



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-137

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:

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Neal H. Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the York Preparatory School (York Prep) for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's decision which found that the district failed to offer an appropriate educational program to the student. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student attended tenth grade at York Prep (see Tr. pp. 215-16, 226, 246). The Commissioner of Education has not approved York Prep as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute (see 34 C.F.R. § 300.8[10][i]; 8 NYCRR 200.1[zz][6]; Tr. pp. 292-93).

The student in this case attended a private school (PS-1)¹ until 1993, when the parents moved into a "very good public school" neighborhood and enrolled the student in public school

¹ The actual name of the prior private school placement is irrelevant to the disposition of this appeal; therefore, it is identified as PS-1. The actual name of a second prior private school placement is also irrelevant to the disposition of this appeal and is identified as PS-2, infra.

for first grade (Tr. p. 201). After approximately three months at public school, the parents removed the student and re-enrolled her at PS-1, where classes contained approximately 15 students (Tr. pp. 201-02). During third grade at PS-1, the student exhibited difficulties and underwent a psychoeducational evaluation (Tr. p. 202).² At that time, the parents "investigated a lot of schools" and placed the student in another private school (PS-2) for the following school year, where she initially repeated third grade and then remained until graduation after the completion of eighth grade (Tr. pp. 202-03).³

After the student completed seventh grade at PS-2, the parents obtained a private psychoeducational evaluation of the student in June 2007 (Parent Ex. H at 1). The parents requested the updated evaluation in order to "assist in determining [the student's] future educational needs" because the student would graduate from PS-2 in June 2008 (id.). According to the psychoeducational evaluation report, the student received "extra work in math and language arts" and her behavior had "always been good" in school (id. at pp. 1-2). At that time, the student reported friendships with peers, being "sought out by peers for friendship," and that she enjoyed "acting, singing, dancing, playing the piano, tennis, art, and being with friends" (id. at p. 2). An administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) revealed a full scale intelligence quotient (IQ) of 97, placing the student's overall intellectual functioning within the "average range" (id. at pp. 2-5, 9). On the verbal comprehension scale, the student's overall score fell within the "upper average range" and her scores on the similarities subtest (verbal reasoning skills and concept formation), vocabulary subtest (word knowledge, learning ability, and long-term memory), comprehension subtest (verbal reasoning and the understanding of social mores and common sense), and information subtest (ability to obtain, retain, and retrieve information from school and the environment) fell within the "upper average range" to the "superior range" (id. at pp. 3, 9). On the perceptual reasoning scale, the student attained a score in the "upper average range," and the evaluator noted that all of the student's scores fell "solidly within age level expectations" and ranged from "average" to "upper average" (id. at pp. 3-4, 9). The evaluator also noted that although the student exhibited "some problems" with sequencing and word retrieval, the student could "immediately" self-correct (id. at p. 4). On the working memory scale, the student's scores fell within the "low end of the average range," and the student exhibited difficulty holding information "in her head and working with material that she hears" (id. at pp. 4, 9). In particular, the evaluator noted that the digit span test (low average range) and letter-number sequencing test (average range) relied "heavily on auditory attention, memory and processing skills" (id.). On the processing speed scale, the student's scores fell within the "bottom of the low average range," which indicated that the student was "very slow in processing visually-presented material" (id. at pp. 4-5, 9).

To assess the student's academic achievement in June 2007, the evaluator administered the Woodcock-Johnson Tests of Achievement—Third Edition (WJ-III ACH) (Parent Ex. H at pp. 5-6, 10). The evaluator noted that the student's WJ-III ACH scores revealed "weak" reading comprehension and writing skills and a "relative strength" in the area of mathematics (id. at pp. 5-

² The psychoeducational evaluation report referred to in testimony was not submitted into evidence at the impartial hearing; according to testimony by the student's father, the student received a diagnosis of "dyslexia" as a result of that psychoeducational evaluation (Tr. pp. 201-02).

³ The student's father described PS-2 as a "special school" with "very small classes" and "one on one help" (Tr. pp. 202-03).

7, 10). According to the evaluator, the student's performance on the oral language subtest demonstrated her "difficulty with auditory processing," the student's performance on the story recall subtest revealed her "difficulty recalling details at times," and the student's performance on the understanding directions subset indicated that she experienced "difficulty with sequential directions" (*id.* at pp. 5, 10). On subtests measuring the student's reading skills, the student performed within the "average range," while her reading comprehension skills varied "depending on the task" (*id.*). For example, the student performed within the "upper end of the average range" on the reading fluency subtest, but she exhibited "difficulty when reading more complex material and when word retrieval [was] required" (*id.*). On the passage comprehension and reading vocabulary subtests, the student's scores fell within the "low average range" (*id.*). With respect to writing skills, the student performed within the "low end of the average range" on both the WJ-III ACH individual subtests of writing and on the Test of Written Language—Third Edition (TOWL-3) subtests assessing the student's punctuation and spelling (*id.* at pp. 6, 9-10).

In the area of mathematics, the student's WJ-III ACH scores fell "solidly within the average range" on the calculation subtest and "within age level expectations" on the mathematics fluency subtest and applied problems subtest (Parent Ex. H. at pp. 6, 10). The evaluator noted, however, that the student's "language processing issues interfered to some extent" with her performance on the applied problems subtest (*id.* at pp. 6-7).

In summary, the evaluator indicated that the student was "well aware of her learning disabilities and of the compensatory strategies that she must employ in order to cope with them" (Parent Ex. H at p. 7). Overall, the student's test results revealed an "intellectual potential at least at the upper end of the average range" with "especially good" reasoning skills (*id.*). The test results also revealed, however, that the student exhibited "problems with language processing and retrieval," and the evaluator determined that the student met the criteria for diagnoses of a receptive and expressive language disorder, a reading disorder, and a disorder of written expression (*id.*). To address the student's areas of need, the evaluator recommended a "special education school" with "small" class size so that the student could receive "individualized attention to academics using a multi-sensory approach" (*id.*). The evaluator recommended a "small" class size due to the student's "problems with language processing and with retrieval of words" (*id.*). In addition, the evaluator recommended extended time for "all classroom and standardized tests," use of a computer for writing to check spelling and punctuation, and to "explore the use of voice activated software" so the student could express her thoughts orally as opposed to in writing (*id.*). The evaluator also recommended the use of books on tape to expose the student to "age appropriate" reading material (*id.* at p. 8).

In November 2007, the parents initiated the student's application process at two private schools, including York Prep, for the 2008-09 school year (Tr. pp. 266, 272).

On March 12, 2008, the parents executed an enrollment contract for the student to attend York Prep for the 2008-09 school year (Parent Ex. G at pp. 1, 3). As part of the enrollment contract, the parents agreed to assume full responsibility for the "total amount of annual charges" at York Prep for the 2008-09 school year regardless of whether the student was absent, withdrew, or was dismissed from York Prep prior to the end of the school year (*id.* at p. 1; *see* Tr. pp. 270-72). The parents also enrolled the student in the Jump Start program at York Prep, which required the payment of an additional fee (Parent Ex. G at p. 1; *see* Tr. p. 262). The enrollment contract required the parents to make quarterly payments by May 1, July 1, October 1, and December 1, 2008 (Parent

Ex. G at p. 1). On March 13, 2008, the parents paid a non-refundable deposit to York Prep for the 2008-09 school year, and on May 22, 2008, the parents made a tuition payment to York Prep for the 2008-09 school year (Parent Exs. A; G at pp. 1-3).

During the 2007-08 school year, the student's teachers at PS-2 prepared progress reports, which reported information in the following areas: reading fluency and comprehension, listening comprehension, writing, mathematics, social studies, perceptual functioning (visual memory), graphomotor skills, organizational skills, following written and verbal directions, oral language and communication skills, behavior, social interactions, work habits, and homework (see Dist. Ex. 4 at pp. 1-5). In the area of reading fluency and comprehension, the progress report identified the student's independent level (6.5), the student's instructional level (7.0), and described the student as a "fluent reader" who read at an "appropriate rate" unless she encountered "unfamiliar words," which slowed her rate (id. at p. 1). According to the progress report, the student used an "appropriate balance of decoding strategies" and further noted that "context play[ed] a dominant role" in the student's decoding skills with new, multisyllabic vocabulary words (id.). The student could "successfully" apply "rules of syllabication and other phonetic patterns" (id.). Comments regarding the student's reading comprehension skills noted that the student displayed difficulty "comprehending both fiction and expository text" when she encountered "unfamiliar language or an unfamiliar context" (id.). Although the student demonstrated "strong recall," she "frequently" made inaccurate interpretations, exhibited difficulty with "interferences," and required monitoring when independently interpreting text to ensure her understanding (id.). In addition, the student used reading strategies "well" when provided with "guidance and frequent prompting" (id.). The progress reports listed the following strategies that "helped [the student] develop her reading skills:" small class, pre-reading work (vocabulary preview, focus questions, discussing the setting and/or context), reading difficult passages as a group, providing opportunities for rereading, question and response strategy, identifying text structures (definition, example, causal, sequence/process), frequent discussion, and providing study guides for tests (id.).

With respect to writing, the progress report characterized the student's abilities in the following areas as "secure:" applying basic grammatical and punctuation rules; writing compound and complex sentences; writing complete paragraphs; using age-appropriate vocabulary; summarizing a story accurately; using an outline effectively; and writing multi-paragraph essays, such as research reports, book reports, and biographies (Dist. Ex. 4 at p. 2). In addition, the progress report described the student as a "good," "solid writer" who edited and rewrote "extremely well" (id.). The progress report also noted that while the student produced "thorough and well organized" assignments, she lacked a "writer's voice" and struggled to consistently "engage the reader" (id.).

In the area of mathematics, the student's teacher identified her instructional level (7.0) and noted that the student covered the following areas during the school year: percentages (percent word problems, percent increases and decreases), ratios and proportions (concept of ratio and proportion, problem solving with proportions), and algebra (sets, operation with signed numbers, order of operations, evaluating expressions, solving equations, algebraic word problems, and coordinate graphing) (Dist. Ex. 4 at p. 2). The student's teacher indicated that she continued to require reinforcement with "word problems with ratios and proportions and all other word problems that require[d] inferential reasoning" (id.).

In social studies, the student's teacher reported that the student displayed "exemplary" study skills, and that she was "well organized," "thorough," "[r]esponsible," and "hardworking" (Dist. Ex. 4 at p. 3). The teacher noted that although the student exhibited difficulty recognizing "the cause-effect relationship," she could talk "her way through to comprehension" with "1:1 discussions" (id.). The progress report also noted that the student could accurately copy from the blackboard, she could write legibly, and she used a "laptop for everything" (id.). In addition, the progress report indicated that the student's organizational skills and homework were "never a problem" (id. at p. 4).

With regard to the student's oral language and communication skills, the progress reports noted that the student could be "shy" or "easily pushed off of her point" by stronger peers or by a teacher (Dist. Ex. 4 at p. 4). The student exhibited persistence, but needed to work on being more assertive (id.). At times, the student struggled "to find her words," and she used "simplistic" syntax and grammar (id.). The progress report further noted that at PS-2, the student's language therapy was "integrated into the general curriculum" and that if a student needed "direct instruction," the "therapist assigned to the class" would assist the student (id.).

On May 27, 2008, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop an individualized education program (IEP) for the 2008-09 school year (Dist. Exs. 6 at pp. 1-2; 7; see Dist. Ex. 3). The following participants attended the CSE meeting: a district school psychologist, regular education teacher, special education teacher, and social worker; the student's father; an additional parent member; the student's reading teacher from PS-2 via telephone; and the student's co-teacher from PS-2 via telephone (Dist. Exs. 6 at p. 2; 7; see Tr. pp. 25-28).⁴ In preparation for the student's annual review, the district gathered documentation from PS-2, including the 2007-08 progress reports, and conducted a vocational interest assessment of the student (Dist. Exs. 3-5; see Tr. pp. 21, 24-25). The CSE also had the student's educational file available at the meeting, which contained additional documents such as previous reports obtained from the student's schools, the June 2007 psychoeducational evaluation report, a social history, and medical reports (Tr. pp. 48-50, 55-58). The CSE reviewed and considered the June 2007 psychoeducational evaluation report at the meeting (Tr. p. 204).

To develop the student's present levels of academic performance and learning characteristics, the CSE relied upon the PS-2 progress reports, updated information provided by the student's PS-2 teachers who attended the meeting, and parental input (Tr. pp. 27-32; compare Dist. Ex. 6 at p. 3, with Dist. Ex. 4 at pp. 1-4). Within this section of the IEP, the CSE described the student as a "fluent reader" who used the "rules of decoding to read" (Dist. Ex. 6 at p. 3; see Dist. Ex. 4 at p. 1). The CSE also noted that the student did "better when new multi-syllabic words [were] contextualized" (id.). In addition, the CSE indicated that the student had "difficulty comprehending fiction and expository text" that contained "unfamiliar words" and that she tended to "misunderstand inferences" (id.). In the 2008-09 IEP, the CSE identified the student's instructional level in reading (7.0 grade level) based upon the instructional levels reported in the PS-2 progress reports and the information provided by the PS-2 teachers who attended the meeting (Tr. p. 29; compare Dist. Ex. 6 at p. 3, with Dist. Ex. 4 at pp. 1-2).

⁴ The district's school psychologist also served as the district representative and as the CSE chairperson (Dist. Ex. 6 at p. 2; see Tr. p. 25). Throughout this decision, this individual will be referred to as the CSE chairperson.

With regard to her writing skills, a PS-2 teacher reported the student's skills as "strong" (Dist. Ex. 6 at p. 3; see Dist. Ex. 4 at p. 2). The CSE noted that the student revised her work and could write "a truly exceptional essay" (id.). A PS-2 teacher also reported to the CSE that the student, at times, did not fully develop characters in her fictional writing, she exhibited difficulty understanding "subplot," and in social studies, she had difficulty understanding "cause and effect relationships" (Dist. Ex. 6 at p. 2; see Dist. Ex. 4 at pp. 2-3). However, the student would meet with "her teacher to discuss areas in which she need[ed] clarification" (Dist. Ex. 6 at p. 2; see Dist. Ex. 4 at p. 3).

In the area of mathematics, the CSE noted that the student did not have "gaps in her math skills," and she could solve "equations with one unknown" and use the "order of operations" (Dist. Ex. 6 at p. 3; see Dist. Ex. 4 at p. 2). However, the student exhibited difficulty "solving word problems with ratios, proportions and inferences" (id.). In the 2008-09 IEP, the CSE identified the student's instructional level in mathematics (7.0 grade level) based upon the instructional levels reported in the PS-2 progress reports and the information provided by the PS-2 teachers who attended the meeting (Tr. p. 29; compare Dist. Ex. 6 at p. 3, with Dist. Ex. 4 at pp. 1-2). Finally, the CSE commented on the student's ability to copy from the board, the legibility of her handwriting, her organizational skills, and her oral language and communication skills in the IEP, which noted the student's difficulty finding "her words at times," her use of simplistic grammar and syntax, and that the student may need to seek clarification for orally presented information (Dist. Ex. 6 at p. 3). In the academic management needs section of the IEP, the CSE recommended the use of frequent prompting with the student to use learned reading strategies; use of mnemonics; use of graphic organizers; and in mathematics, dividing the student's page into quadrants with fewer arithmetic problems per page (id.).

Turning to the area of social/emotional performance, the CSE described the student in the IEP as a "kind, well respected, sociable student with a strong group of friends" (Dist. Ex. 6 at p. 4). Although the student could be "somewhat hesitant with new peers or new students," a PS-2 teacher reported that she was "very engaging with peers" (id.). The CSE noted in the social/emotional management needs section of the IEP that the student required a "well integrated educational setting with the appropriate remediation and speech and language therapy" (id.). The CSE relied upon information provided in the PS-2 progress reports and information provided at the CSE meeting to develop this section of the student's 2008-09 IEP (Tr. pp. 32-33; compare Dist. Ex. 6 at p. 4, with Dist. Ex. 4 at p. 5).

The student's IEP also contained annual goals and short-term objectives to address the student's identified needs in the areas of reading (2 annual goals, 7 short-term objectives), mathematics (1 annual goal, 5 short-term objectives), writing (1 annual goal, 4 short-term objectives), and oral language and communication (4 annual goals, 17 short-term objectives) (Dist. Ex. 6 at pp. 6-9; compare Dist. Ex. 6 at p. 3, with Dist. Ex. 6 at pp. 6-9). For example, one of the annual goals for reading addressed the student's difficulty with reading comprehension, and the four corresponding short-term objectives developed the student's ability to accurately draw inferences and conclusions, identify the main idea of teacher selected texts, identify character development in fictional texts, and to answer questions regarding abstract concepts in text (Dist. Ex. 6 at p. 6).

Based upon the information presented and discussed at the May 27, 2008 CSE meeting, the CSE recommended placing the student in a collaborative team teaching (CTT) classroom with

related services of two 45-minute sessions of speech-language therapy per week in a small group for the 2008-09 school year (Dist. Ex. 6 at pp. 1-2, 4, 10-12).⁵ Before recommending placement in the CTT classroom, the CSE considered and rejected placing the student in a special class in a community school because although the student would require "some curriculum modification and the attention of a special education teacher," the CSE also recognized that the student required "sufficient academic challenge," the student would "benefit from opportunities for instruction and interaction with her nondisabled peers," the student exhibited strengths in "certain academic areas," and the student had a positive "social domain" (Dist. Ex. 6 at p. 11; see Tr. pp. 41-46, 69-72, 80-81, 84-85).⁶ In addition, the CSE also considered and recognized that given the amount of progress the student had made at PS-2, a special class or a specialized school was not appropriate (see Tr. pp. 41-42, 44). The PS-2 teachers did, however, express concern about whether the student would continue to progress at the same rate that she had made progress at PS-2 (Tr. pp. 42-46, 63-64, 73-74, 84-85). The CSE chairperson indicated that the special education component of the recommended CTT classroom consisted of a 14:1 student-to-teacher ratio (id. at p. 1; see Tr. pp. 65-69, 205-06). The CSE chairperson testified that at the CSE meeting, the regular education teacher explained that in the high school setting, the CTT class would "typically be smaller" with approximately 25 to 26 total students in the class (Tr. pp. 74-75, 78-79). After the CSE recommended the CTT class, the student's father expressed his disagreement with the CSE's recommendation because he believed the class was too large for the student (Tr. pp. 42-46, 72-73).

In addition to recommending placement in a CTT classroom and speech-language therapy, the CSE also recommended the following testing accommodations: separate location, time extended (double time), and directions read and reread aloud (Dist. Ex. 6 at p. 12; see Tr. pp. 38-39). According to the IEP, the CSE further recommended that the student participate in State and local assessments with accommodations and that the student would follow the standard criteria for promotion (Dist. Ex. 6 at p. 12; see Tr. pp. 39-40).

On August 4, 2008, the parents made a second tuition payment to York Prep for the 2008-09 school year (see Parent Ex. A).

By Final Notice of Recommendation (FNR) dated August 8, 2008, the district advised the parents of the special education programs and services recommended for the 2008-09 school year and identified a public school placement for the student (Dist. Ex. 8). Upon receipt of the FNR on August 13, 2008, the parents scribed a handwritten note on the FNR, indicating that the student's IEP had not been forwarded with the FNR and they could not "take any further action" until they

⁵ State regulations incorporate "collaborative team teaching" services within its "Continuum of services" as "integrated co-teaching services," which is defined as the following: "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "integrated co-teaching class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

⁶ The CSE chairperson testified that the CSE considered and rejected placement in a special class in a community school because it would have only offered an integrated setting for the student "in the school, but not actually in her program in her classroom" (Tr. p. 72).

received the student's IEP (Parent Ex. F; see Tr. pp. 280-81). The parents returned the FNR with the handwritten note to the district via facsimile on August 14, 2008 (id.).

By letter dated August 27, 2008, the district acknowledged receipt of the parents' notice of the student's unilateral placement at York Prep (Dist. Ex. 9). The district advised the parents that the notice of unilateral placement failed to comply with the federal regulations, which required that the parents state specific concerns for rejecting the IEP or the recommended placement (id.). The district invited the parents to contact the CSE within two days of the date of the notice in order to address their concerns prior to the start of the school year (id.).

On November 3, 2008, the parents made the final tuition payment to York Prep for the 2008-09 school year (see Parent Ex. A).

By letter dated November 19, 2008, the parents notified the district of their visit to the recommended public school placement on October 8, 2008 (Parent Ex. D). The parents indicated in the letter that they observed a CTT classroom with 32 students, with 14 special education students and 18 regular education students (id.). The parents noted that the classroom contained "too many children" and the student "would never be able to learn or function under these circumstances" (id.). In addition, the parents had been advised that approximately 35 percent of special education students graduated from the recommended placement and approximately half of those students attended college (id.). Thus, the parents rejected the recommended placement (id.).

By due process complaint notice dated May 26, 2009, the parents asserted that the student's IEP created at the May 27, 2008 CSE meeting was "both procedurally and substantively invalid" (Dist. Ex. 1). As a basis for relief, the parents alleged the following: the "CSE process failed to comply with the appropriate procedures;" the CSE was not properly composed; the "goals and objectives were inadequate, too broad and inappropriate;" the CSE "failed to provide the parent[s] with a copy of the student's IEP;" and after visiting the proposed placement, the parents determined it was not appropriate (id.). As relief, the parents requested reimbursement of the student's tuition costs at York Prep for the 2008-09 school year and the provision of transportation and related services (id.).

The parties proceeded to an impartial hearing on July 15, 2009 that concluded on October 19, 2009, after three days of testimony (Tr. pp. 1, 196, 316). As a witness, the district presented the assistant principal of special education (assistant principal) from the recommended placement identified in the FNR (Tr. pp. 104-45). He testified that during the 2008-09 school, the special education component of the recommended placement's ninth grade CTT classes consisted of no more than an 8:1 student-to-teacher ratio and no more than 30 total students (Tr. pp. 112-14, 118-19; see Tr. p. 151). The CTT classes included a double period of English, a double period of mathematics, one period of science, and one period of social studies, and the special education students in the CTT classes attended physical education and lunch in a "mainstreamed" environment (Tr. pp. 112, 121).

Generally, the regular education teacher and the special education teacher of a CTT class met to develop lesson plans, and the special education teacher was responsible for differentiating instruction for each of the special education students in the CTT class by "rewriting a lesson, providing alternate handouts, working in small groups, rewriting tests, [or] formatting" (Tr. pp. 115-16; see Tr. pp. 117-18, 151). To measure the students' progress in the CTT class, the

recommended placement used a "number of assessments," noting, for example, that students' reading levels would be determined through assessments administered in September and that the results of the assessments would then be incorporated into the special education students' individual IEPs (Tr. pp. 116-17). The assistant principal further testified that the CTT class provided the students with a less restrictive environment where they learned from peers, they received support from both the regular education teacher and special education teacher, they received the "optimum instruction" by having both a regular education teacher and a special education teacher in the class, and they also received "small group instruction" (Tr. p. 117). He further noted that students in CTT classes attended more often than students who attended self-contained classes because the CTT classes allowed the students to succeed both academically and socially (id.).

In reviewing the student's present levels of academic performance in the 2008-09 IEP, the assistant principal testified that on the "integrated co-teaching spectrum [the student] would have been at the higher level of the group of Special Ed students" (Tr. pp. 122-23). Compared to the other students in the recommended placement's ninth grade CTT class, the assistant principal testified that academically, the student would fall within the "upper range" of the special education students and within the "middle to lower" range of the regular education students (see Tr. pp. 123, 144-45). With respect to the student's present levels of social/emotional performance, he testified that the student would also "fit in pretty well" and that she "probably would become friendly" with the regular education students (Tr. pp. 124-25). The assistant principal testified that the recommended placement could implement the annual goals, short-term objectives, and testing accommodations in the IEP, as well as provide the related service of speech-language therapy recommended in the IEP (Tr. pp. 125-27).

The district also presented a CTT special education English teacher as a witness (special education teacher) (Tr. pp. 146-89). She testified that during the 2008-09 school year, she co-taught in a ninth grade CTT double period English class, which consisted of 8 special education students and 22 to 23 regular education students (Tr. p. 151; see Tr. pp. 175, 179). During the CTT English class, the classroom routine consisted of independent reading for the first 10 to 15 minutes of the class; writing comments about their independent reading in a "Reader's Response Notebook," which the students would sometimes share with others in class; daily oral language skills, which addressed grammatical punctuation; daily reading aloud by the teacher, which allowed the teacher to "model thinking out loud" for the students, followed by time for the students to discuss the reading selection; daily mini-lessons; and the CTT English class ended with an entire period devoted to working on the mini-lessons in groups or individually (Tr. pp. 152-53). The CTT English class concluded with a summary and homework assignments (Tr. p. 153). To provide individualized instruction to the students in the CTT class, both teachers circulated through the classroom during the independent reading time to provide individual assistance to students (Tr. pp. 154-55; see Tr. pp. 177-82).⁷ The special education teacher further testified that during the "work period" if a student needed "extra help," she would use a variety of strategies, including pairing the student with another student, providing direct teacher assistance, or providing additional materials to the student (id.). In addition to meeting with the regular education teacher to develop lesson plans for the CTT English class, the special education teacher also collaborated with the

⁷ The special education teacher testified that the district offered the Wilson reading program and that she had referred students for that program (Tr. pp. 183-84).

students' other special education teachers and related service providers to provide further support to the students (Tr. pp. 151, 170-72; see Tr. pp. 115-16).

Reviewing the student's present levels of academic performance in the 2008-09 IEP, the special education teacher testified that the student was "quite high functioning as far as her reading level" and that her "seventh grade" reading level was a "higher functioning level" compared to the other students in her ninth grade CTT English class during the 2008-09 school year (see Tr. pp. 158-59, 162-63). The IEP also informed the special education teacher that the student was a "hard worker and organized, [and] a strong writer," that she self-edited and rewrote, and that she had "excellent study skills" (id.). The special education teacher testified that overall, the student was "a little higher functioning than some" of the students on her roster during the 2008-09 school year (Tr. p. 159). For instruction, the special education teacher testified that the student would have been "grouped probably more so with some of the General Ed kids because she seem[ed] to be functioning at that capability" and that she would "assess and monitor" the student to "make sure that [the student] was doing well in whatever group" she was placed (id.).

Turning to the student's academic management needs contained in the IEP, the special education teacher testified that she "regularly" used "[f]requent prompting . . . to use learned reading strategies" with "almost the entire class" (Tr. pp. 161-62). For example, the special education teacher would have students "make text to text connections" or "text to self" connections; she asked students to relate the text to something in their lives or to something else the students had read; she would ask students to restate in their own words or take notes or highlight information; and she used graphic organizers (id.).

With regard to the student's annual goals and short-term objectives, the special education teacher first noted the similarity between those contained in the student's 2008-09 IEP and the goals she would have written for her own students (Tr. p. 167). The special education teacher then testified, in detail, about how she would have implemented, assessed, and measured the student's progress toward her annual goals (Tr. pp. 167-69). For example, the special education teacher testified that to address the student's reading comprehension goal, the student would read a text selected for the entire class and the special education teacher would provide a series of questions to the student, both orally and in writing, to assess her comprehension of the material (Tr. pp. 163-64). In addition, the student would participate in oral discussions of the selected text to ensure her understanding of the "basic literary elements," such as the setting and the basic plot (id.). The special education teacher would use quizzes, teacher-made materials, oral discussions in class, formal assessments, standardized testing, rubrics, and self-assessments to measure the student's progress (Tr. pp. 164-66).

For the parents' case, the director of learning and psychological services (director) at York Prep testified at the impartial hearing (Tr. pp. 217-49). During his 40 years of employment at York Prep, the director held "several job titles" including teacher and head of the science department (Tr. pp. 221-22). He also served as the York Prep witness at impartial hearings (Tr. p. 222). The director described York Prep as a school for approximately 340 students in grades 6 through 12, with classes that ranged in size between 14 and 16 students (Tr. pp. 222-23). The Jump Start program constituted the "special education component to York Prep" (id.). A student enrolled in the Jump Start program was assigned to a "dedicated teacher" who would meet individually with the student for two 45-minute sessions per week (Tr. p. 223). In addition, the student met with the assigned Jump Start teacher on a daily basis between 8:00 a.m. and 8:30 a.m., and also after school

on Monday through Thursday between 3:15 p.m. and 3:45 p.m. (*id.*). A Jump Start teacher provided services to no more than 11 students, and all of the students assigned to a particular Jump Start teacher shared the time offered to meet with the Jump Start teacher during both the before-school and after-school periods (*id.*). A student could not be enrolled in the Jump Start program without being enrolled at York Prep (Tr. p. 225).

The director testified that the Jump Start teacher had several available methods of communicating with a particular student's regular teachers at York Prep, including "Grade Clerk," which teachers used to post and communicate students' grades for the availability of "administration, parents . . . , and the student" (Tr. pp. 223-24). In addition, teachers posted homework assignments on "Ed-Line" on a daily basis, and the teachers used "regular verbal communication" to discuss students' areas of difficulty and how to address those difficulties (Tr. pp. 224-25, 244).

During ninth grade at York Prep, the student participated in a "traditional curriculum," including the following classes: English, world history, algebra I, physical science, and a reading class instead of a foreign language (Tr. p. 226). The Jump Start teacher who taught the reading class was not the student's dedicated Jump Start teacher (Tr. pp. 226-27). According to the director, the student did "very well" in ninth grade and noted that her grades earned her "special Honor Roll recognitions," which required average grades in the "high 80's to low 90's" (Tr. pp. 227-28). The director testified that the student worked on "reading comprehension issues" and algebra I with the Jump Start teacher (Tr. pp. 228-29). Although he noted the student's progress in algebra I and reading comprehension during ninth grade, the director could not identify the student's functional levels during the 2008-09 school year, but indicated that she required the small class size offered at York Prep (Tr. pp. 230-31). The director also testified that the student worked on the reading and mathematics annual goals contained in the 2008-09 IEP while at York Prep (Tr. pp. 232-33, 239).

During cross-examination, the director acknowledged that York Prep was a "general education school" and that the Jump Start program was the only special education component of York Prep (Tr. pp. 234, 243). In order to determine the student's areas of deficit, York Prep relied upon information contained in the student's 2008-09 IEP and from information provided by PS-2 (Tr. pp. 235-36). At York Prep, the Jump Start program was responsible for recognizing and addressing the student's areas of deficit, which the director identified as reading comprehension, expressive writing, and mathematics (Tr. pp. 236-39). York Prep did not provide speech-language therapy services, but did provide the student's testing accommodation of extended time as noted in the 2008-09 IEP (Tr. p. 240; *see* Tr. pp. 262, 292).

The director also testified that the student was not enrolled in Jump Start for tenth grade at York Prep during the 2009-10 school year (Tr. p. 246).

In addition to the director, the student's father (parent) also testified at the impartial hearing (Tr. pp. 199-216, 249-305). With respect to the May 27, 2008 CSE meeting, the parent recalled the CSE's recommendation to place the student in a 14:1 CTT classroom and that he expressed concern that the classroom had "way too many students" (Tr. pp. 205-06). At the impartial hearing, the parent testified that he "didn't understand what [a] collaborative program was . . . until [he] went to the school" (Tr. pp. 205-06, 209). The parent also testified that the CSE did not discuss the annual goals and short-term objectives contained in the student's IEP (Tr. pp. 206, 292-94).

Believing that the student required a small class, the parent decided to continue the student's enrollment at York Prep after he visited the recommended placement in October 2008 (Tr. pp. 207-14). He understood that the Jump Start program provided the student with assistance in mathematics and reading during the 2008-09 school year, and the parent described the Jump Start program as a "one on one program every morning and every afternoon" (Tr. pp. 214-15). By the end of the school year, the parent "believed that [the student] surmounted" the problems she experienced in both mathematics and reading, and that as a result of the Jump Start program and York Prep's small class size during the 2008-09 school year, the student could attend York Prep during the 2009-10 school year without the additional Jump Start program (Tr. pp. 215-16). He further noted that by the end of the 2008-09 school year, the student had become "much more proficient at both math, English and reading, so that she was almost up to—the students that attend that school without a Jump Start education" (Tr. p. 215).

On cross-examination, the parent acknowledged attending approximately five to six CSE meetings since the student had been classified as learning disabled in third grade, that he understood the IEP process, his role as a CSE member, and the purpose of the IEP meetings (Tr. pp. 250-52). The parent testified that he did not request any new or additional evaluations of the student in preparation for the May 27, 2008 CSE meeting (Tr. pp. 251-53). In addition, he testified that he was comfortable relying upon the PS-2 progress reports and the updated information provided by the PS-2 teachers who attended the CSE meeting to generate the student's 2008-09 IEP, and further, that he would have requested additional evaluations if he was not comfortable relying upon that information (Tr. p. 253). The parent also admitted being "fully involved" in the creation of the student's 2008-09 IEP at the CSE meeting, that the CSE did not impede his involvement at the CSE meeting, and that after the CSE "went through everything," he expressed his concern about the size of the recommended classroom (Tr. pp. 253-56). When questioned about the creation of the IEP annual goals, the parent testified that the goals were "done afterward" and that the "writing in the IEP that [he] received [was] done after the meeting" (Tr. pp. 254-56).

Reviewing the student's present levels of academic performance, the parent acknowledged that the CSE discussed the information in this section of the 2008-09 IEP of the IEP, that he was involved in the creation of this section of the IEP, and that he agreed that this section of the IEP accurately described the student (Tr. pp. 256-59, 291-92). Turning to the annual goals and short-term objectives contained in the IEP, the parent could not "point to a specific goal" that he had characterized in his due process complaint notice as "inadequate, too broad, and inappropriate" (Tr. pp. 258-61). He did recall, however, his participation in the CSE's discussion regarding a special class placement (Tr. pp. 263-64). When he left the CSE meeting, the parent testified that he understood the CSE's recommended placement in a 14:1 CTT classroom to mean that the student would attend a 14:1 classroom all day long (Tr. pp. 287-88, 291). Although he now understood the nature of a CTT classroom, the parent testified that even if the special education component had been a 12:1 student-to-teacher ratio, he still believed that the CTT classroom was "too big, with no specialized help" (Tr. pp. 290-91).

Although the parent had paid a nonrefundable deposit and a tuition payment to York Prep by May 22, 2008, he did not advise the CSE at any time during the May 27, 2008 CSE meeting of his intention to place the student at York Prep for the 2008-09 school year (Tr. pp. 264-65, 275-76). The parent also testified that the student expected to attend York Prep for the 2008-09 school year, and at the time of the May 27, 2008 CSE meeting, he and his wife and his daughter "had an idea of where" the student would attend school in September 2008 (Tr. pp. 275-76). He also

testified that he would have considered placing the student in a district placement if the district had an appropriate program (Tr. p. 289).

Finally, the parent testified that at the May 27, 2008 CSE meeting, all of the CSE members introduced themselves and identified their individual functions or roles at the CSE meeting (Tr. pp. 295-96). He also noted that "several" of the May 27, 2008 CSE members had attended the student's CSE meetings for "a couple of years in a row" and that all of the CSE members were "very courteous" (Tr. pp. 295, 303-04). The parent testified that he chose York Prep for the student specifically because the school offered the Jump Start program (Tr. p. 298).

In his decision dated November 9, 2009, the impartial hearing officer determined that the district failed to offer the student a free appropriate public education (FAPE), the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at York Prep, and the parents were not entitled to reimbursement for the student's tuition costs at York Prep for the 2008-09 school year (IHO Decision at pp. 3-9). To support his conclusion that the district failed to offer the student a FAPE, the impartial hearing officer indicated that although the CSE relied upon the June 2007 psychoeducational evaluation report, the PS-2 progress reports, and input from the student's PS-2 teachers who attended the CSE meeting, the district had not obtained its own psychoeducational evaluation or independent evaluation of the student (*id.* at p. 6). The impartial hearing officer noted that while the IEP reflected the student's present levels of performance as "teacher estimates" of her instructional levels in mathematics and reading and writing, the present levels of performance were not based upon any test or evaluation (*id.*). In addition, the impartial hearing officer noted that the IEP did not contain entries for the student's present levels of performance in areas such as decoding, reading comprehension, listening comprehension, or writing, which the impartial hearing officer opined had been "stressed" as "wide discrepancies" in the June 2007 psychoeducational evaluation report (*id.*). The impartial hearing officer noted that the CSE "ignored" the recommendation for a small class so that the student could receive "'individualized attention using a multi-sensory approach'" when recommending a CTT classroom for the 2008-09 school year (*id.*). Although mindful of the CSE's obligation to consider the least restrictive environment (LRE) mandated by State and federal regulations, the impartial hearing officer found that the student's "significant deficits" could not be "adequately met" in the recommended CTT classroom because the special education teacher assigned to the CTT classroom was responsible for all of the special education students in the room, which deprived the student of the "individual attention she required and precluded any individualized instruction utilizing the multi-sensory approach" recommended in the June 2007 psychoeducational evaluation report (*id.* at pp. 6-7). The IHO concluded that if the student attended the CTT classroom, she would not "have been able to keep up academically with her program or achieve success within such setting" (*id.* at p. 7).

Turning to the issue of whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at York Prep during the 2008-09 school year, the impartial hearing officer concluded that the testimonial evidence presented by the student's father and the director of York Prep "failed to address the particulars of what special education services were being afforded" to the student and "how such services were specially designed" to meet the student's needs (IHO Decision at pp. 7-9). In particular, the impartial hearing officer found that the hearing record was "bereft of any information as to what occurred during" the Jump Start sessions (*id.* at p. 9). Thus, the impartial hearing officer concluded that the "global description of the Jump Start Program" provided by the director's testimony was insufficient to

establish that the student received "specially designed instruction sufficient to meet her unique needs while a student at York Prep" and denied the parents' request for tuition reimbursement for the 2008-09 school year (*id.*).

On appeal, the parents contend that the impartial hearing officer erred in his determination that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at York Prep for the 2008-09 school year. The parents assert that the impartial hearing officer applied an erroneous standard in analyzing whether York Prep was appropriate to meet the student's special education needs, noting that the unilateral placement must be appropriate, not perfect. The parents argue that the hearing record contains sufficient evidence to find that York Prep appropriately addressed the student's needs, primarily because the student had been enrolled in the Jump Start program. In addition, the parents assert that equitable considerations, although not considered by the impartial hearing officer, favor the parents.

In its answer, the district asserts that the impartial hearing officer properly concluded that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at York Prep for the 2008-09 school year. The district also argues that equitable considerations do not favor the parents because the evidence demonstrates that the parents never intended to place the student in a public school. The district cross-appeals the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2008-09 school year. The district asserts that the CSE was properly composed, the CSE reviewed and discussed evaluative information, the CSE created an appropriate IEP with measurable goals and objectives, and that the impartial hearing officer's conclusion regarding the recommended CTT classroom was based upon speculation and not supported by the evidence. The district also asserts that although a clerical error resulted in the FNR being sent to the parents without the 2008-09 IEP attached, such error did not prejudice the parents' decision regarding the public school placement because the student had already been committed to attend York Prep at that time.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits

(20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and

instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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

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

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

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129;

Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

Turning first to the district's cross-appeal, the hearing record supports a conclusion that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2008-09 school year. In support of its claim that the district offered the student a FAPE for

the 2008-09 school year, the district initially asserts that the May 27, 2008 CSE was properly composed. Although the parents' due process complaint notice contained a general allegation that the May 27, 2008 CSE was not properly composed, they did not allege a specific basis for this violation (Dist. Ex. 1). At the impartial hearing, the parents raised the issue that neither the regular education teacher nor the special education teacher who attended the CSE meeting would have implemented the student's IEP during the 2008-09 school year, and the district did not object to the issue being raised at the impartial hearing (Tr. pp. 60-62). Although the impartial hearing officer did not address the CSE composition in his decision or use this rationale as a basis for his determination that the district failed to offer the student a FAPE, I will review the issue on cross-appeal.

Federal and State regulations provide that "not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment" and "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" attend a student's CSE meeting (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R § 300.321[a][2-3]). In this case, the CSE chairperson testified that although the regular education teacher and the special education teacher would not implement the student's IEP during the 2008-09 school year, both teachers were licensed and capable of implementing the student's IEP (Tr. pp. 60-62, 88-89).

While it is undisputed that both a regular education teacher and a special education teacher attended the May 27, 2008 CSE meeting, I am not persuaded by the evidence that the attendance of either teacher, in this circumstance, comports with the requirements of federal and State regulations (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R § 300.321[a][2-3]; Application of the Dep't of Educ., Appeal No. 08-105). However, impartial hearing officers and State Review Officers are constrained by federal and State regulations from finding that a procedural violation rose to the level of a denial of a FAPE unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Notwithstanding that the May 27, 2008 CSE was not properly constituted, I find that the hearing record does not demonstrate that the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Here, the parents do not allege any specific harm caused by the procedural errors, only that the CSE was not properly constituted (see A.C., 553 F.3d at 172; Matrejek, 471 F. Supp. 2d at 419).⁸ In addition, a review of the hearing record indicates that the parent who attended the May 27, 2008 CSE

⁸ It is well settled that although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Perricelli, 2007 WL 465211, at *1). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

meeting had previously attended approximately five to six CSE meetings; he understood the IEP process, his role as a CSE member, and the purpose of the IEP meetings; the CSE members had introduced themselves at the CSE meeting and explained their function or role at the CSE meeting; "several" CSE members had attended the student's CSE meetings for "a couple of years in a row;" and the student's PS-2 teachers attended the CSE meeting via telephone and provided updated information about the student, which the CSE relied upon, in part, to develop the student's 2008-09 IEP (Dist. Exs. 6 at p. 2; 7; see Tr. pp. 25-28, 250-52, 295-96). Moreover, the parent testified that he had been fully involved in the creation of the student's 2008-09 IEP, and notably, that the CSE did not impede his involvement at the CSE meeting (Tr. pp. 253-56). Therefore, I find that the hearing record contains insufficient evidence to conclude that the failure to include a regular education teacher or a special education who would implement the student's 2008-09 IEP at the May 27, 2008 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Dep't of Educ., Appeal No. 08-122; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). I caution the district, however, to ensure that it complies with the regulatory requirements pertaining to the participation of the appropriate regular education and special education teacher members at CSE meetings.

Next, the district alleges that the CSE reviewed and discussed evaluative information, created an appropriate IEP with measurable annual goals and short-term objectives, and developed appropriate academic management strategies that specifically addressed the student's individual learning needs. In his decision, the impartial hearing officer supported his conclusion that the district failed to offer the student a FAPE, in part, because the CSE failed to conduct its own evaluations of the student, the CSE used "teacher estimates" in the IEP to characterize the student's instructional levels in mathematics and reading, and the CSE failed to report the student's performance in areas such as decoding, reading comprehension, listening comprehension, and writing (IHO Decision at pp. 6-7). Initially, I must note that none of the issues noted by the impartial hearing officer were specifically raised in the parents' due process complaint notice (see Dist. Ex. 1). To the extent that the parents raised these issues during the impartial hearing without objection by the district, the evidence in the hearing record indicates that such claims are without merit and do not constitute a denial of a FAPE.

As noted above, 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, 2008 WL 2736027, at *6), 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]). Here, the CSE relied upon the student's most recent psychoeducational evaluation report, PS-2 progress reports from the 2007-08 school year, updated information provided by the student's PS-2 teachers from the 2007-08 school year, and parental input to develop the student's IEP (Tr. pp. 21, 25-33, 204; Dist. Exs. 3-6; Parent Ex. H). The CSE also had the student's entire educational file available at the meeting, which contained additional documents such as medical reports and a social history (Tr. pp. 48-50, 55-58). A review of the documentary evidence indicates that the CSE developed the student's present levels of academic and social/emotional performance directly from the information contained in the PS-2 progress reports and the updated information provided

by the student's PS-2 teachers, as well as the June 2007 psychoeducational evaluation report (compare Dist. Ex. 6 at pp. 3-4, with Dist. Ex. 4 at pp. 1-5; see Parent Ex. H at pp. 2-8). Notably, the parent testified that he had been "fully involved" in the creation of the student's 2008-09 IEP at the CSE meeting, that he was comfortable relying upon the PS-2 progress reports and the updated information provided by the PS-2 teachers who attended the CSE meeting to generate the student's 2008-09 IEP, that he would have requested additional evaluations if he was not comfortable relying upon that information, and further, that he agreed that the IEP accurately described the student (Tr. pp. 251-59, 291-92). I also note that the hearing record does not contain any evidence to contradict the accuracy of the information contained in the student's 2008-09 IEP, or significantly, that the parents indicated that any further evaluative information was necessary to identify the student's needs, the student's present levels of performance, or to develop the student's IEP.⁹

With regard to the annual goals and short-term objectives in the student's 2008-09 IEP, the parents asserted in their due process complaint notice that the goals and objectives were "inadequate, too broad and inappropriate" (Dist. Ex. 1). During the impartial hearing, although the parent could not "point to a specific goal" in the IEP that was inadequate, too broad, or inappropriate, he testified that he CSE did not develop the goals and objectives at the CSE meeting, but that the goals had been "done afterward" and that the "writing in the IEP that [he] received [was] done after the meeting" (Tr. pp. 254-56, 258-61). However, the parents point to no legal authority that requires the parents' presence during the actual drafting of the written IEP document (see J.G. v. Briarcliff Manor Union Free Sch. Dist., 2010 WL 339781, at * 5 [S.D.N.Y. Jan. 29, 2010] [citing E.G., 606 F. Supp. 2d at 388-89]). Moreover, according to the evidence, the parents had the opportunity to respond to the goals and objectives in the 2008-09 IEP after receiving the IEP in August 2009, and in the November 19, 2008 letter written to the district rejecting the recommended placement, but failed to do so (see Tr. pp. 47, 53-54; Parent Ex. D; see also Dist. Ex. 6 at p. 2). In addition, the district invited the parents to schedule a meeting to discuss any concerns that they had regarding the student's IEP in a letter dated August 27, 2008, but the parents failed to avail themselves of that opportunity (see Dist. Ex. 9). Based upon a review of the evidence, I find that although the parent did not recall any discussion of the annual goals and objectives at the CSE meeting, the annual goals and objectives in the student's IEP were directly linked to the student's identified areas of need and that the annual goals and short-term objectives contained sufficient specificity by which to guide instruction, intervention, and how to evaluate and measure the student's progress (see Dist. Exs. 3-5; Parent Ex. H; compare Dist. Ex. 6 at pp. 3-4, with Dist. Ex. 6 at pp. 6-9). The student's IEP contained goals and short-term objectives in the

⁹ Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4-5]). The procedure for a reevaluation requires that a group that includes the CSE and other qualified professionals, as appropriate, conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Such review may take place without a meeting (8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional data is needed, the school district shall administer tests and obtain other evaluation materials as may be needed to produce the needed data (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]).

areas of reading, mathematics, writing, and oral language and communication skills (Dist. Ex. 6 at pp. 6-9; see Tr. pp. 34-38). According to the director's testimony, the student worked on the reading and mathematics goals in the IEP while she attended York Prep during the 2008-09 school year (Tr. pp. 232-33, 239). Based upon the foregoing, I am not persuaded that the parents' claim pertaining to the discussion of goals and objectives rises, in this instance, rose to the level of a denial of a FAPE for the 2008-09 school year.

Next, I am persuaded by the district's arguments that the impartial hearing officer erred in finding that the recommended CTT class was not appropriate to meet the student's needs. In their due process complaint notice, the parents generally alleged that the CTT classroom was not appropriate, and during the impartial hearing, the parents alleged more specifically that the 14:1 CTT classroom described at the CSE meeting was not appropriate because they believed it was too large for the student, and further, that even a 12:1 special education component in a CTT classroom would be "too big, with no specialized help" (Dist. Exs. 1; 6 at p. 1; see Tr. pp. 205-06, 209, 287-88, 290-291; Parent Ex. D). In his decision, the impartial hearing officer opined that the CSE's decision to recommend a CTT class ignored the evaluator's recommendation in the June 2007 psychoeducational evaluation report for a small class and ignored the parent's objection to the recommended CTT class expressed at the CSE meeting (IHO Decision at pp. 6-7). However, the CSE chairperson testified at the impartial hearing that none of the information in the PS-2 progress reports or in the information provided at the CSE meeting by the PS-2 teachers or by the parent at the CSE meeting warranted placing the student in a more restrictive educational environment separated from her typically-developing peers (Tr. pp. 27-33). Based upon an independent review of the evidence, I agree.

While it is undisputed that the June 2007 psychoeducational evaluation report contained a recommendation to place the student in a "small class . . . because of [the student's] problems with language processing and retrieval of words," a further review of the report indicates that the evaluator did not identify how the student's language processing and word retrieval difficulties impacted her ability to access the regular education curriculum or what—if any—modifications were necessary to the regular education curriculum to address these areas of identified needs, other than noting that the student should receive academic instruction using a multi-sensory approach (Parent Ex. at pp. 2-10).¹⁰ And although a CSE is required to consider private evaluation reports, it is not required to follow their recommendations (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145; 34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi]; Application of a Student with a Disability, Appeal No. 07-139). In this case, a review of the evidence indicates that the special education programs and services in the student's IEP, as well as the recommended placement in a CTT classroom, would have met the student's needs and enabled her to receive educational benefits in the LRE.

According to the June 2007 psychoeducational evaluation report, the student's test scores on the WISC-IV and WJ-III ACH revealed "intellectual potential at least in the upper end of the average range," which supports a finding that the student would have been able to keep up academically in the CTT class with the appropriate supplementary aids and services (Parent Ex. H at pp. 2-10). Testimonial evidence presented by the assistant principal and the special education

¹⁰ In addition, the evaluator recommended a testing accommodation (extended time), the use of a computer to check for spelling and punctuation, and exploring the use of voice-activated software so the student could express her thoughts orally as opposed to in writing (Parent Ex. H at p. 7).

teacher further support this conclusion. Both witnesses testified that based upon the student's present levels of academic performance in her IEP, the student would have been among the higher functioning special education students in the CTT classes, within the middle to lower functioning regular education students in the CTT classes, and that she could have been grouped with regular education students for instruction (Tr. pp. 122-23; see Tr. pp. 144-45, 158-59, 162-63). The assistant principal also testified that the student's present levels of social/emotional performance were similar to those of the students in the CTT classes and that she would "fit in pretty well" and "probably would become friendly" with the regular education students (Tr. pp. 124-25).

Both witnesses further testified that during the 2008-09 school year, the student would have attended CTT classes with no more than 8 special education students and no more than 30 total students (Tr. pp. 112-14, 118-19; see Tr. pp. 151, 175, 179). According to the testimonial evidence, the CTT class would have provided the student with the "optimum instruction" and support from both the regular education teacher and the special education teacher, the special education teacher jointly developed lessons plans with the regular education teacher, the special education teacher was solely responsible for differentiating instruction for the special education students, the special education teacher collaborated with the students' other special education teachers and related services providers to enhance the support offered to the students, and notably, the CTT class provided special education students with an opportunity to learn from their nondisabled peers and to receive instruction in small groups if necessary (Tr. pp. 115-16; see Tr. pp. 117-18, 151, 170-72). In addition to small group instruction, the CTT students received individualized instruction when both the regular education teacher and the special education teacher circulated throughout the classroom (Tr. pp. 154-55, 177-82).

Both witnesses also testified that the recommended placement could implement, assess, and measure the student's progress toward her annual goals and short-term objectives, and that the recommended placement could implement the testing accommodations and the speech-language therapy services in the student's IEP (Tr. pp. 125-27, 163-66, 167-69). The special education teacher also testified about her ability to implement the student's academic management needs in the CTT classroom (Tr. pp. 161-62). In addition, I note that the CSE's recommendation for small group speech-language therapy and the accompanying annual goals and short-term objectives addressed, in particular, the student's language processing and word retrieval difficulties noted in the June 2007 psychoeducational evaluation report (Dist. Ex. 6 at pp. 3-4, 7-9). Given the inclusion of the speech-language therapy in the student's IEP and the special education teacher's testimony regarding her collaboration with the students' related services providers, I find that the student's acknowledged difficulties in these areas would have been adequately addressed.

In conclusion, the evidence supports that the CSE accurately identified the student's areas of need based upon information gathered from the June 2007 psychoeducational evaluation report, the 2007-08 PS-2 progress reports, input from the parent, and information contributed by the PS-2 teachers at the May 27, 2008 CSE meeting. In addition, the 2008-09 IEP contained meaningful and measureable annual goals and short-term objectives to address the student's identified areas of need. Weighing the evidence presented, I find that the CSE appropriately recommended a CTT class for the student, and that the evidence supports a finding that the district sustained its burden to establish that the special education programs and services in the 2008-09 IEP—and the recommended CTT placement—would have addressed the student's needs in the LRE, that the recommended special education programs and services were reasonably calculated to enable the

student to receive educational benefits, and thus, that the district offered the student a FAPE for the 2008-09 school year.

Notwithstanding the above determination, an independent review of the hearing record indicates that the impartial hearing officer properly determined that the parents failed to sustain their burden to establish that the student's unilateral placement at York Prep was appropriate to meet the student's special education needs during the 2008-09 school year, and thus, he properly denied the parents' request for tuition reimbursement on this basis (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d at 1121-22; Application of the Bd. of Educ., Appeal No. 05-081). The impartial hearing officer set forth the proper legal standard to determine whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at York Prep (IHO Decision at pp. 3-4, 7-9). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties on this issue, and further, that he weighed the evidence, noting that the testimonial evidence "failed to address the particulars of what special education services were being afforded" to the student and "how such services were specially designed" to meet the student's needs (id. at pp. 7-9). In addition, the impartial hearing officer correctly found that the hearing record was "bereft of any information as to what occurred during" the Jump Start sessions and that the "global description of the Jump Start Program" was insufficient to establish that the student received "specially designed instruction sufficient to meet her unique needs while a student at York Prep" (id.). In short, based upon my independent review of the entire hearing record, I find that there is no need to modify the determinations of the impartial hearing officer with respect to his conclusion that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at York Prep during the 2008-09 school year, and thus, were not entitled to tuition reimbursement (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

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

Dated: Albany, New York
February 23, 2010

PAUL F. KELLY
STATE REVIEW OFFICER