



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-059

### **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, Emily R. Goldman, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondent, Jenna L. Pantel, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Winston Prep (Tr. p. 5). Winston Prep is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an other health impairment is not in dispute in this proceeding (Tr. p. 4; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz ][10]).

The student has been offered a diagnosis of an attention deficit hyperactivity disorder (ADHD), inattentive subtype, and exhibits difficulty with written language, reading comprehension, and organizational skills (Dist. Ex. 6 at pp. 1, 2, 3, 6, 7). Cognitively, the student's verbal skills are in the low average range, and his visuospatial skills are in the high average range (id. at p. 3). The student's overall language skills are in the average range, with a specific weakness in the area of semantics (id. at pp. 5-6). He exhibits inattention and distractibility in the classroom, and needs redirection and behavioral interventions to maintain focus and work independently (Dist. Exs. 2 at p. 5; 5).

The student attended public school from kindergarten through sixth grade (Tr. pp. 236-37). The parent indicated that increasingly during second grade, her son exhibited "distracted" behaviors (Tr. p. 236). Although the student did not have difficulty learning to read, he had difficulty with language formulation and organization, and by the end of third grade, he received special education teacher support services (SETSS) (Tr. pp. 236-37; Dist. Ex. 6 at p. 2). Also in third grade, the student received vision therapy services, met the diagnostic criteria for ADHD, inattentive subtype, and was administered a medication used with students who are "distracted" (Tr. p. 237; Dist. Ex. 6 at p. 2). By report, initially the medication worked "terrifically" and the student had a successful fourth grade school year (Tr. p. 237). The parent indicated that by the time the student began sixth grade, despite dosage adjustments the medication's effectiveness had diminished, homework refusal was a problem, and the student exhibited a "falling off in attention" (Tr. pp. 237-38). During the 2006-07 school year, the student was in the district's general education program and received SETSS, four sessions per week of occupational therapy (OT), and "counseling and reading and math support" (Dist. Ex. 6 at pp. 1-2). By report, the student was also learning to use a portable word processor for note taking and written assignments (*id.* at p. 2).

On June 26, 2007, the parent obtained a private "screening evaluation" of the student's "attention processes" (Dist. Ex. 6). The neuropsychologist reported that the student's school performance was extremely variable, and that his sixth grade teachers consistently indicated that he did not complete or turn in homework, did not study, talked, and exhibited inattentive behavior in class (*id.* at p. 1). The neuropsychologist administered the Wechsler Abbreviated Scale of Intelligence (WASI), the Wechsler Individual Achievement Test-Second Edition (WIAT-II), the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), and a hearing screening (*id.* at p. 2). A parent history form, the "Parent Child Behavior Checklist, Parent and Teacher Attention Deficit/Hyperactivity Disorder Checklist from the Diagnostic Symptom Manual-Fourth Edition (DSM-IV)" and the Parent and Teacher Observational Rating Scale from the CELF-4 were also completed (*id.*). During testing, the neuropsychologist reported that the student exhibited frequent "fidget" behaviors, variable attention, and "some impulsivity" (*id.*). The parent's completion of the Child Behavior Checklist yielded affective and conduct problem subscale scores in the "clinical range," and the ADHD problem subscale score was "elevated" (*id.* at pp. 2-3). Results of parent and teacher completion of the ADHD Checklist from the DSM-IV indicated that the student met the criteria for ADHD, inattentive subtype (*id.* at p. 3).

Administration of the WASI yielded a full scale IQ score of 99 (47th percentile), a verbal IQ score of 88 (21st percentile, low average), and a performance IQ score of 109 (73rd percentile, high average) (Dist. Ex. 6 at p. 3).<sup>1</sup> The neuropsychologist reported that the student's expressive and receptive language skills were in the average range, although as with the cognitive subtests that assessed the student's verbal skills, he exhibited difficulty with semantic relationships and vocabulary definitions (*id.* at pp. 4-5). The student's performance on the VMI was in the deficient range (2nd percentile) and he exhibited difficulty copying designs with more than one line or shape when they were spatially overlapped or related (*id.* at p. 3). The neuropsychologist reported that the student's memory skills appeared to be "age appropriate" (*id.* at p. 5). The student's

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<sup>1</sup> Due to the "substantial difference" between the student's verbal and visuospatial skills, the neuropsychologist reported that the full scale IQ score was not a good estimate of his overall skills (Dist. Ex. 6 at p. 3).

performance on reading subtests of the WIAT-II yielded average scores on measures of his ability to read single words (39th percentile) and decode nonsense words (47th percentile), and an overall reading composite score in the average range (standard score 91, 27th percentile) (*id.* at p. 6). On a test of the student's ability to comprehend what he had read, the neuropsychologist observed that the student read the passages silently and very quickly, which "probably contributed to his relatively poor comprehension" and score in the low average range (18th percentile) (*id.*). She further noted that the student's reading scores on all measures had declined from his previous 2004 test results (*id.*). The neuropsychologist concluded that the student's "current placement and supports are clearly inadequate as evidenced by his poor performance this year. [The student] would benefit from a smaller, more structured and supportive classroom with grade appropriate academics and learning expectations" (*id.*). Her recommendations included continued OT, use of a portable word processor, graphic organizers and visual cues/strategies, and evaluations conducted by a clinical psychologist regarding school-based difficulties, and a medical assessment for ADHD with consideration of a trial of medication (*id.* at pp. 6-7).

The parent enrolled the student at Winston Prep for seventh grade during the 2007-08 school year (Tr. p. 238). A Winston Prep report dated winter 2007 indicated that the student had difficulty arriving on time and attending school, which significantly affected possible gains in his academic growth (Dist. Ex. 5). The student received instruction in "Focus" class, literature, language skills, writing, math, physical science, history, commercial art, and physical education (*id.*). During the 2007-08 school year, the student's teachers commented that when the student was present in school, he actively participated, responded well to discussions and readings, and asked relevant and intelligent questions in class (*id.* at pp. 1-3, 5). His teachers also commented that the student inconsistently completed homework assignments, was easily distracted, required redirection, and exhibited difficulty sustaining focus in class (*id.* at pp. 2-5).

On March 20, 2008, a district social worker conducted a classroom observation of the student at Winston Prep (Dist. Ex. 4). On that day, the student's class consisted of 12 students and one teacher (*id.*). While working on an in-class assignment, the student was observed asking questions of the teacher, moving around the room gathering supplies, and conversing with the student next to him (*id.*). The social worker reported that the student was "off task and unfocused," appeared to be avoiding work, and that her presence did not prompt the student to be more attentive (*id.*). The social worker indicated that her observation occurred the day before a school vacation and that there was "a lot of cross-conversation in class," but that most students alternated between talking and working behaviors (*id.*). However, the social worker's report indicated that the student exhibited off-task behaviors during the entire class period and did not approach the teacher for help or direction (*id.*).

On March 24, 2008, the parent executed an enrollment contract with Winston Prep for the 2008-09 school year and paid a deposit toward the student's tuition (Tr. pp. 267-68; Parent Ex. E).

A committee composed of the parent, a special education teacher who was also the district representative, a school psychologist, a regular education teacher, and the student's Focus teacher from Winston Prep convened on May 1, 2008 for an annual review meeting (Dist. Exs. 2 at pp. 3,

5, 6; 3 at pp. 1-2; see Tr. pp. 22-23, 36, 238-39).<sup>2</sup> The committee continued to find that the student was eligible to receive special education services as a student with an other health impairment because of his diagnosis of ADHD (Tr. pp. 58-59; Dist. Ex. 2 at p. 1). For the 2008-09 school year, the committee recommended a 14:1 collaborative team teaching (CTT) program for the 10-month period from September 2008 through June 30, 2009 (Tr. pp. 24, 25, 239; Dist. Ex. 2 at pp. 1, 3, 15).<sup>3</sup> The May 1, 2008 committee also recommended that the student be provided with OT as a related service (Tr. p. 24; Dist. Ex. 2 at pp. 1, 17).

A district committee convened again on May 30, 2008 (Tr. pp. 6, 22, 23, 59, 242; Dist. Exs. 2 at pp. 1, 2; 3 at p. 2).<sup>4,5</sup> The committee was composed of a special education teacher who also acted as the district representative and the school psychologist from the May 1, 2008 committee meeting as well as the parent, who participated by telephone (Tr. pp. 59-62, 242-43; Dist. Ex. 2 at p. 2; see Dist. Ex. 2 at p. 3). The district representative stated that the committee convened in order to "correct clerical errors" in the May 1, 2008 individualized education program (IEP) (Tr. pp. 60, 61). In particular, she stated that the committee met to clarify that its May 1, 2008 recommendation for a CTT classroom was not a recommendation for a new program, but a recommendation for the same type of program that had been recommended the year before (Tr. p. 59). The district representative also stated that the committee modified the May 1, 2008 IEP to show that the student would be provided OT individually during the 2008-09 school year rather than in a group of three (Tr. p. 59; see Dist. Exs. 2 at pp. 2, 17; 3 at p. 2). The committee also added on the IEP that the student would be provided with an "AlphaSmart" assistive technology device, something the district representative stated had been "accidentally" left off of the May 1, 2008 IEP (Tr. pp. 59, 62; Dist. Exs. 2 at pp. 2, 9; 3 at p. 2). The district representative indicated that the committee did not create any new goals at the meeting, that there was no additional discussion of the appropriateness of the CTT recommendation, and that the IEP was not reviewed in its entirety at the May 30, 2008 meeting (Tr. pp. 60, 61, 62).

The hearing record reflects that subsequent to the May 30, 2008 meeting, the district sent the parent an IEP on or about June 23, 2008 (see Dist. Ex. 2 at p. 2). The district issued a Final Notice of Recommendation (FNR) to the parent dated July 10, 2008 recommending a specific

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<sup>2</sup> As indicated below, the parent contends that the May 1, 2008 meeting was a Committee on Special Education (CSE) meeting; the district contends that it was a meeting of a subcommittee on special education.

<sup>3</sup> "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>4</sup> As indicated below, the parent contends that the May 30, 2008 meeting was a CSE meeting; the district contends that it was a meeting of a subcommittee on special education.

<sup>5</sup> The petition indicates that the date of the second committee meeting was May 31, 2008 (Pet. ¶ 22). However, the hearing record indicates that the second committee meeting was held on May 30, 2008 (Tr. p. 23; Dist. Exs. 2 at p. 2; 3 at p. 2).

district school (Dist. Ex. 7). By letter dated July 23, 2008, the parent acknowledged receipt of the FNR and advised the district that she would "not agree to the recommendation until [she] had a chance to visit the school in September when it [was] once again in session" (Parent Ex. B; see Tr. pp. 243-44).

On September 15, 2008, the parent visited the district's recommended school and classroom (Tr. pp. 244, 265; Parent Ex. A at p. 2; see Tr. pp. 244-50). The parent stated that she visited a humanities class, that she spoke to both classroom teachers "a little bit," and that she stayed "maybe 20 minutes" (Tr. pp. 244, 245, 249, 265-66).

By letter faxed and dated September 22, 2008, the parent advised the district that she did not believe its recommendation was appropriate (Tr. p. 267; Parent Ex. A at pp. 1, 2, 4; see Tr. p. 254). The parent reported that she explained to the committee that the student had "made progress in a small classroom, with interventions to help him maintain focus and be an active learner without the need for medication (Parent Ex. A at p. 1). The parent's letter described the proposed CTT classroom as "very noisy and distracting" and "much too large and busy," and she stated that her son would not demonstrate progress in the CTT class due to his diagnosis of ADHD (id.). The parent stated that the student's inattentiveness was his primary area of need, that he required "more small group and individualized learning," and "a lot of structure and support in the classroom to keep him focused and working independently" (id.). She further stated that the student would not receive instruction tailored to meet his academic and attentional needs in the CTT classroom due to the number of students (id. at pp. 1-2). The parent rejected the CTT program recommendation and informed the district that the student would continue to attend Winston Prep for the 2008-09 school year (id. at p. 2).

By due process complaint notice dated October 6, 2008, the parent, by her attorney, requested an impartial hearing (Dist. Ex. 1). The parent asserted that the student's May 30, 2008 IEP was "substantively and procedurally invalid" (id.). Specifically, the parent asserted that "the IEP team was invalidly composed;" that notwithstanding that the IEP described the student as having been diagnosed with ADHD inattentive type, the IEP did not include goals for attentional issues; that while the IEP stated that her son had behavioral interventions to deal with focus and working independently, the IEP failed to identify behavioral interventions to be used in the classroom; and that the goals and objectives were insufficient to meet her son's specific needs (id.). The parent also asserted that she had visited the district's recommended placement and found it to be inappropriate for her son's needs because the class was noisy and distracting and her son's ADHD would be exacerbated in that setting; the students in the class were learning disabled, but her son was classified as other health impaired; her son would not be placed with peers who have similar learning difficulties; and the students in the class were working on an assignment that was at a much lower academic level than her son's level (id.). The parent also contended that the student would not receive the level of attention and support he required in the CTT classroom (id.). The parent alleged that the student required a small class within a small school where he would receive appropriate services (id.).

The impartial hearing began on January 12, 2009 and concluded on the second day of testimony on March 11, 2009. The impartial hearing officer rendered a decision dated April 16, 2009, which ordered the district to reimburse the parent for the student's tuition at Winston Prep for the 2008-09 school year.

The impartial hearing officer found that the district's IEP and recommendations were inappropriate on the basis that the May 1, 2008 committee did not include an additional parent member and that the parent had not waived the participation of such a member (IHO Decision at pp. 9-10). The impartial hearing officer also stated that "the [district's] witness testified that there was no parent member because the CSE did not intend to change [the student's] IEP recommendations and that if they had decided to change the recommendations, there was a parent member 'on call'" (id. at p. 10). The impartial hearing officer stated that he concluded from this testimony "that the CSE had determined their recommendations prior to the [May 1, 2008] review meeting, without any input from the parent" (id.). The impartial hearing officer found that the parent's right to participate in the decision-making process had therefore been impeded (id.). Based on this, he concluded that the district failed to offer the student a free appropriate public education (FAPE) (id.).

The impartial hearing officer further found that the student's placement at Winston Prep was appropriate (IHO Decision at p. 10). He indicated that Winston Prep offered a "structured, small class environment which [the student] requires to address his attentional and executive functioning deficits" (id.). The impartial hearing officer also indicated that "[c]lasses are formed of students with similar functioning levels and needs, and [that] the school developed a[n] individualized curriculum which addresses [the student's] needs and includes appropriate goals" (id.). He further indicated that "[s]mall supportive classes offer the reinforcement, re-direction, and supervision which [the student] requires" (id.). According to the impartial hearing officer, Winston Prep's "focus teacher regularly monitors [the student's] progress and homework, reinforces class work, and bolsters [the student's] organizational skills" (id.). He further indicated that "[t]eachers and deans communicate regularly to monitor progress and make any necessary program modifications" (id.). Additionally, the impartial hearing officer found that the student had made progress at Winston Prep (id.). The impartial hearing officer indicated that the school's "program seems reasonably calculated to ensure that [the student] benefits educationally and makes academic and social progress" (id.). Lastly, the impartial hearing officer found that equitable considerations supported an award of tuition reimbursement because the parent cooperated with the CSE, timely filed her due process complaint notice, and because the amount of reimbursement requested was reasonable (id. at p. 11). In determining the equities, the impartial hearing officer did not address whether the parent had given the district the required notice prior to removal from the public school for the 2008-09 school year that the parent had rejected the recommended public school placement, stated her concerns, and expected the private school placement to be at public expense.

The district appeals. The district asserts that the impartial hearing officer incorrectly held that it denied the student a FAPE. With respect to the impartial hearing officer's conclusion that the May 1, 2008 committee should have included an additional parent member, the district alleges that pursuant to applicable State regulations, a subcommittee on special education may in certain circumstances conduct an annual review, that such a subcommittee does not require an additional parent member, that such circumstances were present in this case, and therefore the May 1, 2008 committee did not require an additional parent member. The district also contends that there was no evidence presented at the impartial hearing that the additional parent member's absence resulted in a loss of educational opportunity for the student or infringed on the parent's ability to participate in the committee review. With respect to the impartial hearing officer's conclusion that the May 1, 2008 committee's lack of an additional parent member showed that it had predetermined its

recommendations prior to that meeting without any input from the parent, the district contends that the impartial hearing officer improperly made such a conclusion sua sponte and that the district did not engage in predetermination. Finally, the district contends that it offered the student an IEP "likely to produce progress not regression" and one that "affords the student with an opportunity greater than mere trivial advancement." In particular, the district alleges, among other things, that the recommended annual goals and short-term objectives were appropriate for the student's needs and that the recommended CTT program was also appropriate. With respect to the May 30, 2008 committee meeting, the district asserts that "a full CSE team was not necessary" because under applicable regulations, the parent and a local district may agree not to convene an IEP meeting for the purpose of making a change and instead may develop a written document to amend or modify a student's IEP. The district alleges that the May 30, 2008 committee was convened to correct "clerical errors" contained in the May 1, 2008 IEP.

The district also alleges that the impartial hearing officer erroneously found Winston Prep to be appropriate for the student because Winston Prep did not provide the student with mainstreaming opportunities, it is not clear from the hearing record that the student made progress there, and Winston Prep did not offer the student the OT that he requires. Lastly, the district contends that the impartial hearing officer incorrectly held that equitable considerations support an award of tuition reimbursement because the parent did not provide the district with the required notice that she was withdrawing her son from the public schools. Furthermore, the district contends that the parent did not raise concerns about or objections to any portion of the IEP at the committee meetings.

The parent answers and requests that a State Review Officer affirm the impartial hearing officer's decision and dismiss the petition. The parent asserts that the district failed to offer the student a FAPE. In particular, the parent contends that a district CSE was required to convene on May 1 and May 30, 2008 to develop the student's IEP and that the committees that met on those days were not properly composed due to the absence of an additional parent member, an appropriate special education teacher, and/or an appropriate regular education teacher. The parent further alleges that the improper composition of the district's committees significantly impeded the parent's right to participate in the decision-making process and resulted in a loss of educational opportunity for the student. Among other things, the parent contends that the IEP included inappropriate annual goals and short-term objectives that failed to comport with applicable regulations; the IEP failed to include goals specifically addressing the student's attention and impulsivity issues; and that the proposed CTT class was inappropriate because the student would not have been properly grouped by similarity of individual needs, the class would have provided insufficient instructional and special education support, would have failed to address the student's attentional needs and difficulty working independently, and would have failed to address the difficulties that the student would have transitioning to a new and larger school setting.

The parent further asserts that the unilateral placement of the student at Winston Prep met the student's special education needs because, among other things, it provided him with appropriate instruction that was tailored to his needs, with materials modified for him; provided him with assistive technology, and further, that the student had made progress at Winston Prep. The parent also alleges that the equities favor an award of tuition reimbursement and that the impartial hearing officer's decision to approve tuition reimbursement should be upheld. Among other things, the parent sets forth that she attended and participated in the May 1 and May 30, 2008 committee

meetings and provided documentation to the district regarding the student, expressed concerns at the committee meetings, cooperated with the committees and did not obstruct its process, did not reject the program at the May 1 or May 30, 2008 meetings, visited the recommended program when school reconvened, promptly provided the district with her opinion about the program and why she did not think it was appropriate, and pursued her due process rights. Further, the parent contends that there was no evidence that the district tried to reconvene a review or that the parent precluded it from doing so when she advised the district that she did not believe the recommended program was appropriate.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d

111, 114 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

Turning to the merits of the district's appeal, I will initially address the district's contention that the impartial hearing officer incorrectly held that the district denied the student a FAPE. The impartial hearing officer concluded that the May 1, 2008 committee did not include an additional parent member, that the parent had not waived the participation of the additional parent member, that the impartial hearing testimony showed that the May 1, 2008 committee had determined its recommendations prior to the meeting without any input from the parent, and that this procedural

violation significantly impeded the parent's right to participate in the decision-making process resulting in a denial of a FAPE.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a][viii]; 8 NYCRR 200.3[a][1][viii]; see R.R. and D.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*8 [S.D.N.Y. May 15, 2009]; Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a][viii]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). However, an additional parent member is not a required member of a subcommittee on special education (see Educ. Law § 4402[1][d]; 8 NYCRR 200.3[c][2]).<sup>6</sup>

In this case, it is undisputed that an additional parent member did not attend the May 1, 2008 or May 30, 2008 committee meetings (Tr. pp. 37-38; Dist. Ex. 2 at p. 3; Pet. ¶ 8; Answer ¶ 8). Furthermore, there is no parental waiver of the additional parent member contained in the hearing record. While the lack of an additional parent member, absent a proper waiver, is a procedural error and contrary to State law and regulations, I am not persuaded by the evidence in the hearing record that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, 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., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419). Although the parent generally asserts that the absence of an additional parent member significantly impeded her right to participate in the decision-making process, the hearing record reflects that the parent had an opportunity to participate in the May 1, 2008 committee meeting, the committee asked her about her concerns, and that the parent provided the May 1, 2008 committee with information relative to the student and her point of view (Tr. pp. 27-28, 39, 239, 241, 264; Dist. Ex. 3 at p. 1). When testifying at the impartial hearing, the parent characterized herself as "pretty

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<sup>6</sup> On appeal, the district argues that an additional parent member was not a required member of the May 1, 2008 and May 30, 2008 committees because such committees were subcommittees on special education, whose membership is not required to include an additional parent member. The district did not raise this argument during the impartial hearing and the hearing record indicates that during the impartial hearing, the parties and their counsel referred to the committees as "the CSE," "the team," or "the IEP Team" (see, e.g., Tr. pp. 5, 24, 25, 27, 29-30, 32-33, 41, 49, 65, 232, 264, 269, 283-91). The IEP for the committee meetings and corresponding minutes identify the meetings as CSE meetings (Dist. Exs. 2 at p. 3; 3 at p. 1). Accordingly, the district has not sufficiently demonstrated that the May 1 and May 30, 2008 meetings were subcommittee meetings and I will therefore evaluate the parent's composition claim in accordance with the regulations setting forth the required membership of a CSE. For the purpose of this decision, I will continue to refer to the May 1 and May 30, 2008 meetings as "committee" meetings.

chatty" during the May 1, 2008 committee meeting (Tr. p. 241). The hearing record also reflects that the student's Focus teacher from Winston Prep attended the May 1, 2008 committee meeting, provided relevant information to the committee, and that parts of the resulting IEP reflected the Focus teacher's attendance and participation (Dist. Ex. 2 at pp. 3-5; see Tr. pp. 28-29, 38-39, 41, 46, 52, 239, 240, 264). The hearing record also reflects that the parent had familiarity with the IEP process, as she has been involved in many CSE meetings (Tr. p. 65). Additionally, the parent has made no claim that the absence of the additional parent member was responsible for, or the cause of, any particular defect in the IEP.

Based on the foregoing, I find that the absence of an additional parent member did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits, and therefore, did not rise to the level of a denial of a FAPE (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., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419). Accordingly, I find that the impartial hearing officer erred in determining that the absence of an additional parent member at the May 1, 2008 committee was a procedural violation that significantly impeded the parent's right to participate in the decision-making process resulting in a denial of a FAPE.

Moreover, I concur with the district's contention that the impartial hearing officer erred in concluding that the May 1, 2008 committee's lack of an additional parent member showed that it had predetermined its recommendations. I find that the impartial hearing officer exceeded his jurisdiction by determining sua sponte that the May 1, 2008 committee engaged in predetermination. However, even if the issue of predetermination were properly before the impartial hearing officer, the hearing record does not support his conclusion of predetermination. The hearing record demonstrates that the parent attended the May 1, 2008 committee meeting and meaningfully participated in it (Tr. pp. 27-28, 39, 239, 241, 263-64; Dist. Ex. 3 at p. 1). The hearing record also shows that the student's Focus teacher from Winston Prep contributed to the development of the IEP at the May 1, 2008 committee meeting and that the committee also considered alternatives other than the recommended CTT program (Tr. pp. 28-29, 38-39, 49-50, 52, 239-40, 264; Dist. Ex. 2 at p. 16). The committee reconvened on May 30, 2008 with the parent's participation and made particular modifications to the student's IEP (Tr. pp. 23, 59-60, 242-43; Dist. Exs. 2 at p. 2; 3 at p. 2). Thus, the hearing record reflects that the student's program was not predetermined and that the parent had meaningful opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (T.P. and S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610-11 [6th Cir. 2006]; R.R., 2009 WL 1360980, at \*8-\*9; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; E.G., 606 F. Supp. 2d at 388; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S., 454 F. Supp. 2d at 147-48; 20 U.S.C. § 1415[f][3][E][ii][II]; 34 C.F.R. § 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]; but see Application of a Student with a Disability, Appeal No. 08-035 [finding that the hearing record supported a conclusion that a predetermination of program services rose to the level of a denial of a FAPE]).

I will now address the district's contention that it recommended an appropriate IEP. I agree with the district that that the May 30, 2008 IEP and recommended CTT program offered the student appropriate academic instruction and services to address his academic needs (see Dist. Ex. 2 at pp. 4, 6-14; see, e.g., Tr. pp. 49-50, 70-78, 108-14, 117-21, 125-27). However, I find for the reasons set forth below that the May 30, 2008 IEP and the recommended CTT program did not adequately meet the student's attentional needs and that under the circumstances of this case, these deficiencies require a finding that the district failed to offer the student a FAPE.

The hearing record indicates that the student's attentional and organizational deficits were significant and that this information was before the May 1, 2008 committee (Tr. pp. 39-40; Dist. Exs. 2; 4; 5; 6). The hearing record also indicates that the student's Focus teacher from Winston Prep advised the May 1, 2008 committee of the student's difficulty with attention and impulsivity and that the student had difficulty maintaining attention in the classroom (Tr. pp. 41-42, 45, 46). The May 1, 2008 committee was also aware that Winston Prep was using behavioral interventions in the student's classroom to address his difficulty with impulsivity and attention (Tr. pp. 41-42). Moreover, consistent with the June 2007 neuropsychologist's report, the May 30, 2008 IEP's present levels of performance indicated that the student had been offered a diagnosis of ADHD, inattentive type, and that he was not administered medication for ADHD (Dist. Ex. 2 at p. 5). The May 30, 2008 IEP also indicated that the student had "behavioral interventions at school to assist with being a more active learner, maintaining focus and working independently" (id.). It also noted that the student could get "overwhelmed and frustrated with challenging tasks" (id.). However, the May 30, 2008 IEP did not include behavioral interventions used by Winston Prep or additional specific supports, services, or annual goals and short-term objectives to address the student's significant attentional needs in the classroom, notwithstanding that the documentation before the committee indicated that these difficulties were among the student's greatest deficits (Tr. pp. 43-46, 57; Dist. Exs. 2; 5; 6). Further, while the academic management strategies contained in the student's IEP would have been helpful to assist the student with his organizational needs, they would not have adequately addressed the student's difficulty maintaining attention and focus in the classroom (see Tr. p. 101; Dist. Ex. 2 at p. 4). I find that the May 30, 2008 IEP contained insufficient information regarding the degree of the student's attention difficulty, and did not provide adequate supports and services to address his need.

Additionally, the district representative/special education teacher testified that having a full-time special education teacher in the CTT class would help with the student's attention difficulties (Tr. pp. 46-47). The hearing record reflects that the student had difficulty with attention during small group instruction and independent work time (Tr. pp. 45-47, 49; Dist. Exs. 4; 6 at p.1; see Dist. Exs. 3; 5). One of the special education teachers assigned to the recommended program testified that during small group activities, which he indicated for his class would be more than 50 percent of the instructional time, he was there to "walk around the room and make sure all the students are keeping up with what is going on" (Tr. p. 85). The hearing record also reflects that in the recommended CTT class there was opportunity for "a fair amount of independent work" (Tr. pp. 89-90, 119). A second special education teacher from the proposed CTT class testified that she addressed students' attention and impulsivity difficulties by giving them "a lot of attention in terms of constant refocusing" (Tr. pp. 136-37). I find, however, that the hearing record does not provide sufficient information about what the special education teachers would do during small group instruction and independent work time to address the student's specific attention, focus, impulsivity, and distractibility needs. The testimony merely acknowledges the presence of a

special education teacher in the CTT classroom and provides information about general strategies used with all of the students.

Finally, the district representative/special education teacher testified that she did not know the maximum number of students that could be enrolled in a CTT class and a special education teacher of the recommended CTT class testified that during the 2008-09 school year, the class proposed for the student had 23 students (Tr. pp. 48, 81). Information that was before the May 1, 2008 committee meeting indicated that the student exhibited difficulty with attention and distractibility in classrooms of approximately twelve students (Tr. p. 193; Dist. Exs. 4; 5), and while in the district's sixth grade general education program with SETSS, his teachers reported that the student did not study, did not complete homework, and was inattentive in class (Dist. Ex. 6 at pp. 1-2). In addition, the June 2007 neuropsychological report that was conducted prior to the May 1, 2008 committee meeting, and assessed the student's attention skills, reported that the student would benefit from a "smaller, more structured and supportive classroom with grade appropriate academics and learning expectations" (Tr. pp. 23-24, 30; see Dist. Ex. 6 at p. 6). Based on the above, I find that the educational program recommended in the May 30, 2008 IEP would have failed to adequately address the student's attention needs in a CTT classroom of 23 students (Dist. Ex. 2). Further, and for the same reasons, I find that the hearing record does not contain information that supports the IEP's recommendation of the proposed CTT class without also offering supports and services designed to specifically address his attention deficits. For the reasons stated above, and under the circumstances of this case, I find that these deficiencies in the student's IEP require me to find that the district has failed to offer the student a FAPE.

Having determined that the district did not offer the student a FAPE for the 2008-09 school year, I now consider the appropriateness of the parent's placement of the student at Winston Prep. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating

"evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

The hearing record describes Winston Prep as a small "independent school for students with learning disabilities grades six through twelve" (Tr. p. 193). A dean of Winston Prep, who is also the student's literature teacher, indicated that it "serves" students with reading disorders, nonverbal learning disabilities, "executive functioning difficulties," Asperger's disorder, and students who exhibit an "area of weakness in their learning that's prohibiting them from reaching their potential" (Tr. pp. 191, 194). Winston Prep offers a "Focus" program, described as daily, individual instruction designed to remediate students' deficit skill areas (Tr. p. 193). The purpose of the Focus program is to work "very intensely" with students in an "undistracted setting" on their areas of greatest need (Tr. p. 161).

The student's literature teacher testified that for the 2008-09 school year, with the exception of his Focus class, the student was placed in a group of 11-12 students who needed support for their difficulty with executive functions (Tr. pp. 192-93, 196). According to the literature teacher, the student's classmates had problems similar to the student's: difficulty attending to work, staying focused, organizing materials and ideas, sequencing and elaborating on ideas, producing written work, and with inferential reasoning skills (Tr. p. 199). The student's daily schedule consisted of instruction in literature, writing and language, history, science, art, physical education, individual Focus program, and community service (Reflect, Assess, Plan, Service: RAPS) (Tr. pp. 195-96). The Focus teacher stated that he met 1:1 with the student daily, assessed his needs and "devised a plan of action around reading, around writing, around grammar, around critical thinking, around organization around homework and we just go about those things and I modify those things as the

need arises" (Tr. pp. 162, 185-86). A Focus teacher's report dated fall 2008 provided the student with goals in the areas of reading comprehension, written language, and academic organization (Parent Ex. C at p. 1).<sup>7</sup>

The Focus teacher testified about the student's academic strengths, and his weaknesses in reading comprehension, making inferences in reading, organizing his writing, producing and organizing homework, and with spelling, grammar, mechanics; "the basics of writing" (Tr. pp. 162-63). During Focus sessions, the student worked on reading skills, vocabulary, organization of ideas for written work, grammar, and how to develop paragraphs (Tr. p. 163; Parent Ex. C at pp. 1-2). To address the student's reading comprehension needs, the student read out loud and worked on reading all the words; rereading words that he had skipped and including punctuation to enhance his comprehension (Tr. pp. 170-71; Parent Ex. C at pp. 1-2). The Focus teacher ensured that the student understood vocabulary words within the context of the paragraph, and he and the student looked up unfamiliar words together (Tr. p. 171; Parent Ex. C at p. 2). The Focus teacher asked the student questions about a section of text, and then asked the student to reread the section to understand what he has missed (Tr. p. 165; Parent Ex. C at p. 1). To address the student's writing needs, the Focus teacher testified that he reviewed the student's written homework "in great detail" and asked the student to reproduce the work with corrections made (Tr. p. 168). For example, the student was asked to produce multiple drafts of each paragraph while working on an essay, focusing on his areas of weakness (*id.*).

The literature teacher discussed strategies used in his class to help students who exhibit difficulty with attention, such as repeating and reviewing new material, reading together as a group and summarizing/reflecting on the information, breaking down information, summarizing the main idea of the page in notations at the bottom of the page, and memorizing and internalizing the message of the text (Tr. pp. 206-08; Parent Ex. C at pp. 2-3). The Focus teacher stated that he reminded the student to remain on task when he exhibited attentional difficulties (Tr. p. 164). The student's classroom materials were presented in "smaller chunks" over multiple pages so as not to overwhelm him with too much information (Tr. p. 209). The literature teacher testified that he modified the student's homework and classroom discussion questions, and while he limited the number of questions asked, he asked questions that were challenging to the student (Tr. pp. 209-10). The student's teachers used graphic organizers, modified the information presented, used visually presented materials, and organized the information for the students "in a way that makes sense that's not too overwhelming and not too over-stimulating" (Tr. p. 211; Parent Ex. C at p. 3). Occasionally students were graded on their ability to sustain their attention and focus on a task without exhibiting off-task behaviors (Tr. p. 207). Additionally, the literature teacher testified that he had discussions with the students about "their attentional issues and their organizational issues" (Tr. p. 208).

The literature teacher testified that the student benefited from a smaller class size due to his difficulty with attention and organizational needs (Tr. pp. 204-05). He stated that the student was easily distracted, and with less students in the classroom "the less distracted [the student will] be" (Tr. p. 205). The Focus teacher testified that in the 1:1 setting of the Focus class, the student

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<sup>7</sup> I note that the student's language and writing, algebra and geometry, life science, US history, art and physical education teachers identified skills to be addressed with the student during the 2008-09 school year (Parent Ex. C).

did not have a lot of distractions, but he exhibited distractibility in the classroom that can "compromise" the quality of his work (Tr. p. 164). The student's literature teacher testified that while in his classroom, the student exhibited an inconsistent ability to attend, and required "a lot more prompting" on some days than others (Tr. p. 201).

The Focus teacher testified that the Focus program was "very important" to the student because he needed "tremendous support in organizing himself" (Tr. p. 174). The Focus program provided reminders about homework and assignments, which were reinforced on a consistent basis (Tr. p. 174; Parent Ex. C at p. 2). The literature teacher testified that the student had difficulty organizing his homework and classroom materials, which at times affected his ability to answer questions during class discussions (Tr. pp. 201-02). He testified that he addressed the student's organizational needs related to written language by using graphic organizers for outlining (Tr. p. 213). In social studies class, students worked on note taking skills, highlighting pertinent information in text and paraphrasing information (Tr. p. 216). The Focus teacher testified that he and the student went through the student's binder to organize papers, and used a checklist with the student's teachers to monitor whether or not the student completed his homework (Tr. pp. 165-67).

The hearing record reflects that Winston Prep measures student progress by looking at three factors: participation, commitment, and work product including tests and quizzes (Tr. pp. 222-23). While the student's difficulty with attention was still present, the literature teacher testified the student's attention skills had "definitely improved" over the course of the 2008-09 school year (Tr. pp. 201, 219). The Focus teacher stated that the student's organizational skills were "variable," but that he demonstrated "modest progression and growth" (Tr. p. 164). The Focus teacher stated that at the beginning of the 2008-09 school year, the student "missed" approximately 50 percent of his homework, and toward the end of the school year, he produced approximately 80 percent of his homework (Tr. p. 166). The literature teacher testified that the difficulties addressed by the student's IEP annual goals were also addressed at Winston Prep, that the student was "doing well," and that the student was making progress in many of the areas mentioned in the IEP (Tr. p. 218). Specifically, the literature teacher cited progress in the student's ability to produce more written work, demonstrate improvements in punctuation and grammar, understand the proof-reading process, produce a more organized written work product, and in his ability to "answer more questions in a detailed way in discussions" (Tr. pp. 219-20). The Focus teacher stated that the student demonstrated progress in the area of writing, in that he produced more "volume" than in the beginning of the school year "with not a lot of difficulty," and he noted improvements in the student's ability to use correct capitalization and punctuation (Tr. pp. 168-69). Additionally, the Focus teacher testified that the student exhibited an increased ability to "take a piece of writing from beginning through the middle to the end with each sentence kind of moving incrementally forward" (Tr. p. 169). The student's progress in reading was described as "slow but steady," and measured by the students' verbal report of what he has understood about a passage, or by a written report about what he has read (Tr. pp. 171, 177).

The May 30, 2008 IEP recommended that the student receive one individual session of OT per week and the use of an AlphaSmart to focus on his "fine motor and graphomotor deficits" (Dist. Ex. 2 at pp. 6, 17). The student's May 2008 OT annual goals and short-term objectives related to his ability to copy written information, his handwriting and keyboard skills, and his ability to recognize and correct errors in written work (Tr. pp. 12-13). Although Winston Prep did not offer OT services (Tr. pp. 232-33), the literature teacher testified that the student used an

AlphaSmart to help him organize his ideas and produce written language as opposed to handwriting (Tr. p. 233). In light of the information in the hearing record in this case, I find that the absence of formal OT services did not render the student's placement at Winston Prep inappropriate.

Finally, the district contends that LRE considerations require a finding that Winston Prep is not appropriate. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Accordingly, under the circumstances of this case, I find that LRE considerations do not preclude a finding that the parent's unilateral placement is appropriate.

Based on the foregoing, I find that Winston Prep addressed the student's special education needs, including his difficulty with attention, and that the lack of interaction with typically developing peers is not dispositive under the circumstances of this case. I therefore concur with the impartial hearing officer that the parent demonstrated that Winston Prep provided the student with educational instruction specially designed to meet the unique needs of a student with a disability (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine

whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

Here, I find that the impartial hearing officer erred in concluding that equitable considerations support an award of tuition reimbursement. The hearing record reflects that the parent did not provide either the May 1 or May 30, 2008 committees with notice of the removal of the student from the district's schools for the 2008-09 school year (Tr. p. 267). Although the parent objected to the district's recommended program by letter dated September 22, 2008 and advised the district that the student would continue to attend Winston Prep for the 2008-09 school year (Parent Ex. A), the parent failed to advise the district prior to enrollment that she intended to enroll the student at Winston Prep at public expense. The due process complaint notice dated October 6, 2008 is the only written notice contained in the hearing record where the parent informed the district that she had enrolled the student at Winston Prep for the 2008-09 school year and would be seeking tuition reimbursement (Dist. Ex. 1).<sup>8</sup> There is no dispute that the student was not enrolled in the district's schools at the beginning of the 2008-09 school year in September 2008. Under these circumstances, I find that the parent failed to provide timely notice of her rejection of the public school placement and her intent to enroll the student in a private placement at public expense that is required by the IDEA, its implementing regulations, and State regulations. I therefore find that the impartial hearing officer erred by finding that the equities supported the parent's claim seeking the costs of tuition at Winston Prep.

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

Lastly, I note that the hearing record demonstrates that the student's needs are such that there is no reason that the student would not be able to receive an appropriate education in the LRE in public school. If it has not done so already, the district should convene a CSE or subcommittee on special education meeting and develop an appropriate public school program for the student for the 2009-10 school year. If the district concludes that a CTT classroom is appropriate to meet the student's needs, the district should ensure that adequate supports are considered, including individual classroom aide services, and that an appropriate public school program is offered that

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<sup>8</sup> The hearing record reflects that prior to the beginning of the 2008-09 school year, the parent entered into an enrollment contract in March 2008 to place the student at Winston Prep for the 2008-09 school year (Parent Ex. E at pp. 1, 2; see Tr. p. 268). The agreement provided that, among other things, there would be "no allowance for absence or early withdrawal" and that the parent would "continue to be responsible for the balance of the entire tuition and fees" and that "all advance payments will be retained" should it become necessary at any time after the signing of the agreement for the student to withdraw (*id.*). The hearing record also reflects that the parent had made nonrefundable tuition payments in an amount totaling "over \$20,000" prior to the start of the 2008-09 school year (Tr. pp. 268-69; Parent Ex. E at p. 2), and made an additional non-refundable tuition payment of approximately \$8,700 after the school year had commenced, but before the parent's notice of placement at public expense contained in her due process complaint notice (Parent Ex. E at p. 2).

includes appropriate support services to address the student's attention needs, and that such services along with appropriate instructional goals are contained on the IEP.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED**, that the impartial hearing officer's decision is annulled to the extent that he ordered the district to reimburse the parent for tuition at Winston Prep for the 2008-09 school year.

**Dated:**           **Albany, New York**  
                          **July 27, 2009**

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