



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-122

### **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

Law Offices of Deusdedi Merced, PC, attorney for respondents, Deusdedi Merced, 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 it to reimburse the parents for the amount of tuition costs they paid for the student's unilateral private placement for the 2007-08 school year.<sup>1</sup> The appeal must be sustained.

At the time of the impartial hearing, the student was attending the second grade at the private school where she had been placed by her parents (Parent Exs. F; M). The student's intellectual abilities are reportedly in the high average range, with her nonverbal skills judged as being significantly stronger than her verbal skills (Dist. Ex. 1 at p. 3). The hearing record describes the student as being "primarily at grade level in her academic subjects," but she was also noted to demonstrate a range in academic abilities from borderline to high average with significant differences between academic areas (*id.*). The student's mathematical abilities are reported to be within the average range and commensurate with her intellectual abilities, as are her oral language abilities (*id.* at p. 10). In contrast, the student is reported to demonstrate weaknesses in basic reading abilities, reading comprehension, spelling and written expression (*id.* at pp. 10-11). Although the student has not exhibited significant behavioral difficulties at home, she has demonstrated difficulties with inattention, distractibility, hyperactivity and impulsivity, consistent

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<sup>1</sup> The impartial hearing officer also directed the district to fund the remainder of the student's tuition costs upon proof of payment (IHO Decision at p. 11).

with her diagnosis of attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 8 at pp. 4, 8). The hearing record further indicates that the student tends to be easily frustrated and that she presents with borderline to significant difficulties in the areas of emotional lability, verbal aggression, anxiety and social problems (Tr. p. 200; Dist. Ex. 8 at p. 4). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this appeal (Tr. p. 85; Dist. Ex. 8 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In January 2007, while they were still residing in another state, the student's parents sought a private psychological evaluation of the student for the reported purpose of documenting the student's then-current cognitive and academic functioning and to assist with educational treatment and planning (Dist. Ex. 1 at p. 1). The assessment report indicated that the student evidenced sensory hypersensitivities and language delays at an early age and that at age two, the student began receiving occupational therapy (OT) and speech-language therapy (id.). As reported by the private psychologist, at the time of the assessment the student had recently been diagnosed as having ADHD, combined type, for which she was prescribed medication (id.).

The private psychologist noted that the student initially experienced some social difficulties in kindergarten, which improved over time (Dist. Ex. 1 at p. 2). According to the private psychologist, the student's mother reported that the student struggled with reading and decoding words (id.).<sup>2</sup> Questionnaires completed by the student's first grade teachers described her academic skills as being primarily at grade level, with math being somewhat above grade level and writing being somewhat below grade level (id.). The student's teachers commented that the student was easily frustrated, struggled with task focus, needed a high level of reassurance, and at times, seemed anxious and/or stressed and lacked self-confidence (id.). They also noted that the student was a warm and caring child who liked to help others and enjoyed socializing with peers (id.). In the home setting, the student was described as vacillating between periods of negativity and periods of seeming happy (id. at p. 2). The psychologist reported that the student did not present with significant behavioral difficulties; however, she had trouble following through on tasks/chores, tended to be loud and complained excessively (id.).

The parents' private psychologist also reported that although the student was on medication for attentional difficulties at the time of testing, the student had difficulty remaining focused on presented tasks and was often fidgety (Dist. Ex. 1 at p. 2). The private psychologist noted that the student tended to give up easily, needed instructions repeated or impulsively interrupted instructions to indicate her lack of understanding (id.). According to the private psychologist, after initial protest, the student would often attempt and successfully complete tasks (id. at p. 3). During testing, the student often had her fingers or sleeves in her mouth, which the private psychologist characterized as an anxious habit (id.).

Administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) yielded the following index standard scores: verbal comprehension, 95; perceptual reasoning, 112; working memory, 88; and processing speed, 109 (Dist. Ex. 1 at p. 8). Due to the significant difference between the student's verbal and nonverbal abilities, the private psychologist indicated that a full scale IQ score would not be considered to appropriately reflect the student's abilities and

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<sup>2</sup> As reported by the private psychologist, the student's mother indicated that the student was more proficient in Hebrew because it was more phonetic (Dist. Ex. 1 at p. 2).

was not reported (*id.* at p. 9). As reported by the private psychologist, the student's intellectual/cognitive abilities were likely in the "high average" range, with her nonverbal, visual-spatial abilities being significantly stronger than the student's verbal reasoning/comprehension abilities (*id.* at p. 3). Administration of the cognitive fluency cluster of the Woodcock-Johnson III - Test of Cognitive Abilities (WJ-III COG) yielded a standard score of 90, which the private psychologist opined was commensurate with the student's general intellectual abilities and placed the student in the average range (*id.* at p. 9). The private psychologist noted that within this cluster, the student demonstrated a weaker ability on the verbal as opposed to the nonverbal subtests (*id.*). The student's academic achievement was assessed using the Woodcock-Johnson III Test of Achievement (WJ-III ACH) (*id.* at p. 10). The student attained the following subtest standard scores, based on her grade level: letter-word identification 73; story recall, 107; understanding directions, 106; calculation, 117; math fluency, 104; spelling, 79; passage comprehension, 81; applied problems, 98; writing samples, 86; and word attack, 97 (*id.*).<sup>3</sup> The student also attained the following composite standard scores: broad reading, 82; broad math, 106; academic skills, 80; academic applications, 85; and oral language, 107 (*id.*). Using grade level norms, the private psychologist reported that the student's academic abilities ranged from the "borderline" to "high average range" (*id.* at p. 1). The student's overall mathematical abilities were judged to be in the "average" range, commensurate with her cognitive abilities (*id.*). Likewise, her oral language skills were determined to be in the "average range" (*id.*). Conversely, the private psychologist noted significant weaknesses in the student's reading and written language abilities, as well as the composites of her overall academic functioning (*id.*). The student's basic reading abilities and reading comprehension were judged to be in the "low average" range; however, the student demonstrated significantly stronger abilities on a measure which assessed her "ability to use phonics and structural analysis to 'pronounce' made-up words" (*id.*). The student was unable to complete the fluency subtests for reading and writing (*id.* at p. 11). The student exhibited spelling abilities in the "borderline" range and writing abilities in the "low average" range and her performance on the academic skills and academic applications composites were in the "low average" range (*id.*). The private psychologist concluded that the student's academic abilities in the subject area of reading, reading comprehension, spelling and written expression were significantly below expectations when compared to her estimated cognitive abilities, and that the student would likely be eligible for a classification of learning disabled based on the criteria of the state where the student was residing at the time of the evaluation (*id.*). With respect to the student's visual-motor functioning, the student's performance on the Bender Visual-Motor Gestalt II, Second Edition (Bender-Gestalt II) was in the high average range and commensurate with her estimated cognitive abilities (*id.*).<sup>4</sup> As measured by the Children's Memory Scale, the student's memory abilities ranged from the "low average" to "average" range with her visual memory abilities significantly stronger than her verbal memory and attention/concentration abilities (*id.* at p. 12). This same pattern was evident on measure of learning, with the student obtaining a significantly higher score on visual learning as compared to verbal learning (*id.*). The private psychologist concluded that the student's visual memory abilities were generally commensurate

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<sup>3</sup> The private psychologist reported scores for the WJ-III ACH using both age and grade level norms (Dist. Ex. 1 at p. 10). She opined that since the student had been exposed to first grade level material, using grade level norms was the most appropriate (*id.*). The student's grade level scores were lower than her age level scores, in some instances, by as many as 11 or 13 points (*id.*).

<sup>4</sup> The Bender-Gestalt II assesses the integration of visual-spatial perceptions and fine motor skills (Dist. Ex. 1 at p. 11).

with her estimated intellectual abilities, but that her verbal memory, verbal attention/concentration and verbal delayed recognition abilities were all significantly weaker than expected (id. at p. 13).

The student's attention/behavioral/emotional functioning was assessed using the Conners' Continuous Performance Test-II, the Achenbach Child Behavior Checklist and Teacher Report Form and the Conners' Rating Scales-Revised, Long Version (Dist. Ex. 1 at pp. 13-15). The private psychologist reported that although the student's performance on the Conners' Continuous Performance Test-II did not indicate significant attentional difficulties, questionnaires completed by the student's parents and teachers indicated that the student continued to exhibit severe difficulties with typical ADHD symptoms such as inattention, distractibility, anxiety and social problems (id. at pp. 3, 13-15). The questionnaires also indicated that the student demonstrated borderline to significant difficulties with regard to emotional lability, verbal aggression, anxiety and social problems (id. at p. 3).

Based on her evaluation, the private psychologist offered the following diagnostic impressions: ADHD, combined type; expressive language disorder (previously diagnosed); reading disorder; disorder of written expression; sensory integration disorder; and rule out generalized anxiety disorder (Dist. Ex. 1 at p. 4). Among other things, the private psychologist offered the following recommendations: (1) that the student's medication be reevaluated in light of testing results; (2) that the student be provided individual psychotherapy to address her lack of confidence, anxiety and possible depressive symptoms; (3) that the student be evaluated for a possible central auditory processing disorder (CAPD); and (4) that the student be taught compensatory strategies and provided with classroom and testing accommodations (id. at pp. 4-7).

By letter dated June 3, 2007, the student's mother indicated that the family would be moving into the district on June 19, 2007 (Tr. pp. 299-30, 303; Dist. Ex. 14).<sup>5</sup> According to the student's mother, the student had been receiving speech-language therapy and OT services in her previous district of residence and based on recent psychological testing, the student had been also recommended for counseling (Dist. Ex. 14; see Tr. pp. 60, 88). The student's mother indicated in the letter that she was enclosing the recent psychological test results and she requested that OT and speech-language services be continued "without a break" (Dist. Ex. 14). The student's mother further noted that the student had been diagnosed with ADHD, for which she was taking medication (id.).

By letter dated July 23, 2007, to the CSE chairperson, the student's mother indicated that the student would be attending a private school during the 2007-08 school year and further requested the provision of appropriate special education, related services and transportation for the student as of the first day of classes (Parent Ex. F).<sup>6</sup> The student's mother indicated that nothing in her letter was intended to waive any rights otherwise provided by law to the parents or the

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<sup>5</sup> The student's mother only addressed the letter "to whom it may concern;" however, the student's mother testified that she had sent the letter to the Committee on Special Education (CSE) (Tr. pp. 299-30; Dist. Ex. 14).

<sup>6</sup> During the impartial hearing, the parents' attorney represented that Parent Ex. F was a "3602-c" letter, which the parents were required to submit to the district, "by July of a certain date," in order for the student's related service to continue because they were considering a private school for their daughter (Tr. p. 311; Parent Ex. F). Subdivision 2 of section 3602-c of the Education Law requires boards of education, upon timely request by parents, to furnish appropriate special education programs to students with disabilities privately placed by their parents in nonpublic schools (Educ. Law § 3602-c[2]).

student, including the student's right to a free appropriate public education (FAPE) for the 2007-08 school year (id.). The letter concluded with a statement indicating that "if necessary," the parents would contact the CSE at a later date "to express any concerns regarding those rights" (id.).

On July 30, 2007, a speech-language therapist from the district conducted a speech-language evaluation of the student (see Tr. p. 61; Dist. Ex. 4). According to the evaluator, the student's mother reported that the student had previously received speech services in her former district of residence and that the student would be attending a private school (Parent Ex. 4 at p. 1). The student's mother also reported that the student had learned English and Hebrew in her previous school; that the student could read Hebrew, but could not "sound out" English words; and that the student had difficulty with sequencing and verbal organization (id.). The evaluator reported that during testing, the student displayed a great deal of movement and was continually in motion (id.). However, the evaluator also described the student as attentive to task, despite the need for refocusing (id.). The student's language skills were formally assessed using the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) (id.). The student attained the following core and index standard scores: receptive language, 105; expressive language, 87; language content, 82; language memory, 94; and total language, 87 (id. at p. 2). In addition, the evaluator reported the following subtest scaled scores: concepts and following directions, 8; word structure, 9; recalling sentences, low average (no score reported); formulated sentences, low average (no score reported); word classes receptive, 12; word classes expressive, 12; sentence structure 13; expressive vocabulary, 1 (id. at pp. 2-3). An informal language assessment conducted by the evaluator revealed that the student exhibited some scatter in her automatic language skills, that the student's "wh" processing was not impaired and she could respond to "wh" interrogatives, that the student's auditory memory for commands was intact and that she could recall and execute three step commands (id. at pp. 3-4). The evaluator further noted that the student used language for all intents and described the student's sequencing skills as very concrete (id.). The student was noted to have word retrieval difficulties, as well as difficulties with thought retrieval and organization (id. at p. 4). Additional weaknesses were noted in the student's recall and reproduction of sentence surface structure, formulation of syntactically and semantically correct sentences and referential vocabulary naming (id.). The student's strengths included her ability to execute commands containing concepts requiring and not requiring logical operations, receptive knowledge of sentence structure rules, expressive knowledge of word structure rules, perception and expression of relationships between words, wh-processing and use of language for all intents (id.). Lastly, the evaluator observed that the student presented with an extremely hoarse vocal quality (id.). She recommended that the student be provided with speech-language therapy twice per week for 30 minutes in a group of three and suggested strong consideration of decertification in one year "if any other services [were] given" (id.).

A psycho-social assessment was also conducted of the student on July 30, 2007 by a district social worker (Dist. Ex. 5). The social worker completing the assessment reported that the student would be attending second grade at a private school in September 2007 (id. at p. 1). The social worker noted that the student's mother felt that the student would benefit from the continuation of speech-language therapy and OT as related services (id.). According to the social worker, the student's mother indicated during the interview that the student needed constant reassurance, became anxious at times and lacked self-confidence (id.). The student's mother reported that despite interventions, the student was unable to read and had difficulty with written expression (id. at pp. 1-2). As reported by the social worker, the student's mother described the student as having

age appropriate behavior in school and at home (id. at p. 2). The student's mother further indicated that the student needed to move all the time (id.). The student's mother also noted that mental health problems existed on both sides of the family and expressed concern regarding her daughter's mental health (id.). The student's mother signed a letter at that time declining the participation of the additional parent member at her daughter's upcoming CSE meeting (id. at p. 3).

On August 1, 2007, an occupational therapist from the district performed an OT evaluation of the student (Dist. Ex. 7 at p. 1). The evaluation form indicated that the student would be attending a special class in a private school (id. at pp. 1-3, 6). The evaluating therapist reported that the student completed a special education first grade class with related services in the state where she had previously resided (id. at pp. 1, 3).<sup>7</sup> The student reportedly had previously received OT to address sensory processing difficulties (id. at p. 3).

The evaluator characterized the student as friendly and cooperative, but also noted that the student was very distracted by visual stimuli and needed redirection to task (Dist. Ex. 7 at p. 3). According to the evaluator, the student demonstrated functional strength, balance and postural control and appeared to be able to negotiate the school environment safely (id. at p. 4). The evaluator further noted that the student's reach, grasp and release patterns were intact (id.). As reported by the evaluator, the student displayed an age appropriate pencil grasp; however, she held the pencil very close to the tip (id.). The evaluator noted that the student copied uppercase and lowercase letters using good formation, but that she wrote the numbers one through twenty with disorganized formation and reversals (id.). The student was able to neatly copy a paragraph, but could not do so in a functional amount of time (id.). When asked to compose a paragraph, the student wrote one sentence and her handwriting was illegible (id.). In order to assess the student's sensory processing skills, the student's mother was asked to complete the Short Sensory Profile (id. at p. 5).<sup>8</sup> Based on her mother's responses, the student was judged to have overall sensory processing delays relative to tactile sensitivity, taste/smell sensitivity, under-responsive/seeks sensation, auditory filtering and visual/auditory sensitivity (id.). Specifically, the student was reported to have difficulty standing in line or close to other people and she expressed distress during grooming (id.). According to the evaluator, the student sought all kinds of movement, which interfered with daily routines, and the student also jumped from one activity to another, interfering with play (id.). The evaluator also reported that the student exhibited difficulty paying attention, and that she responded negatively to unexpected or loud noises (id.). Based on a file review, the evaluator found that the student's sensory processing difficulties appeared to interfere with the student's ability to function in the classroom (id.).

The evaluator reported that the student scored "very high" on the Beery Buktenica Developmental Test of Visual-Motor Integration (VMI) indicating strength in her visual motor skills (Dist. Ex. 7 at p. 5). The student struggled to copy from near point and she was unable to consistently distinguish left from right (id.). Administration of the Wold Sentence Copying Test revealed that the student was able to accurately copy a paragraph, but well below grade level for

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<sup>7</sup> The hearing record reflects that this statement in the OT evaluation report is inconsistent with testimony provided by the student's mother at the impartial hearing, who indicated that the student was not enrolled previously in a special education class before relocating to New York State (Tr. pp. 316-17).

<sup>8</sup> The "Sensory Profile" is described in the hearing record as a caregiver's questionnaire, which assesses the student's response to daily sensory experiences (Dist. Ex. 7 at pp. 4-5).

speed (id.). The evaluator noted that the student's writing was neat and legible with appropriate spacing between words and that the student's motor and visual perceptual skills seemed to be functional (id.). She opined that the student's speed delay appeared to be due to her difficulties focusing and attending (id.). Administration of a short ocular-motor screening revealed difficulties in the student's ability to focus on target to test pursuits, saccades or convergence/divergence (id.).<sup>9</sup> The evaluator indicated that she was unable to determine whether the student's difficulties were due to the student's limited ability to focus or ocular-motor deficits (id.). As reported by her mother, with the exception of tying her shoes, the student was independent in her self-care skills (id. at p. 6). The evaluator recommended that the student receive school-based OT twice weekly in a group of two to promote skills and enhance performance (id.). In addition, the evaluator provided recommended strategies to address the student's deficits in attention, sensory processing, pencil control/writing and ocular-motor functioning (id. at pp. 6-7).

On August 10, 2007, the district's CSE convened for the student's initial review (Dist. Ex. 8 at p. 1). Meeting participants included the student's mother, a district representative, a school psychologist, a regular education teacher and a special education teacher (id. at p. 2).<sup>10</sup> The August 2007 CSE recommended that the student be classified as having an OHI and that she attend a general education classroom and receive special education teacher support services (SETSS) five periods per week, as well as speech-language therapy twice weekly for 30 minutes in a group of three and OT twice weekly for 30 minutes in a group of two (id. at pp. 1-2, 17). The present levels of performance on the student's August 2007 individualized education program (IEP) reflected the results of the private psychological assessment provided by the student's mother, as well as testing completed by the district (Dist. Ex. 8 at pp. 3-6, 8; see Dist. Ex. 1). The August 2007 IEP also included classroom accommodations including preferential seating, use of visuals to convey sequence and time to organize thoughts and verbalizations (Dist. Ex. 8. at pp. 3, 6). In addition, the student was afforded the following testing accommodations: directions read and reread as well as questions read and reread except questions relating to reading comprehension (id. at p. 17). The August 2007 IEP also included goals and objectives related to improving recognition of sight words, improving reading comprehension, improving spelling, increasing vocabulary storage and recall skills, producing semantically and syntactically correct sentences, completing written assignments independently while keeping up with her peers and copying information from near point, i.e., her workbook and far point, i.e., the blackboard (id. at pp. 9-13).

By final notice of recommendation (FNR) dated August 20, 2007, the district identified a placement for the student in a district school, where she would receive SETSS and related services of speech-language therapy and OT (Parent Ex. H). The August 2007 FNR also provided the parents with the name of a district employee who they could contact if the parents wanted to further discuss the August 2007 CSE's recommendations or arrange for another meeting (id. at p. 1). However, the hearing record does not offer any indication whether or not the parents took advantage of the offer set forth in the August 2007 FNR. In an undated "PSF-1 Notice" attached to the August 2007 FNR, the student's mother indicated that she intended to enroll the student in a

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<sup>9</sup> The hearing record describes "test pursuits" as the ability to maintain fixation on a moving target, and "saccades," or "convergence/divergence" as the ability to shift eye movements from one target to another (Dist. Ex. 7 at p. 5).

<sup>10</sup> The same individual served as the school psychologist and district representative (Tr. p. 59).

private school (id. at p. 2).<sup>11</sup> The student's mother requested that in accordance with the student's IEP, the district provide transportation and related services to the student (id.).<sup>12</sup> The student's mother further indicated that private school services were scheduled to commence on September 6, 2007 (id.).

By letter dated September 3, 2007, in general terms and without any specific factual allegations, the parents advised the district that as a result of procedural and substantive infirmities surrounding the creation of the August 2007 IEP, they rejected the proposed program (Parent Ex. I at p. 1). The parents further indicated their intent to privately place the student for which they planned to seek tuition reimbursement from the district for the 2007-08 school year (id. at p. 2).

By due process complaint notice dated April 16, 2008, the parents alleged that in light of procedural and substantive infirmities surrounding the development of the August 2007 IEP, the district had failed to offer the student a FAPE (Parent Ex. J). The parents contended, among other things, that the August 2007 CSE developed the student's IEP without having first obtained appropriate evaluative data on the student, including a structured classroom observation and a functional behavioral assessment [FBA]<sup>13</sup> (id. at pp. 2-3). The parents also asserted that the CSE was not validly composed and that the recommended program was inappropriate to meet the student's needs, inasmuch as it would not have provided her "with an opportunity to progress in the general curriculum, meet appropriate annual goals and/or achieve any educational growth" (id. at pp. 2, 4). The parents also challenged the annual goals and short-term objectives enumerated in the August 2007 IEP, arguing that the parents were denied meaningful participation in formulating them, and that the August 2007 IEP's goals did not appropriately address the student's demonstrated educational deficits, were generic, and were not individually tailored to meet the student's needs (id. at p. 3). The parents sought the provision of transportation to the private school by the district and reimbursement and/or prospective funding for tuition costs at the private school for the 2007-08 school year.

On April 22, 2008, the district submitted an answer to the parents' due process complaint notice (Dist Ex. 13). The district indicated that the August 2007 CSE considered a general education program with related services, but concluded that such a program would not offer sufficient support for the student's educational needs (id. at p. 2). In addition, the district noted although the August 2007 CSE considered a special class for the student, such a program would have been too restrictive for the student (id.). Finally, the district maintained that its placement recommendation was "reasonably calculated to enable [the student] to obtain meaningful educational benefits" (id. at p. 3).

An impartial hearing convened on May 30, 2008 and after three days of testimony, concluded on August 8, 2008 (IHO Decision at pp. 1-2). On September 8, 2008, the impartial hearing officer rendered a decision, in which she found that the student was denied a FAPE on

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<sup>11</sup> The hearing record does not indicate for what "PSF-1" stands for.

<sup>12</sup> Some information has been redacted from Parent Ex. H. The hearing record does not indicate who altered the document or why the information on the form was deleted (see Parent Ex. H at p. 2).

<sup>13</sup> In the State regulations, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).



procedural and substantive grounds for the 2007-08 school year (id. at pp. 10-11). The impartial hearing officer concluded that the district's August 2007 CSE was improperly constituted for the following reasons: (1) the regular education teacher who took part in the August 2007 CSE meeting had not previously taught the student nor would she have been the student's teacher during the 2007-08 school year; and (2) the special education teacher who participated in the August 2007 meeting and had not previously taught the student nor would she be, by virtue of retirement, the teacher of the student in the proposed class (id. at p. 10). Although the impartial hearing officer determined that the August 2007 CSE was improperly composed, she did not determine whether this procedural inadequacy deprived the student of a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits.

The impartial hearing officer further determined that the proposed IEP "failed to provide the student with an opportunity to make reasonable progress" (IHO Decision at p. 10). Given the student's delays in reading comprehension, written expression and decoding, and in consideration of the student's diagnosis of ADHD, the impartial hearing officer determined that the student required a smaller class setting in addition to a smaller student-to-teacher ratio than the recommended general education classroom with SETSS "in order to make meaningful progress" (id. at pp. 10-11). With respect to the parents' unilateral placement, the impartial hearing officer opined that the private school met the student's special education needs, noting that the student benefited from the small classroom setting in the private school, which gave the student ample opportunity for individualized instruction and emotional support (id. at p. 11). Lastly, the impartial hearing officer found that equitable considerations weighed in the parents' favor (id.).<sup>14</sup> Accordingly, she ordered the district to reimburse the parents for the tuition that they had paid to the unilateral placement for the 2007-08 school year and further ordered that upon proof of payment, the district fund the outstanding balance that the parents had not yet paid (id.).

The district appeals and requests that the impartial hearing officer's September 2008 decision be vacated in its entirety. The district first argues that the August 2007 IEP offered the student a FAPE. Specifically, the district contends that the impartial hearing officer erroneously found that the composition of the August 2007 CSE was invalid because the regular and special education teachers who participated in the meeting would not have been the student's classroom teachers during the 2007-08 school year. The district further argues that, assuming arguendo, the challenged IEP was procedurally defective due to the composition of the August 2007 CSE, there were no procedural inadequacies surrounding the creation of the August 2007 IEP that deprived the student of a FAPE, impeded the parents' participation in the process, or caused the deprivation of educational benefits. Moreover, the district maintains that the proposed program of general education with SETSS was substantively appropriate and would have provided the student with sufficient support. Next, the district asserts that the parents' unilateral placement at the private school was not appropriate because it is overly restrictive, and that the impartial hearing officer erred by failing to consider the restrictiveness of the setting. The district further contends that equitable considerations should preclude an award of tuition reimbursement, because the parents never intended to place their daughter in public school. Lastly, the district contends that should the impartial hearing officer's decision be upheld, the amount of tuition awarded should be reduced

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<sup>14</sup> The impartial hearing officer did not state any reasoning or analysis for her finding that the equities favored the parents.

on appeal to account for the amount of religious instruction the student received at the unilateral placement.

In their answer, the parents deny many of the petition's allegations and request dismissal of the petition in its entirety. The parents seek an order from a State Review Officer finding that the impartial hearing correctly found that the district failed to offer the student a FAPE for the 2007-08 school year, that the unilateral placement was appropriate for the student's needs and that the equities in the instant case support an award of reimbursement. Additionally, the parents do not cross-appeal the impartial hearing officer's decision or any portion thereof. With respect to their claim that the student was denied a FAPE, the parents assert that the August 2007 CSE was invalidly constituted. The parents further argue that the IEP was inappropriately developed by the CSE "apparently prejudging" the student's special education needs to require only a less restrictive general education program with SETSS and related services.<sup>15</sup> As to the substantive portion of the challenged IEP, the parents argue that they were not provided with any information regarding the functional grouping of their daughter's proposed SETSS class; rather they assert they were only given general statements regarding the composition of the class and the methods of instruction that would be offered to the student. The parents maintain that during the impartial hearing the district failed to establish how the proposed placement would have met the student's special education needs. Next, the parents' argue that the August 2007 CSE developed the student's program without having first conducted a complete set of appropriate evaluations, including an evaluation to determine the existence of a central auditory processing disorder (CAPD), a structured classroom observation of the student, or an FBA. The parents also assert that the goals listed in the August 2007 IEP were not appropriately discussed with them, and that the resultant goals failed to address the student's educational needs, particularly the student's attention-related needs and social/emotional needs. The parents further argue that their unilateral placement was appropriate and that the student was mainstreamed in certain classes and during lunch and recess. Lastly, the parents assert that the equities favor an award of tuition reimbursement because they cooperated with the district.

Two purposes of the Individuals with Disabilities Education Act [IDEA] (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may

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<sup>15</sup> This issue was not raised in the parents' due process complaint notice nor was it addressed by the impartial hearing officer. Therefore, I will not address it on appeal.

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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]; Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at

\*7 [2d Cir. Oct. 9, 2008]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 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 placement 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]).

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

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

Turning to the instant appeal, I will first address whether the August 2007 CSE was duly constituted. The district argues that the impartial hearing officer erred in finding that the CSE was invalidly composed because the regular and special education teachers who attended the August 2007 CSE had not previously taught the student nor would they have been responsible for implementing the student's educational program. Federal and State regulations require that a CSE must include not less than one regular education teacher of the student if the student is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. §

1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). The IDEA also requires that an IEP be developed by a group of individuals including at least one special education teacher, or where appropriate, at least one special education provider of such student (20 U.S.C. § 1414[d][1][B][iii]; see 34 C.F.R. § 300.321[a]; 8 NYCRR 200.3[a][1][iii]). The special education teacher or provider should be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

Although the hearing record reveals that the regular and special education teachers who took part in the August 2007 CSE meeting had both previously worked for a number of years at the proposed district school (Tr. pp. 41-42, 49-50), thereby suggesting that both individuals were knowledgeable about the school, the hearing record reflects that both the regular education and special education teachers did not meet the legal requirements for participation in the CSE meeting for this student. Therefore, the August 2007 CSE was not properly constituted and an error occurred in the procedure for developing the IEP. However, impartial hearing officers and State Review Officers are constrained by federal and State regulations from finding that a FAPE is denied by a procedural violation unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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]). Notwithstanding that the district's August 2007 CSE was not properly constituted, the hearing record fails to demonstrate how this procedural deficiency resulted in the denial of a FAPE to the student (Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL101618765, at \*5 [S.D.N.Y. July 11, 2005]; see Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). Moreover, as more fully discussed below, the hearing record reveals that the parents were not significantly impeded from participating in the decision-making process with respect to the provision of FAPE to the student. I do, however, caution the district to ensure compliance with the procedures for the development of an IEP.

Turning to the substantive analysis of the challenged IEP program, the district correctly asserts that the impartial hearing officer erred in finding that the recommended program of general education in conjunction with SETSS and related services would not have provided the student with sufficient support. The hearing record shows that prior to moving into the district from out-of-state, the student was not enrolled in a special education classroom, although she received speech-language therapy and OT services (Tr. pp. 316, 338). The parents' private psychologist described the student's cognitive abilities as "strong," and further stated that they were in the high average range and that the student was primarily at grade level in her academic subjects (Tr. p. 259; Dist. Ex. 1 at p. 3). Furthermore, while the private psychologist testified that the student required a smaller student-to-teacher ratio in order to perform at the level of which she was capable, a review of her testimony does not reveal that she recommended placement in a special education classroom or that she specified the requisite class ratio needed in order for the student to receive a FAPE.

Although 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), they

must offer a program that is reasonably calculated to confer educational benefit. Here, as detailed below, a review of the hearing record shows that the proposed program would have given the student adequate support to allow her to make meaningful progress in the LRE. According to the hearing record, the student would have been placed in a "very structured, organized class" that contained 17 students (Tr. pp. 21, 44). The proposed placement's assistant principal/special education supervisor (special education supervisor), who had reviewed the student's August 2007 IEP, described the teacher for the proposed classroom as "very supportive," who could focus and redirect the student, a primary area of educational need for the student (Tr. pp. 21-22). She confirmed that the teacher of the proposed class had experience working with students with ADHD and distractibility issues (Tr. p. 22). With regard to the recommended SETSS classroom, the special education supervisor testified that the student would be instructed in a group of eight students (Tr. p. 46). The special education teacher would begin by introducing a skill to be learned and providing the group with a "mini lesson" (*id.*). Following the lesson, students are given a task to complete, during which time the special education teacher would work with students on an individual basis (*id.*). The group would reconvene at the end of the period to review the lesson (Tr. p. 47). The recommended SETSS period would last 50 minutes in duration (*id.*). The special education supervisor stated that the student would not be removed from the general education classroom during reading or writing instruction because those were the student's greatest areas of weakness (Tr. p. 23). According to the special education supervisor, students are assessed in September and October so that they may be grouped by similarity of needs (Tr. pp. 26-27). She opined that the student would have been placed in a second grade SETSS group to work on reading, as opposed to a lower level group, because her skills were "not that low" (Tr. pp. 27-28). The special education supervisor reported that to address the student's difficulty in decoding, the special education teacher could use the "Foundations" program, which would teach the student to "tap out" the words and the sounds, thereby helping her learn to read (Tr. pp. 32-33). If the student was functioning above the "Foundations" program, then the Wilson program could be used (Tr. pp. 34-35). In order to address the student's reading comprehension and writing difficulties, the special education supervisor testified that using a balanced literacy approach, the SETSS teacher would work with the student during guided reading (Tr. p. 33). The special education supervisor also noted that "whatever skill or strategy [wa]s being introduced for that week" in the general education class, the student's SETSS teacher would reinforce that skill and conference with the student and take notes (Tr. pp. 33-34). Specifically, the SETSS teacher would record the student's weaknesses and then address those weaknesses (Tr. p. 34). The student would have also received support in writing through use of the "four square" method, which the district's special education supervisor described as a "visual and sequential program" (Tr. pp. 36-37).<sup>16</sup>

Lastly, although math computation was an area of strength for the student (Tr. p. 36), the hearing record shows that the student also would have had access to the Everyday Math program, which the special education supervisor described as a "scripted program, [where] every skill and every strand [wa]s repeated constantly" (Tr. p. 35). In addition to SETSS, the August 2007 CSE recommended that the student receive speech-language therapy and OT as recommended by the therapists who evaluated the student (compare Dist. Ex. 4, and Dist. Ex. 7, with Dist. Ex. 8 at p. 17). The student's IEP also included several program and testing accommodations recommended

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<sup>16</sup> The hearing record defines the "four square" method as a program where the student is provided with four boxes, and their thoughts are sequenced, the beginning, the next and then the continuation (Tr. p. 37). Students add thoughts to each box and then the boxes are put together as one piece (*id.*).

by the parents' private psychologist including preferential seating, the use of visuals to convey sequence, directions read and reread during testing and questions read and reread during testing, except questions related to reading comprehension (Dist. Exs. 1 at pp. 4-6; 8 at pp. 3, 6, 17). An additional accommodation, allowing the student time to organize her thoughts and verbalizations, was also recommended by the CSE (Dist. Ex. 8 at p. 6). The hearing record indicates that the recommended district school could have provided academic support services that would have been available to the student after school and on weekends (Tr. pp. 38-39, 47-49).

The impartial hearing officer found that the August 2007 IEP failed to provide the student with an opportunity to make reasonable progress since it recommended a general education program with no support in the classroom and, that based on the student's academic delays and attending difficulties the student required a classroom with a smaller student to teacher ratio than the CSE recommended general education class (IHO Decision at p. 10). The hearing record does not support her conclusion. The private psychologist who evaluated the student's academic achievement provided both age level and grade level standard scores (Dist. Ex. 1 at p. 10). She opined that since the student had been exposed to first grade material use of grade based norms was more appropriate (*id.*). Overall, the student's performance as compared to same aged peers was "slightly higher" than her performance as compared to same grade peers (*id.*). Using grade based norms, the private psychologist reported that the student had "significant weaknesses" in reading, written language and overall academic functioning (*id.* at pp. 10-11). However, in further describing the student's academic functioning, the private psychologist indicated that all of the student's assessed skills were in the average or low average range, with the exception of the student's spelling skills, which were in the borderline range (*id.*). In addition, the private psychologist indicated that based on teacher reports, the student's academic skills were primarily at grade level (*id.* at p. 2). She further noted that the student did not present with significant behavioral difficulties (*id.* at p. 3). The hearing record reflects that, during the prior school year, the student had attended a general education class and had functioned primarily at grade level (Tr. pp. 316-17; Dist. Ex. 1 at pp. 2-3).

Moreover, the hearing record illustrates that the August 2007 CSE considered and rejected a general education program without services, noting that the student needs additional academic support to address her demonstrated delays, as well as a special class in a community school, having determined that it would have been an overly restrictive setting for the student (Dist. Ex. 8 at p. 16). Similarly, the district's special education supervisor noted that she did not see anything in the student's program showing that her needs could not be met in a general education program with SETSS services (Tr. p. 37).

Based on the foregoing, there is no indication in the hearing record to suggest that the student would not have received sufficient academic support in the district's recommended general education program with SETSS. Accordingly, the hearing record establishes that the proposed program as set forth in the August 2007 IEP, was reasonably calculated to enable the student to receive educational benefit in the LRE for the 2007-08 school year.

Turning next to the additional issues raised the parents in their answer, the parents contend that although the district's CSE suspected that the student presented with a CAPD, the August 2007 CSE failed to take the appropriate steps to confirm its existence. A review of the parents' due process complaint notice reveals that this issue was not raised (Parent Ex. J). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original

due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][i][a], [b]; see Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065). I further note that the impartial hearing officer did not address this issue, nor do the parents' cross-appeal her failure to address it. Therefore, this issue is not properly before me.

Next, I will consider the parents' argument that the district failed to conduct a classroom observation and an FBA. A review of the parents' due process complaint notice reveals that the parents raised both of these issues, that they were addressed during the impartial hearing and that they were raised by the parents in their answer on appeal. Although the impartial hearing officer did not make any findings with respect to either of these issues, given that they were raised in the parents' due process complaint notice and that the parties considered them during the impartial hearing, some discussion of these issues is warranted. Turning first to the parents' claim that the district failed to conduct a classroom observation, the hearing record suggests that student moved to New York on or around June 19, 2007 (Tr. p. 298; Dist. Ex. 14). The school psychologist acknowledged that a classroom observation of the student had not been conducted because the student was not attending school (Tr. p. 61). She further indicated that the CSE did not consider observing the student outside of school during the summer months (Tr. pp. 110-11). However, I note that district staff who evaluated the student during summer 2007 included observations of the student's behavior, social interaction and attending ability in their evaluation reports (Dist. Exs. 4 at p. 1; 7 at p. 3). Based on the circumstances presented herein, the hearing record does not show that the lack of additional classroom observation data deprived the student of a FAPE.

The parents next assert in their answer that the district should have conducted an FBA. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. Sept. 26, 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>17</sup> Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior a CSE "shall consider the development of a behavioral intervention plan" [BIP] (8 NYCRR 200.22[b]).<sup>18</sup> In this case, the

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<sup>17</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], [f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

<sup>18</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]).



creation of an FBA would have been premature because the student had yet to attend the proposed placement. Therefore, the August 2007 CSE had no way of knowing if the student would exhibit behaviors that would impede her learning in the proposed program, which included structures and supports designed to manage such behaviors. In addition, an integral aspect of conducting an FBA is determining how a student's behavior relates to the environment in which it occurs. At the time of the development of the student's proposed IEP, the CSE did not yet know whether, in her new environment, the student would engage in behavior that impeded learning. Also, I note that the student's mother reported that the student exhibited age appropriate behavior (Dist. Ex. 5 at p. 2). Under the circumstances, I find that an FBA would have been premature because the student had not attended the recommended program and placement (see M.M. v. New York City Dep't. of Educ., 2008 WL 4656876, at \*10 [S.D.N.Y. Oct. 21, 2008]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008]; Application of a Child with a Disability, Appeal No. 07-012, Application of the Bd. of Educ., Appeal No. 05-023; Application of a Child with a Disability, Appeal No. 04-033).

Although the parents' assert that the August 2007 CSE failed to conduct the aforementioned evaluations before making its recommendations, the hearing record reflects that the student was evaluated prior to the CSE meeting in her primary areas of deficit and the results of those evaluations were discussed with the student's mother during the meeting (see Tr. pp. 59-60). The hearing record also establishes that the August 2007 CSE had an opportunity to review the district's speech-language evaluation and the OT evaluation as well as the private psychological evaluation obtained by the parent (Tr. pp. 61-62). The student's needs were discussed with everyone in attendance (Tr. p. 80). The evaluation reports were reviewed with the student's mother and the results of those reports gave the August 2007 CSE a sense of the student's present levels of performance (Tr. p. 62; see also Tr. p. 80). The school psychologist also testified that a number of the private psychologist's recommendations were incorporated into the resultant IEP (Tr. pp. 71-72). I further note that the school psychologist testified that the student's mother was provided with an opportunity to ask questions and voice concerns during the August 2007 CSE meeting (Tr. p. 91). The school psychologist also indicated that she "absolutely" believed that the student's mother had participated in the CSE meeting and that she did not think that "there was any dissent" (id.). The hearing record contains no testimony from the student's mother to rebut this statement. Based on the above circumstances, the parents' argument that the CSE made a program recommendation for the student without a complete and appropriate set of evaluations, lacks merit.

I now turn to the parents' allegation in their answer that the August 2007 CSE developed the student's IEP in an inappropriate manner by failing to discuss the proposed goals with them. As set forth in greater detail below, this assertion is unpersuasive. Conversations about possible recommendations for a student, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (M.M. v. New York City Dep't. of Educ., 2008 WL 4656876, at \*6-\*7 [S.D.N.Y. Oct. 21, 2008] citing W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. Sept. 26, 2006] and Nack v. Orange City Sch. Dist., 454 F.3d 604, 611 [6th Cir. 2006]; see, e.g., Application of a Child with a Disability, Appeal No. 06-121; Application of a Child with a Disability, Appeal No. 05-110). In the instant case, although the school psychologist who participated in the August 2007 CSE meeting testified that the August 2007 CSE did not read at the meeting "each page" of the goals that were written in advance of the meeting, in contrast, through un rebutted testimony, the hearing record reflects that the student's mother attended the CSE meeting and that she was provided with

an opportunity to object to the CSE's recommendations (Tr. pp. 91, 118-19; Dist. Ex. 8 at p. 2). The school psychologist also testified that the goals listed in the IEP and the student's needs were discussed with everyone in attendance at the August 2007 CSE meeting (Tr. p. 80). Accordingly, the hearing record shows that although some of the student's IEP goals were drafted prior to the CSE meeting, the student's mother was nevertheless afforded a meaningful opportunity to participate in their development (Cerra, 427 F.3d at 193).

The parents also contend in their answer that the goals enumerated in the August 2007 IEP failed to address all of the student's educational needs, particularly, her attention-related and social/emotional needs. Notwithstanding their assertion, a review of the hearing record shows that although the parents made general allegations about the academic goals, they did not specifically allege that the goals delineated in August 2007 IEP failed to appropriately address the student's attentional and social/emotional deficits in their due process complaint notice or at the impartial hearing in a manner that allowed the district to address this issue. Furthermore, the impartial hearing officer did not address the adequacy of the goals in the challenged IEP and the parents did not appeal from the impartial hearing officer's decision. This issue is accordingly outside the scope of my review and not properly before me, and thus, I decline to address it on appeal (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]; Application of a Student with a Disability, Appeal No. 08-098, Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

Having determined that the district offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parents' private placement was appropriate, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Lastly, although not properly raised as an issue herein, I encourage the CSE when it next reconvenes to consider the appropriateness of conducting an auditory processing evaluation of the student.

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated September 8, 2008 is hereby annulled.

**Dated:** Albany, New York  
December 10, 2008

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