



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-140

**Application of a STUDENT WITH A DISABILITY, by his parent, 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 petitioner, Neal H. Rosenberg, Esq., of counsel

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

### DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the York Preparatory School (York Prep) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in York Prep (Tr. pp. 139, 171; see Dist. Ex. 10; see also Tr. pp. 76-78, 172, 212-14). The student was enrolled in York Prep on October 14, 2008, during his eleventh grade year (Tr. p. 214; see Dist. Ex. 2 at pp. 1, 2). York Prep is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1 [d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz ][6]).

The hearing record reflects that the student attended district schools from kindergarten until eleventh grade when he entered York Prep (Tr. p. 140; Dist. Ex. 10).<sup>1</sup> The student's cumulative academic transcript indicated that for ninth grade (2006-07), the student earned 13.2 credits and had an overall average of 87 percent and that for tenth grade (2007-08), the student earned 13.2

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<sup>1</sup> Testimony by the parent reflects that the student repeated second grade at the district (Tr. pp. 144-45).

credits and had an overall average of 82.58 percent (Tr. pp. 150-55; Parent Ex. E). The cumulative academic transcript reflects that while attending district schools, the student passed Regents examinations in global history, math, chemistry, living environment, and a Spanish proficiency examination (Parent Ex. E).

A December 20, 2007, "Vocational Psychological" evaluation report indicated that on that date a district psychologist interviewed the student as part of a "triennial evaluation" (Dist. Ex. 5 at p. 1). The vocational psychological evaluation report indicated that the evaluator spoke with the parent, who reportedly informed the evaluator that a complete psychoeducational evaluation was in the process of being conducted privately by a licensed psychologist and that when the evaluation report was completed, the parent would forward a copy of it to the student's school (*id.*). The district psychologist indicated in the vocational psychological evaluation report that because the student was in the midst of the private evaluation, it was unnecessary for him to provide the student with additional testing (*id.*). The vocational psychological evaluation report further noted that a previous private psychoeducational evaluation that was included in the student's record indicated in part, that the student was of high average intelligence and had "dyslexia" (*id.*). The vocational psychological evaluation report further reported details of the student's history, including that he related well in school with students and adults, earned grades in the 80s, had passed several standardized tests needed for graduation, that the student's "major interest" was athletics, and that he was on a school sports team as well as on a competitive sports team that was part of a league (*id.* at pp. 1-2).

The vocational psychological evaluation report also noted the student's intention to attend college and play sports when in college (Dist. Ex. 5 at p. 2). The district psychologist described the student in the evaluation report as cooperative, pleasant, well mannered, courteous, and that he had a relaxed demeanor and was well dressed and groomed (*id.*). In addition, the evaluation report indicated that during the evaluation the student presented as "nice," "appropriate," "attentive," and was able to speak up if something were unclear to him (*id.*).

The vocational psychological evaluation report indicated that with regard to a vocation, the student desired to have a career in sports, possibly earning a living coaching or by working in some other aspect of sports management (Dist. Ex. 5 at p. 2). The evaluation report indicated that "formal testing confirmed [the student's desires], with high scores in the social domain and more specifically in the subcategory of personal service which includes sports" (*id.*). The evaluator opined in the vocational psychological evaluation report that given the student's athletic skills and interest, combined with his personal qualities, his desired direction for the future appeared to be a viable option (*id.*).

A private "Neuropsychological-Educational" evaluation was conducted over a total of seven sessions with the student between November 26, 2007 and December 17, 2007 (Parent Ex. D at p. 1). Several formal tests were administered (*id.*). According to the private evaluation report, the student was referred for a neuropsychological educational evaluation to update his individualized education program (IEP) and to reinforce the necessity of double time for standardized testing such as the College Board SAT<sup>2</sup> examinations and school-based quizzes, tests and exams, and to

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<sup>2</sup> Presumably, "SAT" refers to a standardized examination offered by the College Entrance Examination Board ("college board") that many high school students take to fulfill college application requirements.

determine the student's cognitive, academic, and emotional strengths and weaknesses "to assist in appropriate educational and therapeutic interventions" (*id.* at pp. 1-2). The private evaluation report also noted that the student had a long history of diagnosed reading and writing disabilities in conjunction with variable attention and concentration skills and slowed processing skills, for which he had received ongoing supportive services since second grade within his mainstream elementary classrooms or a pull-out program, and within a resource room setting in middle school and through high school (*id.* at pp. 2, 13). Overall, the private evaluation report summarized that the student presented as an intelligent adolescent with a complex picture of innate cognitive and ego strengths compounded by pervasive reading and executive function difficulties, as well as emotional vulnerability (*id.* at p. 14).

Administration of the Wechsler Adult Intelligence Scale - Third Edition (WAIS – III)<sup>3</sup> yielded a verbal comprehension index score of 124 in the superior range, a perceptual reasoning index score of 103 in the average range, a working memory index score of 102 in the average range, a processing speed index score of 91 in the average range, and a full scale IQ score of 115 within the "[h]igh [a]verage" range of intellectual functioning (Parent Ex. D at pp. 13, 17). The private evaluation report indicated that consideration of a highly significant discrepancy between inter- and intra- test scatter noted throughout the subtests of the WAIS - III and other evaluative measures and the student's full scale IQ score, reflected the student's identified reading disability, processing speed, and executive function-based difficulties characterized by sometimes inefficient use of forethought, planning, and organization on abstract numeric, multistep codes, symbols, and familiar images (*id.* at pp. 13-14). The private evaluation report indicated that discrepancies in the student's performance reflected the diagnosis of a reading disability with pervasive processing speed deficits necessitating extended time (*id.* at p. 13). The private evaluation report indicated that the student's "much needed slow pace" enabled him to exhibit exceptional verbal understanding, abstract reasoning skills, and mathematical prowess; but that "[w]ithout extra time to process and organize his responses to assessment material, [the student] would not complete tasks within given time constraints" (*id.*). In addition, the private evaluation report indicated that the student's verbal memory ability was intact when the context was provided and material was meaningful (*id.*). The student struggled more when asked to simultaneously process, manipulate, and replicate information, such as with oral directions or oral comprehension questions (*id.*). Although the student had overall exceptional verbal comprehension skills, his ability to "auditorially" process language was compromised by difficulties in executive functions (*id.*). The private evaluation report stated that instruction that depended upon auditory processing would require that the student be provided with language supports such as cueing, directed verbal prompts, and choices to reduce overstimulation and to promote focused attention (*id.*). The evaluator opined that although the student's short-term visual memory and organizational skills when recalling visual stimuli was superior, these skills might wane if not supported by meaningful, repeated viewings or verbal rehearsal of contextualized material (*id.* at p. 14).

The private evaluation report further described the student as having good reality testing and the ability to think in a logical and coherent manner (Parent Ex. D at p. 14). At the time that

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<sup>3</sup> A review of the private neuropsychological evaluation report indicated that the Wechsler Adult Intelligence Scale - Third Edition was administered (Parent Ex. D at pp. 1, 6, 13, 17). The abbreviation associated with that test on the first page of the evaluation, which was "WISC – III," appears to be a typographical error as it should have been "WAIS-III" (*see* Parent Ex. D at pp. 6, 13, 17).

the evaluation was conducted, the evaluator reported that the student appeared to be overwhelmed by ongoing chronic stressors that had been internalized with feelings of sadness, frustration, and lowered self esteem in response to academic challenges and familial difficulties (id.).

The evaluator opined in the private evaluation report that at the time the evaluation was conducted, the student would benefit from therapeutic help to improve his coping skills and to help him manage stress, as recent familial stressors had made him feel vulnerable to internal disorganization, sadness, and anger (Parent Ex. D at p. 14). The evaluator further opined that ongoing resource room was "imperative to maximize" the student learning effective strategies and to support his "uneven executive functioning abilities," and that the student should be provided double time on all quizzes, tests, exams, and especially on standardized tests such as the SATs (id.). The private evaluation report described the student as "susceptible" of becoming overwhelmed and depressed by his experienced difficulty "grappling with auditory-loaded class material" and negotiating daily and long-term school requirements, especially extensive reading assignments, independent reading responsibilities, and long essays (id.).

The private evaluation report included recommendations specific to school placement that included twice weekly resource room support services within the district high school the student was attending at the time of the evaluation, and placement with teachers who could provide a stimulating environment in which orally provided material was supplemented with visual cues and support such as key information on the blackboard, clear instructions on class assignments, study sheets, copies of class notes, and a peer buddy (Parent Ex. D at p. 14). Additional recommendations included "double time accommodations" on timed tasks such as quizzes, tests, class exams, and standardized tests such as the SATs, as well as extended time for informal academic and standardized tests (id. at pp. 14-15). In regard to testing accommodations, the private evaluator recommended a separate location for all tests, exams, and standardized tests such as the SATs and use of a computer for in-class essay questions on tests and standardized written assessment material (id. at p. 15). The evaluator also recommended that the 25 independent reading books, which the hearing record reflects had been assigned to the student during the prior school year, be reduced to approximately 10 to 12 books per year due to his reading disability, and that the student avail himself of books on tape to reduce the amount of reading necessitated by advanced high school and later educational requirements (Tr. p. 149; Parent Ex. D at p. 15).

The private evaluation report also included various recommendations in regard to self management skills for specific time management and organizational strategies to facilitate the student's ability to initiate tasks, shift between tasks, maintain class/homework materials, review for quizzes and tests, and remember daily assignments (Parent Ex. D at p. 15). Recommended strategies also addressed the student's self management and organizational skills, listening and note taking skills, approach to reading textbooks for meaning, test taking skills, and retention of material (id.). Additionally, the private evaluator recommended "supports," including individual cognitive remediation with a specialized tutor for the student to develop organizational skills and to learn how to "attend to/grapple" with school-based demands, organize materials, plan and complete short and long-term assignments, and organize research projects and essays (id. at pp. 15-16). The evaluator also recommended weekly, individual psychotherapy to address the student's ability to advocate for himself as well as to address his anxiety and "feelings of lowered self esteem, self doubt and depressive features resulting from school difficulties and emotional

concerns with regard to chronic, situational, and familial stressors" and that the student be reevaluated after two years to assess his progress and plan for supportive services in college (*id.*).<sup>4</sup>

The hearing record reflects that when the student was in tenth grade during the 2007-08 school year, the parent was concerned about the student's frustration and anxiety regarding his tenth grade English and chemistry teachers, as well as the student's failing grade in English in the marking period prior to the February 2008 Committee on Special Education (CSE) meeting (Tr. pp. 150-54, 226).

On February 29, 2008,<sup>5</sup> the CSE met for a "triennial" education planning conference (EPC) with respect to the student (Tr. pp. 23, 27, 71; Dist. Ex. 2 at pp. 1, 2).<sup>6</sup> The meeting was attended by a school psychologist who also acted as the district representative, a regular education teacher who was the student's English teacher, a special education teacher who was the student's special education teacher support services (SETSS) teacher, the parent, the student, and an additional parent member (Tr. pp. 23-24, 28, 38, 44, 169; Dist. Ex. 2 at p. 2). The resultant IEP reflected the February 2008 CSE's recommendations to continue the student's eligibility as a student with a learning disability, as well as ten-month programming in general education classes with SETSS (8:1) four periods per week in pull-out and/or push-in sessions, which was an increase in SETSS instruction from two periods per week to four periods per week (Tr. pp. 24, 25, 87, 169, 224-25; Dist. Ex. 2 at pp. 1, 9). The February 2008 CSE reviewed and agreed at the CSE meeting to the student's present levels of academic and social/emotional performance, and reviewed and discussed annual goals and short-term objectives with respect to reading comprehension and writing (Tr. pp. 37-38, 43, 45, 51-53, 57, 60, 61, 97-98; Dist. Ex. 2 at pp. 3-5, 7-8).<sup>7</sup> The CSE recommended the following program modifications: the use of graphic organizers as an aid in written expression, that the SETSS teacher and English teacher would provide the student with additional organizational strategies to organize and develop essays, and that the SETSS teacher and English teacher would provide the student with strategies to improve his reading comprehension skills (Dist. Ex. 2 at pp. 3-4, 9). Recommended testing accommodations reflected on the IEP were for a separate testing location and extended time (double) (*id.* at p. 11). The February 2008 IEP also included a transition plan to facilitate the student's movement from school to post-school activities, which included the information contained in the district's December 2007 vocational psychological evaluation regarding the student's desire to attend college (Tr. pp. 73-74;

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<sup>4</sup> The parent testified that for "school issues" and "for other reasons," she sent the student for private therapy "mostly [in] ninth and tenth grade; [though] it might have started in eighth" (*see* Tr. pp. 157-58).

<sup>5</sup> The February 2008 IEP indicated that the CSE met on February 25, 2008 (*see* Dist. Ex. 2 at p. 1). However, the student's provider of special education teacher support services (SETSS), who attended the February 2008 CSE meeting, testified that the meeting was held on February 29, 2008 and that the reference to February 25 on the February 2008 IEP was "a typo" (Tr. p. 23).

<sup>6</sup> The IEP at issue in this case is included both as a district and as a parent exhibit (*see* Dist. Ex. 2; Parent Ex. C). For purposes of this decision, reference is made to the district exhibit only. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (*see* 8 NYCRR 200.5[j][3][xii][c]).

<sup>7</sup> Although the private neuropsychological evaluation obtained by the parents was conducted prior to the February 2008 CSE meeting, the district did not receive the evaluation report until after the meeting (Tr. pp. 32, 33, 34, 35, 92, 102, 201; Dist. Ex. 12).

Dist. Ex. 2 at pp. 12-13; see Dist. Ex. 5). The IEP reflected that in addition to a general education program with SETSS, the February 2008 CSE considered providing the student with general education services without a SETSS program and with a collaborative team teaching (CTT) program, but rejected both those alternatives because, as to the former, the CSE determined that the student benefited from small group instruction, and as to the latter, the CSE determined that the CTT program was not the least restrictive environment (LRE) for the student (Dist. Ex. 2 at p. 10). The hearing record reflects that neither the parent nor the student, who both attended the February 2008 CSE meeting, raised any objection to the CSE's recommendations and both participated in the meeting (see Tr. pp. 41, 43-44, 49-50, 57, 184, 185-86; see also Dist. Ex. 2 at p. 2). The parent testified that she had agreed with the February 2008 IEP (Tr. p. 225). The February 2008 IEP reflected that the projected initiation date of the recommended services was March 13, 2008 and that the IEP would next be reviewed on February 25, 2009 (Dist. Ex. 2 at p. 2).

By Final Notice of Recommendation (FNR) dated February 29, 2008, the district advised the parent that the February 2008 CSE recommended "[n]o changes made to the IEP – program and services stay the same" (Dist. Ex. 3; see Tr. pp. 74-75). Also on February 29, 2008, the parent signed the bottom of the FNR, indicating that she had received the form and that she understood "the change(s) / lack of change(s)" indicated on it (Tr. pp. 74-76; Dist. Ex. 3). The FNR also advised the parent that the recommendations would be put into effect if the district "did not hear from [the parent] before ten days" and advised her of rights regarding CSE review, mediation, and impartial hearing (Dist. Ex. 3). The district sent the parent a copy of the February 2008 IEP on March 10, 2008 (Tr. p. 26; Dist. Ex. 2 at p. 2).

By letter to the student's SETSS teacher dated May 12, 2008, the parent indicated that she was enclosing a copy of the private neuropsychological report that was based on evaluations that took place in November and December 2007, discussed above (Dist. Ex. 12; see Parent Ex. D).<sup>8</sup> The letter also indicated the parent's permission for the SETSS teacher to provide a copy of the private evaluation report to the district, "the college boards," and the student's guidance counselor (Dist. Ex. 12; see Tr. pp. 194-95, 199-201, 226). The parent further indicated in the letter that if the SETSS teacher thought it was important to share the private evaluation report with "others, such as some of [the student's] teachers," the parent wished to be notified beforehand (Dist. Ex. 12).

The hearing record reflects that at the beginning of the 2008-09 school year, when the student was in the eleventh grade, the student began verbalizing his concerns and anxieties to the parent about his English teacher's pending leave and about the teaching style of his physics teacher (Tr. pp. 156-57, 159). The parent testified that she requested that the school assign the student to another physics teacher, but the school denied the request (Tr. pp. 107, 108, 161).<sup>9</sup> Subsequently,

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<sup>8</sup> The parent testified that she "probably" received the private evaluation "around" April 2008 (Tr. p. 192).

<sup>9</sup> The student's SETSS teacher testified that she discussed the matter with the principal, that she told the principal that the student's current physics teacher had more than 20 years of experience as a physics teacher, had "studied special education in a formal setting," and also had experience "working with students with learning disabilities;" and that she "expressed" to the principal that the class "was an appropriate place for [the student]" (Tr. pp. 107-08).

the SETSS teacher, the parent, the physics teacher, and the student met and discussed the physics class, including the student's learning style (Tr. pp. 161-62; see Dist. Ex. 10). The hearing record reflects that the SETSS teacher and the parent also met with the student's English teacher to discuss the student's learning style and the accommodations the parent indicated he needed (Tr. pp. 162-63). The parent testified that she was dissatisfied with the two meetings and that "very soon after" her meeting with the English teacher, she began looking at information she had regarding other schools, including York Prep (Tr. pp. 162-64).

By e-mail dated October 9, 2008, the parent wrote the district that "after careful thought and consideration" the student "will be transferring from [the district school] to York Prep," that the student's last day at the district's school would be the next day, October 10, 2008, and that the student's first day at York Prep would be October 14, 2008 (Dist. Ex. 10). The parent's e-mail apologized for "such short notice" regarding the student's transfer (id.). The parent also expressed "thanks" to the student's SETSS instructor for her "kindness over the last [two] years," as well as to another district staff person for "recognizing and encouraging" the student's athletic skill (id.).

By due process complaint notice dated December 16, 2008, the parent, through her attorney, requested an impartial hearing (Dist. Ex. 1). The parent noted that a CSE review meeting was held for the student on February 25, 2008 (id.).<sup>10</sup> The parent asserted that the student "was developing emotional issues as a result of an inappropriate program" at the district's high school and that "[t]here was a failure to communicate between subject teachers and [the] resource room teacher" (id.). The parent contended that she "asked the principal to change a teacher and the principal refused" (id.). The parent further alleged that the student "became unmotivated, anxious and lost his self esteem" (id.). The parent asserted that the IEP created as a result of the February 2008 CSE meeting was "procedurally and substantively invalid thereby leading to the denial of [a] FAPE" (id.).<sup>11</sup> The parent contended that the student required "a small class setting within a small educational environment" (id.). The parent advised that the student's current school was York Prep and, as a proposed resolution, requested tuition reimbursement and provision of transportation and related services for the 2008-09 school year (id.).

The impartial hearing began on April 30, 2009 and concluded on September 22, 2009, after three days of testimony. The impartial hearing officer rendered a decision dated October 26, 2009, which dismissed the parent's request for tuition reimbursement at York Prep in connection with the student's attendance there for the period commencing on October 14, 2008 and concluding at the end of the 2008-09 school year (IHO Decision at p. 9). The impartial hearing officer found that the district had "successfully borne the burden of establishing, by a preponderance of the evidence, that the special education program established by the [CSE] . . . for the 2008-09 school year and being provided to [the] [s]tudent in October of 2008 was both appropriate and adequate to provide the [s]tudent with a meaningful educational opportunity" (id.). Regarding the parent's

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<sup>10</sup> See n. 5, *supra*, regarding the date of the February 2008 CSE meeting.

<sup>11</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

general allegation in the due process complaint notice that the February 2008 IEP was "procedurally and substantively invalid" resulting in a denial of a FAPE to the student, the impartial hearing officer found that the February 2008 IEP was "procedurally valid, created by a duly and appropriately constituted [CSE]" and contained appropriate and sufficient present levels of performance, as well as appropriate annual goals and objectives (id. at p. 7). The impartial hearing officer further determined that while the parentally privately obtained "Neuropsychological evaluation" had not been shared with the CSE at its February 2008 meeting, "the conclusions reached by that evaluator clearly support[ed] the appropriateness of the [CSE's] recommendation" (id.). The impartial hearing officer further found that the February 2008 IEP conformed with the private evaluation's recommendation for resource room support services and provided "even double the amount of such services" (id.).

Regarding the parent's objection at the impartial hearing that the February 2008 IEP was inappropriate because the SETSS recommended in the IEP was described as being "[p]ull-out and/or [p]ush-[i]n," and that a district "[m]anual" stated that an IEP should indicate the amount of time that SETSS would be provided indirectly and directly and specify the location of the SETSS, the impartial hearing officer found that no district manual was offered or received into evidence (IHO Decision at p. 7). The impartial hearing officer further found that should such a requirement exist, the absence of more specific information in the February 2008 IEP regarding SETSS was "a procedural omission" that did not affect the validity of the student's IEP or "in any manner" impede the student's right to a FAPE (id.). The impartial hearing officer also concluded that there was nothing in the hearing record that established the contention in the parent's due process complaint notice that the student required "a small class setting within a small educational environment" (id.).

The impartial hearing officer further concluded that the parent unilaterally transferred the student to York Prep not because of any inadequacy in the student's special education program at the district school, but because of the parent's "perceived inadequacy" in the general education program offered to the student at the district school; specifically, the student's concerns regarding his physics and English teachers (IHO Decision at p. 8). The impartial hearing officer reiterated that these concerns related to the student's general education program, not his special education program (id.). With respect to the parent's contention at the impartial hearing that the district failed to provide the student with a special education program after the expiration of the February 2008 by not creating a new IEP in February 2009, the impartial hearing officer concluded that it was reasonable for the CSE not to create a new IEP in February 2009 because the CSE was aware that the student had been unilaterally placed at York Prep for the 2008-09 school year and would not be seeking a district placement before the school year had ended (id.). He further concluded that the district's "failure to enact a new [IEP] before the expiration of the then-current [IEP] [was], at best, a procedural deficit that did not affect the provision of an appropriate program or impede the provision of a [FAPE]" to the student (id. at pp. 8-9).

The parent appeals, disputing that the district offered the student a FAPE and contending that despite receipt of the student's private evaluation in May 2008, the CSE did not reconvene to draft a new IEP. The parent also alleges that the February 2008 IEP expired in February 2009 and "[t]here is no evidence that the CSE reconvened to review [the student's] IEP or to create a new one." The parent asserts that this was a procedural inadequacy amounting to a denial of a FAPE. Additionally, the parent alleges that her placement of the student at York Prep with Jump Start support was appropriate for the student and that the equities support the parent's claim for



reimbursement because the parent "acted reasonably throughout the IEP process, in good faith cooperation with the CSE."

The district answered the parent's petition, requesting that it be dismissed in its entirety. The district contends that the impartial hearing officer "correctly found" that it had offered the student a FAPE for the 2008-09 school year. The district further states that it agrees with the impartial hearing officer that the parent unilaterally transferred the student to York Prep because of a perceived inadequacy of the student's general education program and not because of any inadequacy in the student's special education program. The district further asserts that the parent has raised only one issue on appeal; specifically, the "three month gap" between the expiration of the February 2008 IEP and the development of the IEP for the 2009-10 school year in May 2009. The district further contends that this issue was not raised in the parent's due process complaint notice and that the district objected to its consideration when the parent attempted to raise the issue during the impartial hearing and, therefore, the impartial hearing officer improperly considered it and such issue is precluded from review by a State Review Officer. Further, to the extent that this issue may be considered on appeal, the district asserts that it developed a new IEP in May 2009, and it agrees with the impartial hearing officer that not developing a new IEP before the expiration of the February 2008 IEP was "at best" a procedural deficiency that did not affect the provision of an appropriate program or impede the provision of a FAPE to the student.

The district additionally contends that the parent did not satisfy her burden of proving that York Prep was appropriate and that the placement was not specially designed to meet the student's unique needs for the 2008-09 school year. The district asserts, among other things, that the hearing record does not contain any information regarding curriculum, the methodologies used by the instructors, the assessments and tests, or the profiles of the other students in the student's general education or Jump Start class. The district also alleges that the equities do not favor the parent. More specifically, the district asserts that the parent provided the district with one day's notice of the student's removal from the district and that this notice violated the requirements established by 20 U.S.C. § 1412(a)(10)(c)(iii) because the notice was: (1) untimely; and (2) insufficient because it did not state why the parent believed the recommended program was inappropriate.

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]).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

I will now turn to the merits of the parent's appeal. I will first consider the parent's contention on appeal that there was no evidence that the CSE reconvened to review the student's February 2008 IEP or to create a new IEP in February 2009 when the February 2008 IEP expired, and the student was therefore denied a FAPE.. The parent's due process complaint notice did not raise this issue (see Dist. Ex. 1). Further, the hearing record reflects that when the parent raised this issue at the impartial hearing, the district objected on the basis that the matter was outside the scope of the parent's due process complaint notice (Tr. p. 104). I agree with the district that this issue should not have been addressed by the impartial hearing officer because it was not raised in the parent's due process complaint notice and the district did not subsequently agree to an amendment of the due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at \*9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-122; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019;

Application of the Bd. of Educ., Appeal No. 02-024). For the reasons discussed above, the impartial hearing officer should not have considered this issue, and therefore, I will dismiss the parent's claim on this basis (Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-072; Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; see John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). In the alternative, to the extent that the impartial hearing officer considered the merits of the parents claim regarding the expiration of the February 2008 IEP and found no basis for finding that a FAPE had been denied, upon an independent review of the hearing record, I concur with the impartial hearing officer's conclusion as to this issue.

The parent also contends that the February 2008 CSE improperly failed to reconvene to draft a new IEP subsequent to the receipt of the student's private evaluation in May 2008. The parent's due process complaint notice also did not raise this issue (see Dist. Ex. 1). Moreover, while there was some testimony at the impartial hearing relative to the district's receipt of the private evaluation and the question of a further CSE meeting (see Tr. pp. 35-36, 93-94, 114, 200, 203), the hearing record does not reflect that this was raised at the impartial hearing as an issue that the parent was contending. Consistent with this, I also note that the impartial hearing officer's decision did not address the question of whether it was appropriate for the CSE to reconvene after the district received the private evaluation. For these reasons, and taking into account the earlier referenced law and regulations delineating which issues may be considered at an impartial hearing (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]), I find that the parent's contention that the CSE did not reconvene to draft a new IEP subsequent to the district's receipt of the private evaluation in May 2008 is outside the scope of my review and I therefore will not consider it (Application of a Student with a Disability, Appeal No. 09-082).<sup>12</sup>

With respect to the parent's disagreement with the impartial hearing officer's determination that the district offered the student a FAPE (see Pet. ¶ 6), the petition does not identify any specific bases upon which the parent asserts that the impartial hearing officer erred in concluding that the February 2008 IEP was procedurally and substantively valid (see 8 NYCRR 279.4[a]; see also IHO Decision at pp. 6-7). State regulations provide, in pertinent part that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). In particular, the petition sets forth no facts or argument to challenge the impartial hearing officer's conclusion that the February 2008 IEP was "created by a duly and appropriately constituted" CSE,<sup>13</sup> that the February 2008 IEP contained "appropriate and sufficient" present levels of performance, and that the February 2008 IEP contained "appropriate" annual goals and short-term objectives. Nor did the petition set forth facts or argument to challenge the impartial

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<sup>12</sup> I also note that the parent makes no claim in the petition that the absence of a reconvened CSE meeting (1) impeded the student's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (3) caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

<sup>13</sup> However, I have reviewed the hearing record and I concur with the impartial hearing officer that the February 2008 CSE was properly composed (Tr. pp. 23-24, 28, 38, 44, 169; Dist. Ex. 2 at p. 2; see 8 NYCRR 200.3[a][1]).

hearing officer's conclusion that the parent's private neuropsychological evaluation supported the appropriateness of the February 2008 CSE's recommendation. I find that the parent has not set forth with sufficient particularity a challenge on appeal to the impartial hearing officer's conclusion that the February 2008 IEP was "procedurally" and "substantively" valid. Further, I also note that the parent's due process complaint notice did not assert that the district's February 2008 CSE was not duly nor properly constituted nor that the February 2008 IEP's present levels of performance and/or annual goals and short-term objectives were inadequate (see Dist. Ex. 1). Further, the hearing record does not show that the parent made any such allegations during the impartial hearing.

Despite the above, I have reviewed the hearing record and agree with the impartial hearing officer that the February 2008 IEP offered the student a FAPE. Regarding the parent's assertion at the impartial hearing that the SETSS recommendation in the February 2008 IEP was deficient because it did not specify how much of the service would be push-in, how much would be pull-out, and the location of the service; I agree with the impartial hearing officer that this did not deprive the student of a FAPE (IHO Decision at p. 7). The SETSS teacher testified that in implementing the February 2008 IEP, she provided two SETSS sessions to the student in his English class and two additional sessions in a separate location in her resource room (Tr. p. 63). The SETSS teacher's testimony also reflected that she understood the student's learning style, addressed his needs, and communicated about the student's needs and performance with his teachers, the parent, and the student (Tr. pp. 25-26, 57, 63-5). I therefore concur with the impartial hearing officer's conclusion that in light of the hearing record in this case, the absence of such information in the February 2008 IEP does not rise to the level of a deprivation of a FAPE. Further, the petition does not contest the impartial hearing officer's finding in this regard and I therefore concur with the district that the parent has not raised this issue on appeal (see Application of the Dep't of Educ., Appeal No. 08-037).

The parent's due process complaint notice alleged that the student "require[d] a small class setting within a small educational environment" (Dist. Ex. 1). The impartial hearing officer found that there was "nothing in the [hearing] record" to establish this allegation (see IHO Decision at p. 7). I have reviewed the entire hearing record and I concur with the impartial hearing officer's finding in this regard. Further, I note that the petition does not contest the impartial hearing officer's conclusion with regard to this issue.

Further, based on my review of the hearing record, for the reasons set forth below, I agree with the impartial hearing officer and find that the February 2008 IEP was reasonably calculated to provide educational benefits to the student at the time that it was developed by the February 2008 CSE.

The student's present academic performance and learning characteristics as noted on the February 2008 IEP indicated how the student's disability affected his performance in the general education classroom and were consistent with the parent's testimony regarding the student's academic strengths and weaknesses, as well as the testimony by the SETSS teacher who worked with the student during ninth grade, tenth grade, and the beginning of eleventh grade (Tr. pp. 23, 39, 42, 138-39; Dist. Ex. 2 at p. 3). I note also that the present levels of performance reflected current teacher evaluations (Tr. pp. 37-38, 43, 45, 85, 97-98).

Additionally, the hearing record reflects that the February 2008 CSE referred to and used then current teacher evaluations, the district psychologist's evaluation report, and the student's report card to develop the February 2008 IEP (Tr. pp. 29-30, 38, 42, 85-86; see Dist. Ex. 5; Parent Ex. F). The February 2008 IEP indicated that the student's instructional level for reading comprehension and written expression was at the ninth grade level, and that his instructional level for math computation and problem solving was at the tenth grade level (Tr. pp. 29, 39, 42; Dist. Exs. 2 at p. 3; 5). The February 2008 IEP indicated that the student sometimes had difficulty reading passages from narrative texts that had longer sentences and more complex structure (Dist. Ex. 2 at p. 3). The IEP reflected, however, that despite the student's difficulties, he was able to arrive at a general understanding of the plot (id.). The February 2008 IEP indicated that the student might have difficulty understanding texts that used vocabulary specific to the subject matter, such as scientific language (id.). In regard to the student's writing abilities, the February 2008 IEP indicated that the student was able to write clear sentences, with correct syntax (id.). He was able to write essays with an introduction, body paragraphs, and a conclusion (id.). The February 2008 IEP noted that the student might have difficulty formulating and developing a thesis for his essay, and that he had difficulty creating topic sentences that supported his thesis, which he was not able to fully develop with supporting evidence such as quotes from the text (id.). The February 2008 IEP further reflected that the student had good listening skills, that he was able to successfully follow directions, and that he had excellent oral communication skills whereby he was able to verbally express his ideas (id.). In regard to the student's math ability, the February 2008 IEP indicated the student's strength in math, which was consistent with the parent's opinion of the student's math abilities (Tr. p. 138; Dist. Ex. 2 at p. 3). The February 2008 IEP stated that the student was able to interpret math problems and understand what was being asked in the problem, that he could consistently apply new concepts and theories to solve more complicated exercises, and that he was able to use mathematical language to explain the concepts that he was learning (Dist. Ex. 2 at p. 3).

To address the student's academic management needs, the February 2008 CSE recommended that the student be provided with graphic organizers as an aid in written expression and that the student's SETSS teacher and English teacher provide the student with additional organizational strategies to organize and develop essays, as well as provide him with reading strategies to improve his reading comprehension skills (Tr. pp. 46-48, 51; Dist. Ex. 2 at pp. 3-4). I find that these recommendations were consistent with the student's needs set forth in the February 2008 IEP and are supported by the SETSS teacher's testimony at the impartial hearing (see Tr. pp. 38, 40; Dist. Ex. 2 at p. 3). I find that the February 2008 CSE's recommendations for these accommodations in the classroom as well as the CSE's recommended testing accommodations of extended time (double) and a separate location included in the IEP adequately addressed the student's academic needs (Dist. Ex. 2 at pp. 3, 11).

The annual goals and short-term objectives included in the February 2008 IEP were aligned with the student's present levels of performance and incorporated a variety of learning strategies that addressed the student's stated needs (see Tr. p. 58; see also Dist. Ex. 2 at pp. 3-5, 7-8). For example, one annual goal addressed improvement of the student's reading comprehension skills according to tenth grade standards (Dist. Ex. 2 at p. 7). The goal's corresponding short-term objectives focused on the student paying attention to the function of punctuation and its relation to the meaning of text; the student's use of specific strategies to highlight significant facts relating to major elements of text; the student noting any part of a chapter that he did not understand; and the

student noting significant literary elements such as foreshadowing, irony, imagery, point of view and symbolism, and their function in the text and in writing (*id.*). Another annual goal and its corresponding short-term objectives addressed the student's ability to write and organize a well developed essay according to tenth grade standards, and focused on the student writing an appropriate introductory paragraph that included a well stated thesis and identified the main points of the essay; writing supporting paragraphs in an organized manner with topic sentences that directly supported the thesis and included appropriate details, quotes and examples; and writing a concluding paragraph that showed the importance of his thesis and summarized the main points of his essay (*id.*). I find that the annual goals and short-term objectives set forth in the February 2008 IEP were appropriate to the student's needs.

Regarding the student's progress while he attended the district's schools, "[p]assing grades and regular advancement from grade to grade" are "generally accepted indicators of satisfactory progress" and are also "one important factor in determining educational benefit" (Rowley, 458 U.S. at 207 n. 28; Walczak, 142 F.3d at 130). In this case, testimony by the parent and documentary evidence included in the hearing record reflect that the student made appropriate progress and passed from grade to grade, with the exception of second grade,<sup>14</sup> in the district's schools from kindergarten until October 2008, when he was in eleventh grade, at which time the parent unilaterally transferred the student to York Prep (Tr. pp. 140-50, 156; Dist. Ex. 10; Parent Exs. D at p. 3; E; F). The student's transcript from the district's high school reflected that for ninth grade, the student earned 13.2 credits and had an overall average of 87 percent and that for tenth grade, the student earned 13.2 credits and had an overall average of 82.58 percent (Parent Ex. E). The academic transcript also reflected that while attending the district's schools, the student passed State Regents examinations in global history, math, chemistry, living environment, and also a Spanish proficiency examination (*id.*). The student's transcript further reflected that the student earned a cumulative average of 85.54 percent and 30.40 credits out of 30.40 (*id.*). The student had received two periods of SETSS weekly during the 2008-09 school year prior to the February 2008 CSE meeting, and when the student appeared to exhibit difficulty during the second marking period of the 2008-09 school year, the February 2008 CSE recommended increasing the SETSS provided to the student to four periods weekly (Tr. pp. 42, 48, 87, 97, 169, 224-25; Dist. Ex. 2 at p. 9; Parent Ex. F).

The hearing record reflects that socially, the student was athletic and a member of one of the district's high school sports teams (Tr. pp. 139, 145). The February 2008 IEP noted that in general, the student related well with his peers and that although there may have been a few instances in which he appeared unwilling to cooperate with his teachers, the student was generally respectful and well mannered and his behavior was age appropriate (Dist. Ex. 2 at p. 5). I find that

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<sup>14</sup> Testimony by the parent indicates that when in second grade, the student was in a "2-3 class combined," a class consisting of students in second grade and third grade that was taught by one teacher (Tr. pp. 142-43). The parent explained that at that time, she did not think the student would be successful in a "straight third grade class" because he was behind in reading and writing (Tr. pp. 144-45). The parent further indicated that she discussed the matter with the student's second grade teacher and they concluded that the student would repeat second grade (Tr. p. 145).

the February 2008 CSE's recommended general education program for the student at the district's high school with SETSS four times per week,<sup>15</sup> provided the student with a FAPE in the LRE.

In conclusion, upon my review of the impartial hearing record, based on the foregoing, I find that the impartial hearing officer's determination that the district offered the student a FAPE for the 2008-09 school year should be affirmed. I therefore need not reach the issue of whether York Prep was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 25, 2010**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>15</sup> I note that despite the fact that the private neuropsychological evaluation report was not available to the district at the time of the February 2008 CSE, the resultant February 2008 IEP recommended and the student thereafter received a greater level of SETSS than the two periods of resource room supportive services recommended by the private evaluator (compare Dist Ex. 2 at p. 9, with Parent Ex. D at p. 14).