education needs and that she would have been functionally grouped with other students. Moreover, the district maintains that the impartial hearing officer erred in finding that the classroom teacher was not properly certified. Although the impartial hearing officer also determined that the proposed placement was inappropriate for the student because some students in the classroom exhibited behavioral problems, the district claims that this factor should not have rendered the proposed placement inappropriate as the teacher was able to control the behavior of the students. Lastly, the district contends that equitable considerations weigh against the parent's claim for tuition reimbursement.

The parent submitted an answer denying the district's claims and cross-appealed the impartial hearing officer's decision to the extent that she placed the burden of persuasion on the parent to establish that a FAPE was not offered to the student.<sup>4</sup>

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see *Schaffer v. Weast*, 546 U.S. 49, 51 [2005]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 [1982]; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs,

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<sup>4</sup> I note that the parent also contends in her memorandum of law that an adverse inference should be drawn against the district because of the district's alleged failure to fully comply with signed subpoenas for documents. The district asserts in its answer to the cross-appeal that the parent is precluded from raising this issue because it was improperly raised in her memorandum of law. The parent failed to include this argument in her answer or cross-appeal. Section 279.4(a) of the State regulations provides, in pertinent part: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner." Inasmuch as this contention was not addressed in the answer, but was referenced only in the parent's memorandum of law, I will not consider it.



provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>5</sup>

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20

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<sup>5</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

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 Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

At the outset, I will address the parent's contention that the impartial hearing officer erred to the extent that she determined that the parent bore the burden of persuasion as the party challenging the student's IEP. An impartial hearing is commenced with the presentation of a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education [FAPE] to such child" (Vultaggio v. Bd. Of Educ., 343 F.3d 598, 600 [2d Cir. 2003]; see Application of a Child with a Disability, Appeal No. 07-136; Application of a Student with a Disability, Appeal No. 08-015). On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof 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. Here, the parent's due process complaint notice was dated September 4, 2007, well before the burden of proof shifted to the district. Under the circumstances presented herein, the impartial hearing commenced prior to the effective date of the amended law. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parent.

Next, the district's contention that the impartial hearing officer erred by finding that the proposed placement was not offered in a timely fashion will be addressed. As detailed below, I concur with the district's argument.

In the present case, although the student's FNR recommending placement is dated June 25, 2007, the parent testified that she did not receive any written notice of a recommended placement until August 2007 when she received it by facsimile (Tr. pp. 114-15; Dist. Ex. 5). She further indicated that she never received anything in the mail (Tr. p. 117). Regardless of whether the FNR was properly mailed to the parent, the hearing record amply demonstrates that the district afforded the parent adequate notice of the recommended placement. The parent testified that in August 2007 she received a facsimile notice identifying a recommended placement (Tr. p. 116; Dist. Ex. 6; see Dist. Ex. 5; Parent Ex. G). Significantly, the parent also enrolled her daughter in the district's recommended placement prior to the commencement of the school year, and she appeared at the school with her daughter on the first day of school (Tr. pp. 79-80, 121-22, 135; see Cerra, 427 F.3d at 194-95 ["school districts must only ensure that a child's IEP is in effect by the beginning of the school year and that the parents are provided a copy"]; see also 34 C.F.R. § 300.323[a]; 8 NYCRR

200.4[e][1][ii]). Accordingly, even if the FNR was not properly mailed, the parent failed to establish that the district's alleged failure to do so impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (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]).

Next, I will consider the district's contention that the CSE that met to develop the student's May 2007 IEP was validly composed despite the fact that a regular education teacher did not participate in the meeting. The district argues that the issue of CSE composition was not properly raised below and therefore should not have been considered by the impartial hearing officer, nor should it be considered on appeal. Under the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]; 8 NYCRR 200.5[i][7][i][a]). State regulations provide that an impartial hearing officer may grant permission for a party to amend a due process complaint notice, except that such permission may only be granted no later than five days before an impartial hearing commences (8 NYCRR 200.5[i][7][i][b]).

A review of the hearing record indicates that the lack of a regular education teacher at the May 2007 CSE meeting was not raised in the parent's due process complaint notice and was not raised by the parent's counsel until her closing argument at the hearing (Tr. p. 211; Dist. Ex. 1). The district's counsel objected to the issue of CSE composition being raised at the hearing as it was not raised in the parent's due process complaint notice (Tr. p. 204). Here, by permitting counsel for the parent to raise the issue of CSE composition in her closing argument, the impartial hearing officer erred in failing to confine the scope of the impartial hearing to the issues raised in the due process complaint notice (Tr. p. 211).<sup>6</sup> Therefore, I decline to consider this issue. However, I note that regardless of whether a regular education teacher attended the May 2007 meeting, the parent has not demonstrated that the lack of a regular education teacher impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (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]).

The district further argues that the impartial hearing officer erred in finding that the parent's opportunity to participate in the development of her daughter's IEP was significantly infringed upon because the student's special education teacher attended only part of the May 2007 meeting. I concur with the district's argument. In New York State, a CSE meeting must include the parent of the student, at least one regular education teacher of the student (if the student is, or may be participating in the regular education environment), at least one special education teacher of the student or, if appropriate, at least one special education provider of the student, a school psychologist, an additional parent of a student with a disability residing in the district, a

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<sup>6</sup> I note that the parent testified that a regular education teacher from the district attended the May 2007 CSE meeting; however, the student's IEP does not indicate this, and in its petition, the district does not dispute that a regular education teacher was not present at the May 2007 IEP meeting (Tr. pp. 113, 146-47; Dist. Ex. 3 at p. 2).

representative of the school district who is qualified to provide or supervise the provision of special education, and an individual who can interpret the instructional implications of evaluation results, and persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]). In the instant case, the hearing record reveals that a special education teacher from the district and from Cooke attended the May 2007 CSE meeting (Tr. p. 131; Parent Ex. J at p. 2). Although the student's special education teacher from Cooke was present for 15-20 minutes of the May 2007 CSE meeting, the parent testified that during the time that the teacher was present for the meeting, he had input in the student's IEP (Tr. p. 148). The hearing record is not sufficiently developed to demonstrate that the special education teacher's early departure from the May 2007 CSE impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (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]).

Next to be addressed is the district's argument that the impartial hearing officer erred in determining that the placement proposed by the district was not appropriate. For the reasons expressed herein, I find that the hearing record does not support the impartial hearing officer's determination.

The district contends that the impartial hearing officer erred in finding that the district's 12:1+1 classroom did not group the student appropriately with other classmates. As set forth in greater detail below, I concur with the district's argument. Although the student was not grouped in accordance with the age-related guidelines as prescribed by State regulations, the hearing record demonstrates that the district's failure to do so did not constitute a denial of a FAPE to the student. State regulations require that the chronological age range among the students within special classes of students with disabilities who are less than 16 years of age is limited to 36 months (8 NYCRR 200.6[g][5]). A review of the class profile, developed in October 2007, indicates that the students in the proposed class ranged in age from eight to eleven years old with approximately 42 months separating the youngest student from the oldest (Tr. pp. 52-54; Dist. Ex. 7). The birth date of the youngest student was July 8, 1999, while the birth date of the oldest student was January 22, 1996 (Tr. p. 54). The student's birth date was in between these two dates (Dist. Ex. 1 at p. 1). There is no record of the district requesting an age range variance from the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) (8 NYCRR 200.6[h][6]). While the impartial hearing officer concluded that grouping the student in excess of the age-related guidelines constituted a technical defect to the student's program, failure to do so is not always fatal to the district's claim that a FAPE was offered to the student if the students are grouped appropriately in terms of functional needs (Application of the Bd. Of Educ., Appeal No. 06-023; Application of the Bd. of Educ., Appeal No. 06-010).

State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], 200.6[g][2]; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of a Child with a Disability, Appeal No. 07-068). The regulations do not preclude a grouping of students in a

classroom when the range of achievement levels in reading and math would exceed three years (see 8 NYCRR 200.6[g][7]; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073). Here, the class profile indicates that the students in the recommended class had instructional levels for reading that ranged from 1.6 to 4.5 and instructional levels for math that ranged from 0.5 to 4.5 (Dist. Ex. 7). According to the student's May 2007 IEP and a June 2007 review of the student's multidisciplinary plan by Cooke, the student's reading skills ranged from the kindergarten to first grade level, while her math skills were at a first grade level (Tr. p. 73; Dist. Ex. 3 at p. 3; Parent Ex. P at pp. 2, 6). The teacher of the proposed class confirmed that the student would be the lowest level reader in the class (Tr. pp. 73-74).

Despite the impartial hearing officer's conclusion that the proposed grouping was in excess of the mandated age-related guidelines, a review of the district's special education teacher's testimony shows that the students in the proposed placement were functionally grouped for instruction (Tr. p. 55). According to the special education teacher, two of the students were mainstreamed for math, while the other four students were taught at an early fourth grade level with the teacher differentiating instruction for one the students (Tr. pp. 56-57). With regard to reading, the teacher reported that there were roughly three ability levels (Tr. p. 57). He stated that one day he would do a general lesson for all of the students, but then he would break down instruction and group students based on their needs such as decoding or answering inferential questions (*id.*). The teacher testified that he also monitored students to insure they were working at their reading level, took running records and assessed them for decoding and comprehension (Tr. pp. 57-58). The teacher also testified that he provided Wilson instruction in his classroom (Tr. pp. 71-72).<sup>7</sup> He confirmed that the student would have been on the lowest reading level in his classroom; however, he added that there were some students in the classroom who were later first grade readers to early second grade readers (Tr. pp. 73-74). The teacher testified that based on the student's decoding issues, the Wilson Program would have been appropriate for her (Tr. p. 65). He stated that the student fit in with many of the students in his classroom in terms of her goals, specifically those related to making predictions and inferences (*id.*). With regard to mathematics, the teacher opined that the student would have been paired with another third grade girl for whom he currently provided differentiated instruction (*id.*). He opined that the student and the other third grade girl were a "natural pairing" and that they were probably on the same level in math (Tr. p. 82). Although the other girl was a stronger reader than the student in the instant case, the pairing would have been good for mentoring (Tr. pp. 82, 87). Given the aforementioned set of circumstances, the hearing record shows that the teacher for the proposed placement would have functionally grouped the student according to her special education needs and abilities. Accordingly, the parent did not establish how the student's grouping would have resulted in a denial of a FAPE.

As a penultimate matter, I will address the district's argument that the impartial hearing officer erred in concluding that the behavior of some of the students in the recommended classroom rendered the proposed placement inappropriate. As set forth herein, the hearing record fails to demonstrate that the parent established how the behavior of the other students in the classroom would have resulted in a denial of a FAPE to her daughter. Although there were two students in

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<sup>7</sup> The district's special education teacher described the Wilson Program as a "decoding program" (Tr. p. 63).

the proposed classroom who at times exhibited behavioral difficulties, the hearing record does not demonstrate that the focus of the classroom was behavior management. The educational services supervisor from Cooke reported that the student was delayed in her social skills and needed a tremendous amount of support to interact with peers (Tr. p. 160). She opined that if the student were placed in a class with disruptive students, the student would emulate their behavior and withdraw from the situation (*id.*). She noted that it took Cooke staff a long time to get the student to verbally express her feelings and that being in a classroom with disruptive behaviors would cause the student to regress (*id.*). Contrary to the parent's contention that the classroom was "unruly and chaotic," the hearing record demonstrates that with the exception of two fifth grade students, the rest of the students in the recommended placement were very well-behaved (Tr. p. 75; Dist. Ex. 1 at p. 2). Regarding the two students that exhibited behavioral difficulties, the special education teacher indicated that one of the students had a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Tr. p. 76). This student demonstrated off-task behaviors and was disruptive to the class at times, but the special education teacher testified that he was able to control the student's behaviors (Tr. pp. 87-88). In addition, the special education teacher noted that as result of the Wilson instruction that he provided to the students, the student who had a diagnosis of ADHD had gained a lot of confidence and he further indicated that the student was "more settled," than he was at the beginning of the school year (Tr. p. 89). The special education teacher also stated that he had a fifth grade student in the classroom who occasionally exhibited oppositional behavior (Tr. pp. 76-77). However, he also explained that this student was mainly argumentative with him, that her behavior was not disruptive to the class and that the student paid little regard to the younger students in the classroom (Tr. p. 77). The special education teacher opined that the student in this case would have fit into his class and that he could have addressed her needs in his classroom (Tr. p. 65). He noted that on the first day of school which the student attended, the student's behavior was "fine," and the special education teacher further indicated that he thought that she would be a "fairly easy child to manage" in the classroom (Tr. p. 51). The special education teacher based this conclusion on the student's demeanor exhibited the first day of school, describing her as "well mannered [who] seemed like she had a sweet nature to her" (Tr. p. 81). He also testified that the student sat with the other third grade girl, who was also "sweet natured" and "well mannered" (Tr. p. 82). Inasmuch as the hearing record does not indicate how the students' behaviors in the proposed placement would result in a denial of a FAPE to the student and that the evidence adduced at the impartial hearing showed that the special education teacher was able to control the behaviors of the two students who demonstrated behavioral difficulties, I concur with the district that the impartial hearing officer erred in finding that the behavior of the students rendered the proposed placement inappropriate.

In determining the appropriateness of the CSE's recommendation, the hearing record indicates that the district's recommended program addressed the student's primary educational needs. The teacher of the proposed class indicated that the student would have been functionally grouped for instruction and that he would have employed the Wilson reading program to address the student's reading deficits (Tr. pp. 55, 65). In addition, the student would have received speech therapy three times per week to address her speech and language needs, OT two times per week to address weaknesses in fine motor and self-help skills, and counseling one time per week to address her difficulties related to self-esteem and anxiety (Tr. pp. 96-97; Dist. Ex. 3 at pp. 1, 11). As a final point, I note that the student's mother agreed with the recommendation for a 12:1+1 special class program (Tr. p. 131).

I further note that the student's program at Cooke is very similar to the program recommended by district's CSE. At Cooke, the student was placed in a 12:1+1 class where she received speech and OT, as well as counseling (Tr. pp. 163, 175). The CSE recommended placement in a 12:1+1 class with related services of speech, OT and counseling (Dist. Ex. 3 at pp. 1, 11). With regard to grouping, although the age range of students was greater in the class recommended by the CSE (Tr. pp. 160, 170; Dist. Ex. 7), there is no information in the hearing record regarding the range of academic functioning for the private school students. The district's special education teacher and the educational services supervisor from Cooke both testified that for academics the student would be grouped according to functional levels (Tr. pp. 55-57, 154, 171).

Lastly, I will consider the district's argument that the hearing record demonstrates that the district's special education teacher was properly certified. I agree. Under the IDEA, each state educational agency determines the requisite qualifications for individuals to instruct children with disabilities, including that those individuals have the content knowledge and skills to serve children with special education needs (20 U.S.C. § 1412[a][14]). Where, as here, a teacher holds a "Transitional B" certificate, such a certificate authorizes the holder to teach for a period of three years, provided that the candidate meets the necessary education, examination and employment requirements (8 NYCRR 80-5.13). The special education teacher testified that he held a "Transition B certificate," and accordingly, he was dually certified in general and special education and that the certification was valid until he completed his New York City Teaching Fellows program (Tr. p. 48). By holding a dual certificate, the special education teacher stated that he was required to spend more hours in the classroom than the regular education teaching fellows (Tr. p. 67). He also testified that he had worked during the previous year providing special education teacher support services (SETSS) (Tr. pp. 48-49). This experience afforded him familiarity with dealing with students of different abilities and ages (Tr. p. 84). Additionally, the special education teacher stated that he had completed a three-day training session in Wilson instruction as well as a follow-up training session (Tr. p. 71). He further noted that his Wilson training provided him with experience teaching students that exhibited serious issues with phonics, one of the student's noted deficits (Tr. p. 84; see Parent Ex. R). Based on the information in the hearing record, there is not an adequate basis to conclude that the teacher's relative newness to the profession demonstrated that he could not instruct the student appropriately such that a denial of a FAPE would occur (Application of the Bd. of Educ., Appeal No. 99-65).

As I find that the district offered a FAPE to the student for the 2007-08 school year, I need not address the appropriateness of the parent's placement of the student at Cooke or the equitable considerations in this case (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's determination is annulled to the extent that she determined that the district failed to offer the student a FAPE for the 2007-08 school year and awarded the parent payment of the student's tuition.

**Dated:**            **Albany, New York**  
                      **May 19, 2008**

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