



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-097

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy SiligmueLLer, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied the parents' request to be reimbursed for the student's tuition costs at the Summit School (Summit) for the 2008-09 school year and denied the parents' request for reimbursement for additional home-based services. The appeal must be dismissed.

At the time the impartial hearing, the student was attending Summit after being unilaterally placed there by the parents (Tr. p. 42). Summit is a private school that has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Additionally, the student received unilaterally obtained home-based services consisting of 7.5 hours per week of 1:1 home and community-based special education itinerant teacher (SEIT) services, three hours per week of program supervision and parent training and counseling, three hours per week of both individual speech-language therapy and individual occupational therapy (OT), and one hour per week of individual physical therapy (PT).¹ According to the student's pediatric neurologist, the student had been offered a

¹ The hearing record refers to the student's school-age educational support services as "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although mischaracterized in the hearing record, I will continue to refer to the student's school-age educational support service providers as "SEITs" to remain consistent with the hearing record and to avoid confusion in this decision.

diagnosis of a pervasive developmental disorder – not otherwise specified (PDD-NOS) (Parent Ex. PP. at p. 1). The hearing record reveals that at its June 4, 2008 meeting, the committee on special education (CSE) changed the student's classification from autism to a learning disability (Tr. p. 191). The student demonstrates delays in her receptive and expressive language skills, social skills, auditory processing, and gross and fine motor skills (Tr. p. 367; Parent Exs. D; P at p. 1). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (Parent Ex. D at p. 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The student's prior educational history is described in Application of a Child with a Disability, Appeal No. 06-004 and Application of a Child with a Disability, Appeal No. 08-019, and will not be repeated here in detail.

Briefly, the student attended the district's collaborative team teaching (CTT)² program in kindergarten, first, and second grades with a full-time 1:1 SEIT (Parent Ex. W at p. 1). The student attended the district's third grade CTT program for the 2007-08 school year with a full-time SEIT and received related services that included speech-language therapy, OT, and PT (Parent Exs. P at p. 1; NN at p. 1; W at p. 1).

On November 1, 2007, a private pediatric psychologist completed a psychological consultation with the student (Parent Ex. XX). The private psychologist reported that the student was "a social and engaging nine year old girl" with difficulties in receptive, expressive, and pragmatic language, and "regulation" (id. at p. 1). The psychologist further reported that the student had "made ongoing progress in all areas" (id.). The psychologist indicated that the student was able to keep up academically with her peers at her current public school, she had some close friends with whom she enjoyed play dates and other recreational activities, and she was able to comfortably participate in group and class discussions "with a great deal of supports" (id. at p. 3).

In a letter dated November 29, 2007, the parents wrote to the student's CTT teachers concerning an incident with the student wherein another student reportedly deliberately stepped on their daughter's toes (Parent Ex. WW). The parents asked that the "bullying" directed at the student be addressed immediately (id.).

The student's CTT teachers completed third grade progress reports in winter 2008 indicating that the student "me[t] grade standard" in social studies and "approache[d] grade standard" in reading, "word study," writing, and math, but indicated "additional work or development needed" for the majority of "learning goals" identified for each academic area and the area of work habits (Parent Ex. K at p. 1). The student's CTT teachers reported that the student exhibited consistent effort in word study, social studies, and with homework (id.).

² "Collaborative team teaching," also referred to in State regulation 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 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>).

The hearing record reflects that on November 29, 2007, January 28, February 4, and February 13, 2008, the student was the subject of four incident reports related to inappropriate behavior by the student, including two allegations that she had pulled the hair of other students, one allegation that she had pulled her teacher's hair, one allegation that she slapped a teacher, and one allegation that the student had made inappropriate remarks to two other students (Parent Ex. CCC at pp. 1, 4, 9, 12-13).

In a letter dated February 5, 2008 from the parents to the principal of the district school that the student was attending, the parents noted several behavioral incidents involving the student and the student's CTT teachers (Parent Ex. QQ). In the letter, the parents also requested copies of any testing or incident reports involving the student, and requested a meeting with the principal to discuss the incidents and to address the parents' concerns that the student was being "bullied" by classmates (*id.* at p. 3). Also on February 5, 2008, one of the student's CTT teachers wrote an incident report concerning what she believed was an inappropriate phone conversation that had occurred with the student's mother (Dist. Ex. 3).

A neurodevelopmental evaluation of the student was conducted on February 18, 2008, by a private neurologist who noted that the student reported that her "teachers are mean and so are some of the kids" and that the student "was a little more nervous than last year" (Parent Ex. PP at p. 1). The private neurologist also reported that the student had "some friends at school and enjoy[ed] working" (*id.*). The private neurologist administered portions of the Wide Range Achievement Test – Fourth Edition (WRAT-4) to the student, which yielded age-based standard scores of 102 in word reading and 99 in sentence completion (*id.* at p. 2). According to the private neurologist, the student exhibited "expressive, receptive and pragmatic language skills delays, auditory processing difficulties, learning disabilities, and fine and gross motor delays" (*id.* at p. 1). The private neurologist opined that the student had made progress in receptive, expressive, and pragmatic language skills and social skills (*id.* at p. 3). The private neurologist further reported that the student's "spontaneous language and conversational skills ha[d] improved and are quite normal sounding;" however the student continued to display expressive language errors in content, form, and use of language (*id.*). The private neurologist described the student's auditory processing as "problematic" because the neurologist observed that the student did not answer her direct questions, but instead paused and continued "to talk about the subject from her line of thought" (*id.*). The private neurologist reported that the student had previously been offered a diagnosis of a PDD-NOS, but recommended that the student's educational classification be changed from autism to a learning disability because the student now more clearly met the criteria for a learning disability due to her language deficits and auditory processing disorder, which negatively affected her learning (*id.* at pp. 1, 4). The private neurologist further recommended that the student attend a 10-month program in a special education school that used a multisensory approach with a small class size, and provided individualized instruction to meet the needs of a student with a language-based learning disability, and that the student be grouped with peers with similar abilities (*id.* at p. 4). The private neurologist also recommended that the student receive related services in school as well as after school, including three 60-minute sessions of individual speech-language therapy weekly, three 60-minute sessions of individual OT weekly, and one 60-minute session of individual PT weekly for 52 weeks per year including weekends, vacations, and holidays (*id.*).

On March 21, 2008, the parents signed an enrollment contract with Summit for the 2008-09 school year and paid a non-refundable deposit of \$2758.00 to "reserve a place for [the student]" (Parent Ex. UU).

On March 26, 2008, the district's school psychologist conducted an updated functional behavioral assessment (FBA) of the student utilizing data obtained by observation and teacher and parent interviews (Dist. Ex. 1). The school psychologist's description of the student's behavior included "staying on task," difficulty with processing language including receptive and expressive language delays, hanging her head, looking down, and being "underresponsive" (*id.* at p. 1). According to the FBA, the student's behavior occurred during novel instruction, less structured classroom activities, or in the yard/after lunch, and varied in frequency depending upon the setting (*id.*). The school psychologist reported that the student demonstrated anxiety and misinterpreted social cues, receiving negative attention (*id.* at p. 2). The school psychologist further reported that the student with the "correct support can function well academically" (*id.* at p. 1).

In April 2008, a private psychologist and physician reevaluated the student at a center for developmental pediatrics (Parent Ex. NN at p. 1). The resultant evaluation report reflected that the student and her mother reported that the student was being "critique[ed] and ostraciz[ed]" by some of her classmates and that the student's mother expressed that the student was "becoming increasingly sad, anxious and uncomfortable in school, and less available for learning"(*id.*). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a full scale IQ score of 92 (percentile rank of 30), a verbal comprehension composite of 106 (percentile rank of 66), a perceptual reasoning composite of 100 (percentile rank of 50), a working memory of 83 (percentile rank of 13), and a processing speed composite of 80 (percentile rank of 9) (*id.* at p. 13). The student's WISC-IV composite scores were in the low average to average range with the private psychologist noting that the student's full scale IQ score "was not a good statistical representation of her performance on the assessment given the wide disparities within and between her composite scores" (*id.* at p. 4). Administration of selected subtests of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) yielded standard (and percentile) scores of 116 (86) in word reading, 99 (47) in reading comprehension, 116 (86) in pseudoword decoding, 103 (58) in numerical operations, 94 (34) in math reasoning, 130 (98) in spelling, and 96 (39) in written expression (*id.* at p. 14). The WIAT-II scores were in the average to very superior range and the private psychologist reported that the student demonstrated stronger rote skills compared to applied skills (*id.* at pp. 6, 14). The private psychologist reported that overall the student's memory skills were in the low average range and that overall her attention skills were weak (*id.* at p. 7).

The evaluators further reported that testing results indicated that the student's executive functions were in the very low to high average range, her visual motor skills were in the low to average range, and that she presented with expressive language weaknesses (Parent Ex. NN at pp. 10, 16). The evaluation report also indicated that during testing the student's "attention was highly variable" and that she was "often drawn off task by her own thoughts" (*id.* at p. 4). The student's social presentation was also reported to be highly variable and the student responded to some task demands in an excited, playful fashion, but at other times her mood was far more subdued and somewhat anxious (*id.*). Based on the evaluation, the evaluators recommended that the student's educational classification be changed to a learning disability and that the student attend a 10-month special education school with a "consistent, supportive special education environment [to] allow [the student] to benefit from small classes, low student-teacher ratio, multiple teaching strategies and approaches and individualized attention to meet her learning needs" (*id.* at p. 11). Additional recommendations included a 12-month program of related services and SEIT teacher support after school, monthly interdisciplinary meetings with the student's after school providers and parents to

review her progress and modify her program, social skills training in school, and 1:1 instruction in writing for content (id. at pp. 11-12).

In April and May 2008, a private speech-language pathologist conducted a "language evaluation" of the student (Parent Ex. KK at p. 1). The speech-language pathologist reported that the student demonstrated a moderate receptive and expressive language disorder and that the student's "difficulties with higher level aspects of language were noted during both formal standardized assessment and informal, more spontaneous discourse" (id. at p. 4). The speech-language pathologist opined that the student exhibited "higher language deficits that make her vulnerable to difficulties both socially and academically" (id. at p. 5). The speech-language pathologist recommended that the student receive three 60-minute sessions of speech-language therapy weekly at home, "at least" two sessions of speech-language therapy weekly in a small group at school to address social and pragmatic language needs, and that the student attend a small, structured classroom with a low student to teacher ratio (id. at pp. 5-6). The speech-language pathologist further recommended that the parents be provided with counseling on "ways to stimulate language behaviors at home" (id. at p. 6).

On May 5, 2008, the parents, together with the student and one of the student's SEITs, reportedly met with the district's principal to discuss an issue regarding the student (Parent Ex. GG). The hearing record reflects that when the parents attempted to raise the issue of alleged "bullying" of the student at the school, the principal ended the meeting because she did not believe that the issue should be discussed in front of the student (Tr. pp. 1482-84, 1698-1701).

The hearing record contains several letters between the district and the parents during May 2008 (Parent Exs. HH; II; JJ). In two of these letters, the parents expressed their belief that the teachers in the CTT class failed to "understand, support and nurture [the student], her special needs, learning style, and profile" (Parent Exs. HH; II). The parents further indicated in one of the letters their belief that the principal and the CTT teachers were failing to "appropriately address the underlying bullying and social issues" within the classroom (Parent Ex. HH at p. 2).

On May 15, 2008, the student's private neurologist conducted a one hour and fifteen minute observation of the student in her third grade CTT class (Parent Ex. FF at p. 1). The neurologist reported that the student was in a class with two teachers and 26 students, of which approximately 54 percent were general education students (id.). The observation report reflected that the class was working on making "passports" as part of a social studies project on Japan (id.). During the private neurologist's observation, the student was sitting with four other students and was observed to have a positive interaction with one of them and a negative interaction with another (id.). When she observed that other students were coloring their passports, the student got a basket of colored pencils and markers and began to draw on her passport (id.). According to the observation report, at the completion of the activity, the student was able to follow a four-step directive from the teacher with prompting from her SEIT (id. at p. 2). The student was next observed during a math activity (id.). The observation report reflected that the student participated with prompts from her SEIT (id.). The private neurologist then reported observing the student during a writing assignment (id.). The private neurologist opined that in general, the student "seemed anxious, sad, and frustrated" (id.). The private neurologist reported that the student's "head was often down" and that she "had minimal interactions with her classmates," which were "mostly negative" and "clearly affected [the student's] academic performance" (id.). The private neurologist further reported that compared to last school year, the student volunteered less and that her SEIT needed to prompt the student "much more" to get started and continue an assignment (id.). According to

the observation report, the private neurologist found that the student was "not well-integrated into the classroom and was "rejected, excluded or ignored by most of her classmates" and that "this stress has affected [the student's] academic performance" (id. at p. 3). The private neurologist indicated that the "[t]hird [g]rade CTT classroom [wa]s not an appropriate educational placement for [the student]" and recommended the student be placed in a "supportive and therapeutic special education school that meets the needs of a student with language-based learning disabilities" (id.).

On May 20, 2008, one of the student's classroom SEITs completed an educational progress report of the student (Parent Ex. EE). The classroom SEIT reported that the student demonstrated "the ability and potential to perform academically at and/or above grade level, except when her language deficits and delays challenge and adversely affect her understanding of the learning" (id. at p. 1). The SEIT further reported that the student participated extremely well in small groups but had difficulty "transferring" into larger groups (id. at p. 2). She reported that both the student's receptive and expressive language skills were variable, although the student was able to accurately express herself and communicate her wants and needs (id.). The SEIT indicated that the student strived to participate in group activities with her peers and that she "ha[d] a strong desire to be liked and accepted by her peers although negative social interactions within the classroom have made developing positive relationships difficult" (id.). The SEIT also indicated that the student demonstrated grade level to above grade level academic abilities with delays in higher level social skills and receptive, expressive and pragmatic language skills, and recommended that the student "be placed in a small, structured and supportive classroom with a low student to teacher ratio" in a special education environment (id.).

On May 21, 2008, the student's home-based physical therapist conducted a PT evaluation of the student (Parent Ex. AA). The home-based physical therapist reported that the student was independent in many of her activities of daily living (ADL)/self care but sometimes required prompting (id. at p. 1). Administration of the Movement Assessment Battery for Children (Movement ABC), an assessment of fine and gross motor skills yielded a score below the first percentile for the student's age, which the home-based physical therapist determined indicated significant motor skill deficits (id. at p. 4). The home-based physical therapist reported that the student demonstrated "decreased coordination, balance, endurance strength, and age appropriate gross motor abilities" and recommended that the student participate in an adapted physical education class at least two times weekly, in addition to one 60-minute individual PT session weekly at home or in an outpatient setting to address motor planning, balance, coordination, cardiovascular and muscular endurance, and the practice of age appropriate gross motor skills (id.). The home-based physical therapist included five annual goals with 26 corresponding short-term objectives addressing the student's aforementioned deficit areas (id. at pp. 6-8).

Also on May 21, 2008, the student's home-based speech-language pathologist completed a speech-language progress report (Parent Ex. CC). The home-based speech-language pathologist stated that the student continued to make steady progress in all areas of speech-language throughout the 2007-08 school year (id. at p. 1). The speech-language pathologist reported that the student was able to attend for longer time periods when she was provided with redirection and that she demonstrated consistent improvement in following multi-step directions both orally and in written text (id.). She reported that although the student demonstrated improvement in her expressive language skills, she continued to exhibit a significant delay in the area of social language (id. at p. 2). The home-based speech-language pathologist indicated in the progress report that the student's speech-language delays adversely affected her academically and socially

and recommended the student be placed "in a special education setting for 4th grade next year in small classes with a supportive and individualized approach to learning" (*id.*). The speech-language pathologist also recommended that the student receive speech-language therapy in school in a group of 2-3 students to improve her language, pragmatic, social and play skills, as well as three 60-minute sessions of home-based individual speech-language therapy weekly on a 12-month basis (*id.*).

On May 22, 2008, the student's home-based occupational therapist completed an OT progress note (Parent Ex. Y). The occupational therapist reported that the student demonstrated delays in fine motor, graphomotor, visual perceptual/motor and sensory processing (*id.* at p. 1). The occupational therapist further reported that the student was "independent in self-care tasks; however, at time [the student] needs verbal cues to stay on task" (*id.*). The occupational therapist recommended that the student's OT services be reduced to one 60-minute individual session weekly on a 12-month basis in addition to "any OT received in a supportive special education school" (*id.* at p. 2).

Also on May 22, 2008, the student's "program consultant" completed a progress report regarding the interventions provided by the student's SEITs (Parent Ex. W). The consultant reported that the student continued to demonstrate progress in all targeted areas in school, home, and community environments (*id.* at p. 1). Target areas included reading comprehension, writing fluency, social skills, staying on task, following multi-step directions, math word problems, multi-step math problems, higher level language processing skills, and auditory comprehension and processing (*id.* at pp. 1-2). The consultant indicated that the SEITs would continue to address these targeted areas with the student (*id.*). The program consultant recommended that the student attend a small class with a low student to teacher ratio in a 10-month special education school and continue to receive 7 1/2 hours per week of SEIT instruction to promote generalization, address skills not addressed during the school day, and to maintain skills she acquired in school (*id.* at p. 2). The program consultant further recommended up to 10 hours per month of supervision/coordination/consultation from a private institute, monthly team meetings/teaching clinics, and services provided for 52 weeks per year (*id.*).

On May 23, 2008, the student's home-based SEIT completed an educational progress report (Parent Ex. V). The home-based SEIT reported that the student demonstrated delays in language/auditory processing, comprehension, pragmatic language skills, and social skills (*id.* at p. 4). The home-based SEIT described the student as a "cooperative, motivated and enthusiastic participant and partner in her learning activities and homework assignments" (*id.* at p. 2). The home-based SEIT indicated that the student had "strong decoding skills, however, she ha[d] a significantly large gap between her decoding and reading comprehension skills" (*id.* at p. 1). The home-based SEIT also indicated that the student demonstrated difficulty with "planning, organizing, formulating, expanding, elaborating, and detailing her written work" (*id.* at p. 2). The home-based SEIT reported that the student exhibited grade level rote computational, arithmetic math skills; however, the student demonstrated deficits with her math reasoning, word problems, and multi-step problem skills (*id.*). In the area of social/emotional skills, the home-based SEIT reported that the student had made progress initiating conversations and social interactions with peers, but at times she required teacher support to maintain them or join in (*id.*). The student appreciated her friends and looked forward to spending time with them (*id.*). The home-based SEIT reported that the student stated that she wanted "to be accepted and included by her peers in school, to have more friends in school and for her teachers to value her;" however, the home-based

SEIT also reported that over the course of the academic year, the student had continuously expressed her sadness, frustration, anxiety and discomfort with "her being bullied by various children in her class in school" (id. at p. 3). The home-based SEIT indicated in the progress report that this had negatively affected the student's ability to initiate, concentrate, attend, and stay on task with her homework assignments and activities after school, which had affected her academic performance (id.). She recommended that the student attend a special education school that addressed language-based learning difficulties on a 10-month basis, and continue to receive 7 1/2 hours per week of "one to one home-based teacher support on a 12- month basis" (id.).

On May 23, 2008, the student's school-based classroom SEIT completed a progress report (Parent Ex. S). The progress report reflected that the student required prompts to transition and attend to classroom routines and during social and academic portions of the day (id.). The school-based classroom SEIT reported that this support was necessary to reassure the student and enhance her comfort level because of "negative social interactions" in her CTT class (id.). The progress report further indicated that the student exhibited difficulties in receptive, expressive, and pragmatic language (id.). The progress report reflected that the student demonstrated strengths in mathematical calculation, reading and decoding; however, she continued to need assistance in math word problems, math multi-step problems, higher level comprehension, and language processing involving reasoning and inferences (id.). The student's school-based classroom SEIT recommended that the student attend a "structured small class setting, with a low student to teacher ratio" in order to receive individualized attention for her "special needs and learning style" (id.).

By letter dated May 23, 2008, addressed to the district's CTT teachers, the district school psychologist and the district social worker; the parents requested that the district provide the parents with all "formal and informal" district evaluations, assessment, tests, reports, files, student work, and any other documentation that was to be considered at the annual review meeting scheduled for June 4, 2008 (Parent Ex. T at p. 1). The parents further indicated that they intended to audiotape the upcoming CSE annual review meeting (id. at p. 2).

By letter dated May 27, 2008, addressed to the student's CTT teachers, the parents provided copies of the private neurologist's evaluation and school observation reports; progress reports from the student's SEITs; a private speech-language evaluation report; progress reports with recommended individualized education program (IEP) goals/objectives from the student's home-based speech-language pathologist, home-based occupational therapist, home-based physical therapist, and program consultant; a third grade winter progress report; and a progress report from a private "[y]oung [a]rtists" program (Parent Ex. Q at pp. 1-2). The parents further indicated in their letter that they had not received as previously requested, "a copy of any and all District evaluations, assessments, reports, and any other document(s) the IEP team intends to consider during the CSE Annual review IEP Meeting" (id. at p. 2). The parents also indicated that they had not yet received the "Request for Physical Examination Form," the "Notice of Rights as a Parent with a Child with a Disability Booklet," and "A Parent's Guide to Special Education for Children 5-21," which they had previously requested (id.).

By letter dated May 28, 2008, addressed to the student's CTT teachers, the district school psychologist and district social worker; the parents informed the district that they had not yet received any of the documents requested in their letter of May 27, 2008, and provided the district with a SEIT progress report (Parent Ex. N at p.1). Additionally, the parents requested that the district confirm that a representative from the "District Level who has placement and related

services decision making authority for summer 2008 and the 2008-09 school year" would be attending the student's scheduled CSE meeting (id.).

By letter dated May 28, 2008, the district informed the parents that the documents they had requested were attached and requested that the parents sign a letter confirming their previously stated intent to exercise their right to waive participation of the additional parent member at the CSE meeting (Parent Ex. O).³

On May 28, 2008, the student's home-based speech-language pathologist completed a speech-language progress note (Parent Ex. P). The home-based speech-language pathologist reported that the student had made "steady" progress in her speech-language therapy sessions (id. at p. 1). She noted that the student exhibited some improvement in her receptive, expressive and pragmatic language skills, but continued to demonstrate weaknesses in these areas (id.). The private speech-language pathologist noted that the student demonstrated the greatest difficulty with complex sentences such as "why" or "how," retelling/recalling main ideas, sequencing and summarizing stories, greeting familiar individuals, and initiating and maintaining the topic during conversational exchanges (id.). The home-based speech-language pathologist recommended the continuation of individual, extended day speech-language services for three hours weekly on a 12-month basis (id. at p. 2). The home-based speech-language pathologist also recommended that the student attend a language-based special education school that would support and integrate the student's speech-language throughout the school day (id.).

By letter dated May 29, 2008, addressed to the student's CTT teachers, the district school psychologist and district social worker; the parents provided the district with a private neurodevelopmental and psychological evaluation report (Parent Ex. M). The parents indicated that they had not received the documents they requested in their letter dated May 27, 2008 and again requested that the documents be provided to them (id.).

An undated document reported that the student achieved a score of 668 on the 2008 New York State testing results for mathematics placing the student at "Level 3, Meeting the Learning Standard," described as "[s]tudent performance demonstrates an understanding of the mathematics content expected at this grade level" (Dist. Ex. 4).

The student's CTT teachers completed third grade progress reports for the student in spring 2008 noting that the student met "grade standard" in word study, math, and social studies and that she "approache[d] grade standard" in reading and writing (Parent Ex. L at p. 1). The progress report indicated "additional work or development needed" for the majority of "learning goals" identified for writing and the area of work habits (id.). The student's CTT teachers reported that the student exhibited consistent effort and progress in word study, math, social studies, organizational skills, and homework (id.). The CTT teachers also indicated in narrative comments that the student had made academic progress throughout the school year, was reading on grade level, and was an enthusiastic participant when learning about topics of interest (id. at p. 3). The CTT teachers further commented that the student needed to consistently choose books that were

³ The hearing record does not reveal which documents, if any, were attached to the May 28, 2008 letter from the district to the parents (see Parent Ex. O).

at her reading level, develop strategies when working with other students, and develop the ability to sustain a task over time to be successful in fourth grade (id.).

The CSE convened on June 4, 2008 for the student's annual review and to develop her IEP for the 2008-09 school year (Parent Ex. D). Attendees included the parents, the principal from the student's school, the assistant principal who also served as the district representative, a district guidance counselor, a district occupational therapist, a district physical therapist, a district social worker, a district school psychologist, the district regular education and special education teachers who taught the student's CTT class, a private speech-language pathologist, a district speech-language therapist, the student's SEITs, a private neurologist, and a education supervisor (Tr. pp. 405, 406, 758; Parent Ex. D at pp. 2-3).⁴ The written transcript of the CSE meeting reflects that following discussion, the CSE changed the student's educational classification from autism to a learning disability based upon the recommendation of the student's private neurologist who informed the CSE that the student no longer met the criteria for a PDD and that the student had "outgrown that diagnosis this year" (Tr. p. 66; Parent Ex. J at pp. 37, 40; see Parent Exs. D. at p. 1; PP at p. 4). The written transcript of the CSE meeting also reflects that the parents attempted to raise the issue of what they believed was "bullying" of the student in the third grade CTT class, but that the principal stated that the topic was "not about the IEP" (Tr. pp. 875-876, 1560; Parent Ex. J at pp. 45-46). Although the parents stated to the CSE their belief that the student's private neurologist, private speech-language pathologist, home-based SEIT and school-based SEIT all recommended that the student be placed in a "language-based school with smaller classes," the CSE recommended that the student attend a 10-month CTT class with related services (Parent Exs. D at pp. 1, 9; J at pp. 54-58). The transcript of the CSE meeting also reveals that the principal responded to the parents' assertion that they disagreed with the particular CTT class that the student was attending by stating that the student "could go to a CTT in another school," but the parents clarified that they believed the CTT program was not appropriate for the student "in general" (Parent Ex. J at pp. 57-58).

The resultant IEP dated June 4, 2008, provided the student with annual goals and short-term objectives in the areas of math, reading, writing, social/emotional skills, speech-language, and gross and fine motor skills (Parent Exs. D pp. 6A-6AA; F; G; H). Related service recommendations included counseling one time per week in a group of three for 30 minutes, OT three times per week individually for 30 minutes, PT one time per week individually for 30 minutes and one time per week in a group of two for 30 minutes, and speech-language therapy three times per week individually for 30 minutes and twice per week in a group of two for 30 minutes (Parent Ex. D at p. 9). Testing accommodations included extended time ("double" time), separate location ("max 12 students"), directions read and reread, "answers recorded in any manner," and "mask and markers" for placement (id.).

By due process complaint notice dated June 20, 2008 the parents, through their attorney, requested an impartial hearing (Parent Ex. A). The parents asserted both procedural and substantive arguments that they alleged resulted in a denial of a free appropriate public education

⁴ The district physical therapist testified that she attended the June 4, 2008 CSE meeting by way of a teleconference (Tr. pp. 1109-1110). The district physical therapist did not sign the June 2008 CSE meeting attendance sheet (see Parent Ex. D at pp. 2-3).

(FAPE)⁵ for the 2008-09 school year (*id.* at pp. 2-4). The parents argued, among other things, that the CSE should have referred the matter of the student's proposed placement to the district's central based support team (CBST) for a specific State-approved nonpublic school recommendation (*id.* at p. 2). The parents argued that the CSE failed to discuss the student's annual goals and short-term objectives at the CSE meeting, improperly predetermined the recommendations on the IEP, failed to provide the parents with requested documents prior to the CSE meeting, refused to allow the student's SEIT to speak during the CSE meeting, and refused to discuss "bullying" at the CSE meeting; all of which deprived the parents of meaningful participation in the IEP drafting process (*id.* at pp. 2-4). The parents also argued that the annual goals and short-term objectives on the IEP lacked "objective measures," were ambiguous, and that some were inappropriate (*id.* at p. 3). The parents argued that the CSE failed to adequately assess the student's present levels of performance (*id.* at pp. 3-4). The parents also argued that the district ignored the recommendations of the student's related service providers and independent evaluators, who recommended that the student be placed in a speech-language special education school (*id.*). The parents further argued that the CTT class recommended by the CSE was not appropriate for the student because it would not accommodate the student's speech-language needs (*id.* at p. 2). The parents argued that the IEP's recommended related services, which were all "pull out" services occurring during the school day, were inappropriate because the services should have been delivered out of school (*id.* at p. 3). The parents also argued that the IEP ought to have included transportation, an extended school year and parent training and counseling (*id.* at p. 4). Lastly, the parents asserted that Summit was an appropriate placement for the student and that the equities favored the parents. The parents sought a declaration by an impartial hearing officer that the recommended CTT fourth grade classroom and related services in the student's IEP were not "appropriate components" of the student's educational program and did not offer a FAPE to the student in the LRE (*id.*). The parents further sought, among other things, reimbursement for tuition at Summit, transportation to Summit, SEIT home program and after-school extended day services 7.5 hours per week, "consultation/supervision/coordination, program review and modification, school observations and ongoing parent training," and related services including speech-language therapy, OT, and PT (*id.*).

An impartial hearing convened on July 8, 2008, and concluded on March 13, 2009, after eight hearing dates (Tr. pp. 1, 16, 340, 578, 816, 1100, 1285, 1596). At the impartial hearing, the district called eight witnesses and entered six exhibits into the hearing record (Tr. pp. 125, 353, 526, 581, 746, 818, 1103, 1165; Dist. Exs. 1-6) and the parents called 16 witnesses and entered 55 exhibits into the hearing record (Tr. pp. 106, 261, 715, 804, 1156, 1165, 1208, 1222, 1291, 1354, 1420, 1467, 1549, 1597, 1644, 1657, 1688; Parent Exs. A-Z; AA-ZZ; AAA-CCC).

⁵ The term "free appropriate public education" means special education and related services that--

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

(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

In a decision dated July 21, 2009, the impartial hearing officer denied the parents' request for tuition reimbursement for Summit for the 2008-09 school year and for reimbursement for additional home-based services (IHO Decision at p. 34). In her decision, the impartial hearing officer set out background information, summarized the positions of the parties, and then summarized the evidence presented at the impartial hearing (id. at pp. 3-25). The impartial hearing officer found that the district met its obligation to comply with the procedural requirements of the Individuals with Disabilities Act (IDEA) and that the CSE, in a "lengthy meeting," developed an IEP with the input of the parents and some of the outside service providers who provided goals for the IEP (id. at p. 26). The impartial hearing officer found that the parents' argument regarding the lack of discussion of the student's behavioral intervention plan (BIP) at the CSE meeting was not compelling because a lengthy meeting had been held on the topic in March 2008 at which the parents' concerns were discussed and the BIP was modified (id. at p. 27). She further found that the BIP was based on an appropriate FBA that had been developed prior and that the BIP was attached to the June 2008 IEP (id.). The impartial hearing officer found that although the parents were not given an opportunity to discuss the issue of "bullying" at the CSE meeting, it was appropriate for the district to defer the topic to a separate meeting because the issue did not go to the "heart of the whether the CTT program and the related services recommended on the IEP were appropriate" (id.). The impartial hearing officer found that the question of bullying "[a]t best...places in question the location of where such educational programs and related services should be provided," and noted that when given an opportunity to discuss that issue, the parents declined to discuss an alternative public school placement (id.). The impartial hearing officer further found that the district did not withhold any documents from the parents that were relied upon by the CSE in formulating the student's IEP and that the district's witnesses had testified that they had reviewed the reports from the student's evaluators and providers (id. at pp. 27-28). The impartial hearing officer further noted that the district had not formally evaluated or observed the student because the parents "refused to consent" to it doing so (id.). Moreover, she found that if any documents were withheld; the failure to produce them was de minimus and not a denial of a FAPE (id.). The impartial hearing officer found that the district was not required to give the parents a copy of the proposed IEP at the close of the CSE meeting and that the parents had received the IEP the next day (id. at p. 26).

The impartial hearing officer also found that the district met its obligation to show that the IEP was reasonably calculated to enable the student to receive educational benefits (IHO Decision at p. 28). The impartial hearing officer found that the student had been doing well academically in the 10-month CTT program with related services that she had attended for several years previously and that placement in a special school would be more restrictive than the proposed CTT class (id. at p. 29). She further noted that none of the parents' witnesses had stated that the CTT program itself was inappropriate (id.) and found that the amount of related services recommended in the IEP were appropriate (id. at pp. 29-30). The impartial hearing officer found that the evidence did not show that the student required either in school or after school home-based SEIT services and that the district was not required to provide such services where the district offered an appropriate day program (id. at pp. 30-31). The impartial hearing officer also found that it was not clear that the amount of related services in the student's IEP would be disruptive to the student's school day (id. at p. 31). Regarding the parents' claim that the student required an extended school year, the impartial hearing officer found that there was no basis in the hearing record to show that the student would regress if she did not receive her related services over the summer (id. at p. 32).

Although she found that the district had met its burden to show that it had offered the student a FAPE, the impartial hearing officer went on to address the appropriateness of the parents' unilateral placement and found that although the student had made academic and social progress there, Summit's lack of sufficient speech-language, PT, OT, and counseling related services rendered it inappropriate (IHO Decision at pp. 32-33). The impartial hearing officer further found that the parents' choice to supplement the student's program at Summit by providing private related services outside of school did not make Summit an appropriate placement (*id.* at p. 32).

Lastly, the impartial hearing officer found that the parents had not shown that the equities supported reimbursement because the evidence showed that the parents intended to send the student to Summit before the CSE met to plan the student's program for the 2008-09 school year and the parents' refusal to consider alternate district CTT placements was unreasonable (IHO Decision at pp. 33-34).

On appeal, the parents request that the impartial hearing officer's decision be reversed and that a State Review Officer find that the district failed to offer the student a FAPE, that the parents' unilateral placement of the student at Summit with related services and home-based SEIT support was reasonably calculated to provide the student with meaningful educational benefits, and that there were no equitable circumstances revealed in the hearing record that would preclude or diminish an award for reimbursement relief.

Specifically, the parents argue that the impartial hearing officer improperly found that the district's failure to timely provide documents to the parents, including the proposed IEP, was "de minimus." Documents that the parents contend were improperly withheld include a copy of the FBA used for creation of the student's BIP and incident reports written by teachers and other students about the student. Additionally, the parents argue that failing to give the parents a copy of the IEP at the close of the June 2008 CSE meeting because the IEP needed to be further modified, resulted in IEP drafting that occurred outside the presence of the parents which constituted a procedural violation. The parents also argue that the district's recommended program and placement were impermissibly predetermined by the CSE. The parents contend that the CSE failed to properly individualize the student's program because the CSE was constrained by district policies as evidenced by district witnesses who stated that they were not permitted to recommend out of school services, could only deliver related services in 30-minute sessions, and were not permitted to recommend a private school placement. The parents contend that the impartial hearing officer erred in concluding that the district's recommended placement was reasonably calculated to provide the student with meaningful educational benefits because the evidence showed that the "hostile, bullying environment" rendered that placement inappropriate as it was having a negative impact on the student's social/emotional and academic performance.

The parents next argue that the impartial hearing officer erred in finding that the unilateral program was inappropriate because it failed to provide counseling, PT, and sufficient speech-language therapy because the Summit program is language based, has an adaptive gym, and provided the student with counseling through an assigned social worker. Lastly, the parents argue that the impartial hearing officer erred in holding that the equities did not favor them because, contrary to the impartial hearing officer's finding, the parents were never offered any district CTT placement other than the school that the student was attending at the time of the CSE meeting, and because the district's actions toward the parents up to and at the CSE meeting weigh against the district. The parents further argue that the impartial hearing officer erred in finding that the parents never intended to send the student to the public school because the district had a history of refusing

to address the "bullying" issue, including at the CSE meeting, and because the equities do not prevent a parent from entering into a contract with a private school before the CSE meeting.

In their answer, the district argues that the parents abandoned some of their claims that were raised in the due process complaint notice, but were not raised in the petition. The district asserts that the impartial hearing officer properly found that the district offered the student a FAPE, the alleged procedural violations do not rise to the level of a denial of a FAPE, the recommended program and related services were appropriate, and the recommended placement in the district's CTT program would have been appropriate. The district further contends that there was no evidence that the alleged bullying denied the student a FAPE, would have continued, or would not have been addressed by the district's school, and that the school has a "zero tolerance" policy toward bullying. The district also argues that the impartial hearing officer properly found that the parents' unilateral placement at Summit and the home-based services were not appropriate because the evidence shows that the program at Summit does not address all of the student's needs and because the parents failed to enter sufficient evidence into the hearing record regarding the needs that the program did address. The district lastly argues that the impartial hearing officer properly found that the equities did not favor the parents because the parents had decided to enroll the student at Summit before the June 2008 CSE meeting and because the parents repeatedly failed to cooperate with the district and impeded the CSE process by, for example, refusing to allow the district to conduct evaluations of the student.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A district has an affirmative obligation to offer an eligible student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with

sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).⁶ 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]).

The federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Parents are to be afforded an opportunity to participate in the IEP formulation process (34 C.F.R. § 300.322; see Cerra, 427 F.3d at 192; Gavriety v. New Lebanon Sch. Dist., 2009 WL 3164435, at *29 [N.D.N.Y. Sept. 29, 2009]). 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

⁶ Harassment of a student eligible for special education services may deny a student a FAPE (see United States Department of Education Dear Colleague letter dated July 25, 2000 entitled "Prohibited Disability Harassment"; see generally Child Suspected of Having a Disability, Appeal No. 07-086).

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

The parents raise a number of procedural arguments on appeal and allege that the district's procedural errors caused a denial of a FAPE. First, I will address the parents' argument that the impartial hearing officer improperly found that the district's failure to timely provide documents to the parents, including the proposed IEP, was "de minimus" and did not deny the student a FAPE. On appeal, the parents argue that under federal regulations, an agency must comply with a parent's request for a child's education records before an IEP meeting, citing 34 C.F.R. § 300.613(a). Documents that the parents contend were improperly withheld include a copy of an FBA used for creation of the student's BIP and incident reports written by teachers and other students about the student.

The hearing record reveals that the parents repeatedly requested documents in both specific and general terms prior to the CSE meeting (Parent Exs. M; N; Q; T; QQ). It appears that the district failed to provide the parents with a number of documents prior to the June 2008 CSE meeting, including a copy of an FBA used for creation of the student's BIP and incident reports written by teachers and other students about the student (Parent Ex. CCC). Ultimately, these documents were obtained pursuant to a subpoena during the impartial hearing (Tr. p. 932; Parent Ex. CCC). The district's failure to timely disclose the FBA and timely respond to the request for incident reports constitutes a procedural violation (see 34 CFR § 300.613[a]; 8 NYCRR 200.5[d][6]). However, I find that the parents have failed to show that this procedural inadequacy either: (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. The parents appear to allege in their petition that the violation significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, but beyond stating that the documents were "relevant" to the formulation of the IEP and that the parents were at a "disadvantage" because they were without complete information, the parents do not say how the withheld documents impacted their ability to participate. Specifically, as noted by the impartial hearing officer, the failure to disclose the FBA prior to the June 2008 CSE meeting was mitigated by the fact that the FBA was used in creating the student's BIP, which was drafted at a lengthy meeting held in March 2008 in which the parents took an active role (Tr. pp. 381, 509; IHO Decision at p. 27). The parents do

not argue that the student's BIP attached to the June 2008 IEP was flawed in any way and they did not raise any issues regarding the FBA/BIP in their due process complaint notice. The parents also do not specify how having the incident reports prior to the June 2008 CSE meeting would have impacted the parents' participation at the CSE meeting. The hearing record shows, as discussed more fully below, that the parents took an active role at the June 2008 CSE meeting by asking questions and making multiple comments (Tr. pp. 1702, 1763; Parent Ex. J) and that they were significantly involved in the IEP formulation process (Cerra, 427 F.3d at 193). The district is cautioned; however, to ensure future compliance with 34 CFR § 300.613(a) and 8 NYCRR 200.5(d)(6).

Additionally, the parents argue that failing to give them a copy of the IEP at the close of the June 2008 CSE meeting, because the IEP needed to be further modified to reflect the student's change in classification, resulted in IEP drafting that occurred outside the presence of the parents, which constituted a procedural violation. However, I find no merit in this argument and concur with the impartial hearing officer's determination that it was not a procedural violation to deliver the completed IEP to the parents the day after the CSE meeting especially, where as a result of the CSE's discussion at the meeting, the draft IEP needed to be modified to change the student's classification from autism to learning disability (IHO decision at p. 26; see Parent Ex. D at p. 1; Answer ¶ 19).

Next, the parents argue that the district's recommended program and placement were impermissibly predetermined by the CSE. The parents contend that the CSE failed to properly individualize the student's program because the CSE was constrained by district policies as evidenced by district witnesses who stated that they were not permitted to recommend out of school services, could only deliver related services in 30-minute sessions, and were not permitted to recommend a private school placement. For the reasons discussed below, I find that the hearing record reflects that the recommendation for the student to attend a CTT class was not predetermined and thus did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (see K.Y. v. New York City Dep't of Educ., 2009 WL 3233811 [2d Cir. Oct. 9, 2009]; T.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. v Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *8-*9 [S.D.N.Y. May 15, 2009]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; E.G., 2009 WL 773960, at *3; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. Aug. 1, 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. Oct. 21, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-148 [S.D.N.Y. 2006]; 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 supports a conclusion that a predetermination of program services rose to the level of a denial of a FAPE]).

The June 2008 IEP reflected that the CSE considered placing the student in two other programs a general education program with related services and a general education program with special education teacher support services (SETSS), but found that neither of these programs would adequately address the student's academic and social/emotional needs (Parent Ex. D at p. 35). The hearing record also reflects that at the June 2008 CSE meeting, the district principal suggested that if the parents did not like the CTT program at the school that the student currently

attended, the student could attend a different CTT class at a different school (Parent Ex. J at pp. 56-58). The hearing record reflects that the district personnel at the June 2008 CSE meeting stated that they could not, as a matter of policy, recommend out of school services for the student (Parent Ex. J at p. 19). The student's mother stated at the CSE meeting that the parents had requested the presence of a "district representative" at the meeting who "had the authority" to recommend out of school services (id.).⁷ Although the district personnel at the June 2008 CSE meeting did state that they "generally" did not provide 60-minute related services session in the school, there was also discussion about delivering the services in a flexible manner, such as by having two 30-minute sessions back to back so as to simulate a 60-minute session (id. at pp. 17-18). Also during the June 2008 CSE meeting, referring the student's placement recommendation to the district's CBST for a State-approved nonpublic school was discussed, but it was determined that it was not necessary because the CTT class recommendation was the recommendation that the committee felt was appropriate (id. at pp. 68-69, 75, 79). Lastly, during the June 2008 CSE meeting, the parents requested that the student's classification be changed from "autism" to "learning disability" (id. at p. 37). After an extended conversation that included the parents' private evaluators, the CSE agreed to the suggested change in classification (id. at pp. 37-51).

The June 4, 2008 CSE meeting transcript reveals that there was significant parent participation during the CSE meeting (Parent Ex. J). During the CSE meeting, the parents asked for clarification regarding the student's academic progress asking specific questions related to reading, math, and written expression which was provided to them by the student's CTT teachers (id. at pp. 7-9). The hearing record reflects that a private speech-language pathologist who had evaluated the student reviewed his evaluation report and that the CSE had considerable discussion regarding the annual goals provided by the home-based speech-language pathologist during which the student's mother had significant participation regarding why she felt the goals were appropriate (id. at pp. 9-10, 11-15). According to the CSE meeting transcript, the CSE discussed providing related service sessions back to back to create a therapy session lasting 60 minutes in response to the parents' concerns that their private evaluator had recommended 60-minute sessions (id. at pp. 17-18). The CSE meeting transcript also reflects that when the parents objected to the district physical therapist and occupational therapist offering their observations of the student because the parents wanted to rely on their private providers' recommendations, the CSE confined the district providers' input to a review of the private providers' reports (id. at pp. 24-30, 35-36). I note also that although the district's occupational therapist recommended more OT than the parents' private provider, the district acquiesced to the parents' wishes that only the private OT provider's recommendations be considered (id.).

The CSE meeting transcript further reflects that following a lengthy discussion, the CSE agreed to change the student's classification from autism to learning disability based on the recommendation of the student's private neurologist (Parent Ex. J at pp. 36, 45, 47-52, 64-69, 72). The CSE discussed placement of the student in the district's CTT class for the 2008-09 school year as well as the student's providers' recommendation of a special education setting with a "low student-to-teacher ratio" (id. at pp. 54-60, 61, 63, 68-69, 72, 74-75). I note that when the parents objected to the CTT recommendation because of incidents that had reportedly occurred during the

⁷ Although the IEP reflected that the assistant principal acted as a district representative at the CSE meeting (Parent Ex. D at p. 2), it is not clear if that is the person who the parents requested to attend the meeting or if the assistant principal had the authority to recommend out of school services (see Parent Ex. N).

2007-08 school year, the CSE offered for the student to attend a CTT class in another school (id. at pp. 57-58).

In light of the above I find that the hearing record reflects that CSE recommendations for the student were not predetermined and thus did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. The student's recommended program and services were designed to meet the student's academic, language, fine and gross motor, and social/emotional needs within the school day.⁸

The parents further contend that the impartial hearing officer erred in concluding that the district's recommended placement at the district school that the student had been attending at the time of the June 2008 CSE meeting was reasonably calculated to provide the student with meaningful educational benefits because the evidence shows that the "hostile, bullying environment" that the district was allegedly allowing or encouraging to occur rendered that placement inappropriate. Further, the parents contend that after finding that the issue of bullying "places in question the location of where such educational programs and related services should be provided," the impartial hearing officer wrongly burdened the parents with the duty to discuss alternative placements, rather than placing the burden upon the district to offer an appropriate placement.

Turning to the student's needs and the appropriateness of the district's recommended placement and program, as indicated above, the student demonstrates delays in her expressive, receptive, and pragmatic language skills; social skills; auditory processing; and gross and fine motor skills (Tr. p. 367; Parent Exs. D; P at p. 1). The district's school psychologist testified that the student's strengths include her sensitivity and empathic and serious manner along with her good sense of humor (Tr. p. 369) and that she exhibits weaknesses that include staying on task, completing assignments, and her verbal expression (Tr. p. 367). The school psychologist also testified and the FBA produced by the school psychologist reflected that the student demonstrated anxiety and misinterpreted social cues (id.; Dist. Ex 1 at p. 2). The school psychologist further testified that that the student had friends, enjoyed relating with others, and that her academic skills were on grade level (Tr. pp. 369-70).

The parents contend that placement in a CTT class for the 2008-09 school year was not appropriate for the student and that she required a language-based special education school. The hearing record reflects that reports dated April and May 2007 and prepared by the student's school-based and home-based ABA SEITs and ABA SEIT supervisor/program consultant, indicated that during the 2006-07 school year, when the student was attending a district second grade CTT class, the student demonstrated progress in academics, social skills, and language skills (Parent Ex. B at p. 6). For the 2007-08 school year, two developmental pediatricians, all of the student's ABA SEITs, and the ABA SEIT supervisor/program consultant consistently recommended placement in a district third grade CTT class with full-time 1:1 ABA SEIT support that would be gradually "faded" during the school year, and at least ten hours per week of home-based ABA SEIT services (id.).

⁸ I remind the district that any special education programs and services recommendations must be based on the student's needs. Here, the district offered the student an appropriate program and the failure to consider home-based services did not deny the student a FAPE.

In the student's third grade progress reports completed in winter 2008, the student's CTT teachers indicated that the student was "creative and outgoing" and had the ability to perform at or above grade level but hesitated to apply herself fully (Parent Ex. K at p. 3). The student's CTT teachers also indicated that the student exhibited much potential (id.). Although the student's home-based SEIT testified that the student needed 1:1 instruction in a small and nurturing environment to succeed (Tr. p. 1608), the student's third grade progress report completed in spring 2008 indicated that the student had made academic progress throughout the school year (Parent Ex. L at p. 3). The CTT teachers reported that the student's reading abilities were on grade level, that when she read she was highly engaged, and that she was an "enthusiastic participant" regarding topics that were of interest to her (id.). The CTT teachers recommended that the student develop both strategies for maintaining her attention and engaging with her classmates (id.). The student's spring progress report also reflected that the student was either at or approaching grade standards in all areas and that she required additional development in writing and her work habits (id. at p. 1).

The hearing record reveals that the June 2008 CSE recommended a fourth grade CTT program that consisted of both a general education teacher and special education teacher (Tr. p. 365; Parent Ex. D at p. 1). The hearing record also reveals that there were 14 general education students and 9 special education students in the CTT class, with 7 of the 9 students receiving related services of speech-language, OT, and/or counseling (Tr. p. 591). The special education teacher testified that the general education students were selected for the CTT class because of their "exceptional behavior and social skills" and to be peer models (Tr. pp. 582-83). The fourth grade CTT special education teacher testified that in the recommended CTT class, the students benefit from having two teachers, various teaching models, and small group instruction consisting of both homogeneous and heterogeneous groupings (Tr. p. 584). The special education teacher further testified that during the 2008-09 school year, the recommended class included two paraprofessionals assigned to other students and one student teacher (Tr. pp. 584-85). The special education teacher testified that the two paraprofessionals and the student teacher worked with all students in the classroom, both in small groups and on an individual basis, and were present in the schoolyard, at lunch, and during special activities (id.). The fourth grade CTT special education teacher testified that the students in the CTT class had classifications of a speech or language impairment, a learning disability, or an emotional disturbance (Tr. p. 587). The special education teacher indicated that the functional levels of the students in her class consisted of mostly students who were approaching or meeting the learning standards, with the exception of one student (id.). The special education teacher indicated that regarding behavior, there were some students in the class who were "sensitive" and "a little bit short tempered" and that these behaviors were addressed in the classroom through role modeling and discussion (Tr. pp. 588-89). The special education teacher testified that regarding "bullying" there was a "zero tolerance" policy and that if she were unable to resolve conflicts in her classroom that the guidance counselor or the assistant principal would be informed or both the principal and the parents (Tr. pp. 589-90).

The CTT special education teacher testified that a typical day in the CTT class began with the students unpacking their materials and organizing themselves so that "they have enough books for the day, they hand in their homework, they hand in mail, they take out their lunch..." (Tr. p. 585). The CTT special education teacher further testified that there was then a work study period focusing on spelling or vocabulary during which the students worked in homogenous groups, followed by a writing period during which the students were arranged in two large heterogeneous groups (id.). The CTT special education teacher indicated that the students had their math period

in a homogenous group followed by whole group reading instruction and then small group and individual reading instruction (Tr. p. 586). The CTT special education teacher also indicated that the students would then have a "special" such as art or music followed by lunch and yard time (id.). The CTT special education teacher testified that at the end of the day the students "pack up," copy homework, and the teaching staff read to the students (id.).

The fourth grade CTT special education teacher testified that the students were continuously assessed to ensure that the students were appropriately grouped together (Tr. p. 586). The special education teacher further testified that in spelling, the students were grouped "according to where they are on the developmental spelling continuum so they work exactly at their level" (id.). She indicated that in writing, the class was separated into two groups and that the curriculum was "very targeted toward what those children need to learn" (id.).

The CTT special education teacher testified that teacher and parent contact consisted of "teacher night" at beginning of the year, two parent-teacher conferences, telephone conferences, field trips, and almost daily contact in the school yard when parents dropped their children off and picked them up (Tr. p. 590). Additionally, the fourth grade CTT class held a monthly program entitled "parents are learning partners," at which time parents were invited in to view the "class at work" (id.).

The CTT special education teacher testified that within the fourth grade CTT classroom the special education teacher and regular education teacher worked "very, very closely together," "confer[ed] on everything" and taught all subjects simultaneously (Tr. p. 594).). The CTT special education teacher further testified that she was the student's CTT special education teacher during the student's second grade year (Tr. p. 591). The special education teacher further testified that in the recommended CTT class, the student would have received instruction in the manner she "learns best," whether in a large group, a small group, or individual instruction (Tr. pp. 597-98). The special education teacher testified that in the CTT class, the student would have been grouped with other students who were functioning at the same grade level (Tr. p. 597). The CTT special education teacher testified that regarding the student's social/emotional functioning, she would have benefitted from small group instruction and from specific and explicit instruction on methods of interaction with her peers and the completion of activities (Tr. pp. 601-03).

The special education teacher reviewed the student's June 2008 IEP and testified that the recommendations in the IEP were "completely manageable in the 4th grade CTT class" (Tr. pp. 612, 678). The special education teacher further testified that the student's "additional adult support" in the CTT class would have consisted of two teachers, two paraprofessionals, related service providers, and the administration (Tr. pp. 678-79). The special education teacher testified that the other students in the recommended CTT class had similar behavioral needs and similar BIPs as the student, as well as similar annual goals and short-term objectives (Tr. pp. 603-04, 606-07). The special education teacher testified that rewards were used within the classroom along with rating systems "to motivate" the students and that the strategies implemented in the classroom included praise, prompting, redirection, checklists, graphic organizers, and visual aids (Tr. pp. 608-10).

The district school psychologist who completed the student's FBA and participated in the June 2008 CSE meeting testified that the recommended fourth grade CTT class was "very language enriched" and that there was language stimulation throughout the day (Tr. p. 365). The school psychologist further testified that in the recommended CTT class, the teachers modified the

curriculum according to student need and functional level (*id.*). According to the school psychologist, whole group learning activities in the CTT class provided opportunity for appropriate peer modeling by the general education students who were "picked carefully" (Tr. pp. 365-66). The school psychologist testified that the teachers in the recommended CTT class incorporated "skillfully taught instruction" that included methods such as scaffolding to "break" material down into smaller and "simple" terms, and "steps" (Tr. p. 366). The school psychologist further testified that the CTT class was highly structured and that this student did well with a "high-structure setting" (Tr. pp. 370-71).

The June 4, 2008 IEP developed by the CSE provided the student with 43 annual goals and 212 corresponding short-term objectives in the areas of math, reading, writing, social/emotional skills, speech-language, and gross and fine motor skills (Parent Exs. D; F; G; H). The hearing record reflects that the recommended annual goals and short-term objectives from the student's home-based providers were incorporated into the June 2008 IEP (Tr. pp. 216-17, 763). A review of the annual goals and short-term objectives reveals that the majority of the short-term objectives focused on the student's needs in organization and transition, her pragmatic, expressive, and receptive language needs, and the deficits in her social/emotional functioning (Parent Ex. D at pp. 7-32). As discussed above, the student's June 2008 IEP also included a BIP that was based on an FBA to address the student's needs in attending, interpreting social cues, and anxiety (*id.* at p. 38). The annual goals were measurable and the short-term objectives were related to the student's needs (Parent Ex. D). The parents had the opportunity to discuss the annual goals and short-term objectives at the June 2008 CSE meeting (Parent Ex. J).

Regarding the June 2008 CSE's related service recommendations for PT, OT, and speech-language therapy, the district's physical therapist testified that the student's PT annual goals could be met within the 30-minute sessions recommended by the June 2008 CSE (Tr. pp. 1124). The district's physical therapist further testified that the student's annual goals in balance and strength could be addressed through the use of methods that included "wheel barrow walk," jumping, and skipping, both inside the therapy room and in the yard and opined that the PT program recommended in the June 2008 IEP was appropriate for the student (Tr. pp. 1118-20, 1125). Likewise, the district's occupational therapist also testified that the student's needs could be met by the CSE's recommendation of three individual sessions of OT for 30 minutes (Tr. pp. 1179-80). To address the student's needs, the occupational therapist testified that she would have used the "Handwriting Without Tears" program, workbooks, clay, a slant board, adaptive paper, and multisensory methods when working with the student (Tr. pp. 1172-73, 1175). The occupational therapist further testified that she would have supported the student "in the packing up routine, or unpacking routine," getting on line, transitioning from one of the "preps...picking her up there, and then transitioning to our room..." (Tr. p. 1177). The district's speech-language pathologist also testified that the June 2008 CSE recommendation regarding speech-language therapy was appropriate for the student (Tr. pp. 548-49). The district's speech-language pathologist testified that the recommended individual sessions would have addressed the student's "academic concerns" including her "language goals," and that the group sessions would have allowed the student to work with her peers (Tr. p. 549). The speech-language pathologist further testified that the student's "pragmatic difficulties" would have been addressed in both individual and group speech-language therapy sessions (*id.*). Both the physical therapist and the speech-language pathologist attended the June 4, 2008 CSE meeting (Parent Ex. D at pp. 2-3; Parent Ex. J).

Although the hearing record reflects that all of the student's private evaluators and home-based providers recommended that the student attend a special education school, the district's school psychologist testified that the CSE determined that the district's CTT class with related services was appropriate for the student because:

"[W]e felt as a team a CTT was appropriate for her. Since she had been in our setting for a number of years, she does well with small-group instruction. She does well with a highly structured setting. She had friends in the class...she knew the whole school. The whole setting. She had a couple of years before middle school. It just felt like the right – the right place for her. She was on grade level."

(Tr. pp. 370, 391).

As discussed above, the hearing record also reveals that the principal indicated to the parents at the June 2008 CSE meeting that the student could attend a "CTT in another school" (Parent Ex. J at p. 57). I find that the hearing record demonstrates that the district's recommended fourth grade CTT class included many of the programmatic elements that the student's private neurologist, school-based SEIT, and private speech-language pathologist testified were necessary for the student to learn and that the district's recommended program was designed to confer educational benefits to the student in the LRE (Tr. pp. 279-80, 287-90, 1367, 1375, 1487).

In November 2007, a private pediatric psychologist evaluated the student and reported that the student had made ongoing progress in all areas (Parent Ex. XX at p. 1). The private psychologist indicated that the student was able to "keep up academically with her peers at her current public school. She has some close friends with whom she enjoys play dates and other recreational activities, and she is able to comfortably participate in group and class discussions ...with a great deal of supports" (*id.* at p. 3). Although a private neuro-developmental evaluation report dated February 18, 2008 noted that the student reported that her "teachers are mean and so are some of the kids" and that the student "was a little more nervous than last year," the evaluation report also indicated that the student had "some friends at school and enjoy[ed] working" (Parent Ex. PP at p. 1). The evaluation report further reflected that the student had made progress in receptive, expressive, and pragmatic language skills and social skills, and that the student's "spontaneous language and conversational skills ha[d] improved and are quite normal sounding"(*id.* at p. 3).

The student's home-based speech-language pathologist also reported in a May 21, 2008 speech-language progress report that the student continued to make steady progress in all areas of speech-language throughout the 2007-08 school year, but that her speech-language delays adversely affected her academically and socially (Parent Ex. CC at p. 1). The student's home-based SEIT indicated in a May 23, 2008 educational progress report that "[o]ver the course of this academic year, [the student] has continuously expressed her sadness, frustration, anxiety and discomfort with her being bullied by various children in her class in school," and that that these incidents negatively affected the student's ability to initiate, concentrate, attend, and stay on task with her homework assignments and activities after school, which had affected her academic performance (Parent Ex. V at p. 3). However, the home-based SEIT also described the student as a "cooperative, motivated and enthusiastic participant and partner in her learning activities and homework assignments" and indicated that the student coped with the issues she experienced with her peers by discussing the "negative situations" with the home-based SEIT and with her parents "to strategize how to address them in school" (*id.* at pp. 2, 3). The home-based SEIT also reported

in her May 2008 progress report that in the area of social/emotional skills, the student had made progress initiating conversations and social interactions with peers, but that at times she required teacher support to maintain them or join in and that the student appreciated her friends and looked forward to spending time with them (id. at p. 2).

Additionally in her May 22, 2008 progress report, the parents' program consultant reported that the student continued to demonstrate progress in all targeted areas in school, home, and community environments (Parent Ex. W at p. 1). She identified the student's target areas as including reading comprehension, writing fluency, social skills, staying on task, following multi-step directions, math word problems, multi-step math problems, higher level language processing skills, and auditory comprehension and processing (id. at pp. 1-2).

The hearing record also reveals that the student's home-based speech-language pathologist determined that the student had continued to demonstrate progress during the 2007-08 school year as evidenced by her May 28, 2008 speech-language progress note (Parent Ex. P). The home-based speech-language pathologist reported that the student had made "steady" progress in her speech-language therapy sessions and that the student exhibited some improvement in her receptive, expressive and pragmatic language skills, but continued to demonstrate weaknesses in these areas including greeting familiar individuals, and initiating and maintaining the topic during conversational exchanges (id. at p. 1).

Third grade progress reports completed by the student's CTT teachers also reflected that the student made academic progress throughout the 2007-08 school year, was reading on grade level, and was an enthusiastic participant when learning about topics of interest (Parent Exs. K at p. 1; L at pp. 1, 3).

As indicated above, the student demonstrates delays in her expressive, receptive, and pragmatic language skills as well as her social skills (Tr. p. 367; Parent Exs. D; P at p. 1). According to the school psychologist's testimony, the student's strengths included her sensitivity and empathic and serious manner along with her good sense of humor (Tr. p. 369) and that she exhibited weaknesses that include staying on task, completing assignments, and her verbal expression (Tr. p. 367). The school psychologist also testified that the student demonstrated anxiety and misinterpreted social cues (Dist. Ex 1 at p. 2). The school psychologist further testified that that the student had friends, enjoyed relating with others and that her academic skills were on grade level (Tr. pp. 369-70). Although the student's school-based SEIT testified that following incidents of inappropriate social interactions in the schoolyard and classroom, the student's demeanor would decline and she then had a harder time attending to class tasks and would focus on what had happened (Tr. 1473-74), I find that the hearing record does not support a finding that these incidents rendered the recommended CTT program for the 2008-09 school year inappropriate to meet the student's needs. I do, however, encourage the parties to work collaboratively to resolve any concerns regarding the student's needs (Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93).

In conclusion, I find that the district offered the student a FAPE in the LRE.

Having decided that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2008-09 school year, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 October 22, 2009

PAUL F. KELLY
STATE REVIEW OFFICER