



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-026

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

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

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Nathaniel Kuzma, Esq., of counsel

DECISION

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

At the time of the impartial hearing, the student was attending York Prep (Tr. pp. 151-52). The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's cognitive skills are in the average to high average range of functioning, with very superior processing skills (Dist. Ex. 7 at p. 9). He exhibits deficits in auditory comprehension, expressive and pragmatic language skills, written language skills, multisyllabic decoding, and math word problem skills (Dist. Exs. 7 at pp. 10; 8; 11 at p. 1). Socially, the student exhibits anxiety and difficulty being flexible with peers and adults, resulting in argumentative behavior (Dist. Exs. 8; 11). He also requires teacher intervention to resolve conflicts with peers (Dist. Ex. 8 at p. 2). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this proceeding (Tr. pp. 152-53; see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

The student began receiving speech-language therapy and occupational therapy (OT) as a preschool student (Tr. p. 150). From kindergarten through sixth grade (2007-08 school year), the

student attended a "very, very small" private special education school, but was also determined to be eligible to receive special education services and had individualized education programs (IEPs) provided by the district (Tr. pp. 148-49). The student's mother stated that from kindergarten through third grade, the student was treated by a private psychiatrist four times per week (Tr. p. 166).¹ The hearing record reflects that "for the last three or four years" including the 2008-09 school year, the student saw the private psychiatrist for one session per week (Tr. pp. 166, 191-92).²

In January 2006, a licensed psychologist conducted a private psychological evaluation of the student (Dist. Ex. 7). According to the report, the parents' concerns at that time were their son's "continued social struggles; fine and gross motor issues; tendency to 'get stuck'; super competitive nature and 'need' to be right and to win; his high level of anxiety, and his difficulty with comprehension" (id. at p. 2). During the assessment, the student was reportedly polite, friendly and cooperative, although it was noted that "his anxiety was very high, truly palpable" (id.). The student "was attentive to oral directions, but very often asked [the evaluator] to repeat and/or explain them," indicating that "his comprehension difficulties were an impediment" (id.). The evaluator reported that the student did not have difficulty switching from one task to the next, but demonstrated "a great deal of trouble" switching from one "thought/idea" (id.). Although the student's speech was understandable, he exhibited "somewhat erratic" eye contact and had difficulty reading verbal and nonverbal cues (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index score of 104 (61st percentile, average), a perceptual reasoning index score of 104 (61st percentile, average), a working memory index score of 102 (55th percentile, average), a processing speed index score of 131 (98th percentile, very superior), and a full scale IQ score of 113 (81st percentile, high average) (Dist. Ex. 7 at p. 3). The student's performance on tests measuring auditory and visual perception skills was "fine," although his "touch perception [w]as questionable" (id. at p. 4). The student's scores on assessments of his fine motor skills were within the average range of functioning, but the "quality of fine motor movements [was] weak, coordinated fine motor movements [were] often labor intensive, and the final written product [was] often immature" (id. at p. 5). The evaluator noted that the quality of the student's gross motor movements was also "immature" (id.). Assessments of the student's language skills yielded scores mostly in the average range; however, the student's oral comprehension and written expression scores were "significantly below age level," representing "real language function weaknesses" (id. at p. 6). Results of assessments of the student's attention and executive functions skills indicated intact abilities, although those skills were "vulnerable to anxiety, comprehension difficulties, and perseverative tendencies" (id. at pp. 7, 10). The student's problem solving and self-monitoring abilities were impeded by a tendency to get "stuck" on a thought or idea (id. at p. 10).

¹ The hearing record does not provide information regarding the student's need for four sessions of psychiatric treatment per week.

² The parents' attorney indicated during the impartial hearing that the parents were not seeking reimbursement for the privately obtained psychiatric services (Tr. p. 187).

Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to the student yielded the following subtest standard scores (percentile): word reading, 101 (55); reading comprehension, 115 (84); spelling, 105 (63); number operations, 129 (97); and mathematical reasoning, 124 (95) (Dist. Ex. 7 at p. 7). Test of Written Language-2 (TOWL-2) subtest scores revealed the student's difficulty with syntax (5th percentile), vocabulary (2nd percentile), and punctuation (16th percentile) (id.). The evaluator further noted that the student's "above age level" reading comprehension skills masked his problems with receptive syntax, putting him at risk for increasing reading comprehension difficulties as "the syntax demands of reading escalate year by year" (id. at p. 6). The student demonstrated difficulty during the evaluation with both written expression and handwriting skills (id. at pp. 6, 8).

Assessments of the student's personality revealed "a sensitive, creative [and] intelligent" student who was also "anxious and isolated" (Dist. Ex. 7 at p. 9). The student's awareness of his personal talents (e.g., math) contributed to an overall sense of well being, but also contributed to his anxiety about his areas of weakness (e.g., writing) (id.). The student was aware of his difficulty with handwriting and comprehending verbal messages, yet less aware of his difficulty comprehending the nonverbal messages, facial expressions and behaviors of others (id.). According to the evaluator, the student did not "readily engage in age appropriate social interactions with his peers and struggle[d] to 'read' nonverbal as well as verbal cues" (id. at p. 10). The evaluator further reported that the student's anxiety fed his tendency to "get stuck," which impeded his ability to pay attention and behave in an appropriate manner (id.). The evaluator opined that the student's tendency to get "stuck" appeared to be neurologically based, and he was unable to get "unstuck" without outside support (id. at p. 9).

The evaluator concluded that the student exhibited a "written expression disability, a receptive and expressive language disability, and a significant social skills disturbance" (Dist. Ex. 7 at p. 10). She reported that the student had made significant progress at his private school, as it provided the needed "small structured classroom, high teacher-student ratio, individualized prescriptive program, and school staff with special expertise in educating intelligent children with special education needs" (id. at pp. 10-11). The evaluator recommended that the student receive "more help in the social skills arena" and suggested enrollment in groups led by language therapists and individuals experienced in working with students who exhibited "a serious lack of interest in others" (id. at p. 11). She further recommended that the student receive services to address his anxiety and perseverative behaviors (id.).

During the 2007-08 school year, the student's private school class was composed of nine or ten students and three teachers (Dist. Exs. 5 at p. 1; 10 at p. 1). In a progress report dated February 8, 2008, the student's head teacher and the educational director of the private school described the student as "an anxious boy who ha[d] difficulty being flexible to adult and peer suggestions" (Dist. Ex. 8 at p. 1). The report indicated that the student's inflexible behavior usually occurred during social activities such as group games and academics (id.). The student was described as "competitive," "controlling" and "inflexible" during peer activities, which often resulted in conflicts with other students and required teacher intervention (id. at p. 2). If the student did not agree with how the teacher taught a lesson, he would become argumentative, needing "constant" reminders to have an open mind and to be more flexible during those activities (id. at p. 1). According to private school staff, the student had difficulty accepting teachers' opinions and suggestions, and at times, he exhibited behavior described as "controlling" and "bossy" (id. at p.

2). The student often called out in class and required numerous reminders from his teachers to raise his hand and allow others to answer (id.). The report described the successful use of an individualized behavior plan (putting the student's initials on the board) to facilitate improvement in his behavior (id.). The progress report indicated that the student had a difficult time accepting consequences for his actions and would often try to argue his way out of a situation (id.). When this occurred, the student could become "emotional" and needed teacher reminders to "take a break" (id.).

Academically, the student's head teacher and the private school's educational director estimated the student's reading skills to be at a 5.6 grade level with maximum 1:1 support and structure (Dist. Ex. 8 at p. 1). The student was characterized as an active participant in the reading class, who needed teacher assistance when reading aloud due to his difficulty decoding unfamiliar multisyllabic words (id.). The student was also described as having difficulty writing summaries and he required teacher assistance when selecting relevant details (id.). The teacher estimated the student's math skills to be at a 6.4 grade level with support and modifications (id.). The report indicated that the student used efficient strategies for basic equations and demonstrated no difficulty with "mental math" (id.). He exhibited difficulty adding and subtracting positive and negative integers and required teacher assistance when selecting appropriate strategies to solve a given problem (id.). The progress report indicated that the student became frustrated when he did not immediately understand new material, and that he tended to rush through his work (id.). Regarding writing skills, the teacher and educational director reported that the student had creative ideas and enjoyed language arts; however, he struggled with the creative and expository writing process (id.). He benefitted from brainstorming with a peer or teacher, developing an outline, and having a teacher edit his drafts and provide direct instruction in writing (id. at pp. 1-2). The student reportedly completed his assignments in a timely manner, was organized, participated in class, and followed classroom rules (id. at p. 2). The student's teacher and the educational director of the private school indicated that the student continued to need "a 12-month therapeutic special education setting" (id.).

On February 8, 2008, a social worker from the private school developed the student's progress report, indicating that she worked with the student in a peer socialization group twice weekly and that he was also seen individually "as needed" (Dist. Ex. 11 at p. 1). The progress report noted that "classroom and crisis interventions" were also provided to the student (id.). The social worker described the student as "an intelligent, rigid thinking" student who "struggle[d] with abstract language and expression" (id.). The progress report indicated that the student could become distressed with changes in schedules and had difficulty with abstract problems that could not be solved by rules (id.). According to the social worker, the student's difficulty with flexible thinking and pragmatic language skills was especially apparent during social interactions with peers, and the student needed to feel he was the "smartest/best" and was "heard" by peers and adults (id.). Despite the provision of counseling services, the progress report indicated that the student continued to struggle with rigidity in the classroom, becoming "stuck" on doing things "his way" with both peers and teachers (id.). Whether with peers or a teacher, when asked to change something, the student responded by arguing (id.). According to the social worker, the student had difficulty compromising when involved in a competitive game with peers and at times, could not move beyond the disagreement even after it was over (id. at pp. 1-2). The social worker concluded that while overall the student's social interactions had improved with the support of his teachers and therapists, continued counseling services would help the student "come up with better

solutions to his rigidity and anxiety so that he c[ould] improve the quality of his social interactions with his peers and adults" (*id.* at p. 2). She recommended that the student continued to receive the "structure of a therapeutic, supportive education environment" (*id.*).

During the 2007-08 school year, the student received three sessions of small group speech-language therapy per week at the private school (Dist. Ex. 9 at p. 1). A progress report dated February 8, 2008 indicated that the student's therapy sessions focused on improving the student's receptive and expressive language skills, auditory processing abilities, and pragmatic language skills (*id.*). According to the private school's speech-language pathologist, the student had difficulty following multistep directions, especially as the length and complexity increased (*id.*). At times, the student required verbal prompts and redirection to read instructions before asking for help (*id.*). According to the speech-language pathologist, the student often needed directions broken down into sequential steps and main ideas highlighted (*id.*). Expressively, the student reportedly demonstrated word retrieval difficulty, and his expressions featured limited detail and used "simple language" (*id.*). The progress report noted that the student continued to work on improving vocabulary, sentence structure, grammar, punctuation and capitalization of his written work, and also proofreading and editing skills (*id.*). The speech-language pathologist reported that the student could be "rigid with his thoughts and ideas and he continue[d] to need support to be more flexible" (*id.*). The progress report contained numerous annual goals and corresponding short-term objectives in the language areas addressed in therapy, and the speech-language pathologist recommended that the student continue to receive small group (1:2) pull-out speech language therapy once weekly, and a twice weekly push-in language group to address his language needs (*id.* at pp. 1-2).

The student also received OT in the private school classroom during sixth grade (Dist. Ex. 10 at p. 1).³ In February 2008, the occupational therapist reported that the student willingly participated in activities, despite his tendency to rush through them, which affected the quality of his work (*id.*). The progress report also indicated that the student at times could be "rigid and inflexible about following certain guidelines of an activity," and exhibited a poor frustration tolerance (*id.*). OT sessions focused on improving the student's handwriting skills, hand strength, bilateral integration skills, and attention span (*id.*). The student's poor postural control and body awareness were addressed during adapted physical education (*id.*). The progress report contained annual goals and short-term objectives in the areas of fine motor and visual-motor integration skills, and the occupational therapist recommended that the student receive one session of push-in OT per week (*id.* at pp. 1-2).

On February 26, 2008, a district school psychiatrist conducted a classroom observation of the student at the private school "as part of the [a]nnual [r]eview and the process of considering a functional behavioral assessment [FBA]" (Dist. Ex. 5).⁴ According to the school psychologist, the student was observed during three class periods and during "transitional activities" (*id.* at p. 1). While playing a board game in a small group, the school psychologist observed that the student

³ The hearing record does not indicate the number of OT sessions per week that the student received.

⁴ On March 14, 2008, the district school psychologist conducted a vocational assessment of the student, during which time the student was described as "friendly, talkative" and he "readily initiated conversation" (Dist. Ex. 6). The resultant report identified the student's areas of vocational interest (*id.*).

"played cooperatively and fairly, but closely monitored the [other] students" to ensure they played fairly (id.). During a disagreement with other students in the group, a teacher encouraged the members of the group to consider possible solutions, and the student was able to contribute to the resolution of the disagreement (id.). The student was observed to follow teacher directions when asked to transition from an activity and "he did not display any resistance or protest" (id. at p. 2). The student read aloud with fluency and correctly responded to questions during a listening skills activity and again appropriately transitioned to the next activity (id.). During lunch, the student was observed to engage in appropriate conversational exchanges with a teacher and classmates (id.).

On February 18, 2008, the parents signed a student enrollment contract with York Prep, selecting a tuition payment option requiring a non-refundable deposit to be paid to the school by March 13, 2008 (Parent Ex. C at pp. 2-3). The parents declined to participate in York Prep's "[t]uition [r]efund [p]lan," acknowledging that they understood that "no refund or cancellation of the yearly charges will be made by the [s]chool for absence, withdrawal or dismissal before the end of the [s]chool year and herewith agree to assume full responsibility for the total amount of the annual charges" (id. at p. 2). For an additional fee, the parents further elected to enroll the student in York Prep's Jump Start program, described in the hearing record as a program that assists students with different learning styles or "specific learning disabilities to function successfully in an academically challenging mainstream setting" (Tr. p. 176; Dist. Ex. 19 at p. 1; Parent Ex. C at p. 2). On February 27, 2008, the student's parents forwarded a non-refundable deposit to York Prep (Parent Ex. B).

On March 27, 2008, the Committee on Special Education (CSE) convened for the student's annual review and to develop his IEP for the 2008-09 school year (seventh grade) (Dist. Ex. 3). Attendees included the school psychologist who also acted as the district representative, a regular education teacher, a special education teacher, a school social worker, an additional parent member, and the student's mother (Tr. pp. 28-29; Dist. Exs. 3 at p. 2; 4). The educational director, a social worker, and the student's teacher from the student's then current private school participated telephonically (id.). For the 2008-09 school year, the March 2008 CSE recommended placement in a 12:1+1 special class in a community school, with two 40-minute sessions of speech-language therapy per week in a group of three, one 40-minute session of individual counseling per week, as well as one 40-minute session of counseling in a group of three, and various testing accommodations (Dist. Ex. 3 at pp. 11, 13).⁵ The student's mother stated that during the meeting, the March 2008 CSE explained to her its recommendation, and that she understood that the district was offering her son placement in "a small class of 12 students with a teacher and a para[professional] in the community school" (Tr. pp. 152-53).

By July 1, 2008, the parents had paid half of the student's yearly tuition costs to York Prep (Parent Ex. B).

In a letter dated August 13, 2008, the district restated to the student's mother the CSE's recommendations and informed her of the location of the student's recommended placement (Tr.

⁵ The hearing record describes at 12:1+1 program as a special class that contains 12 students with IEPs, a certified or licensed special education teacher, and a paraprofessional in the classroom (Tr. p. 31).

p. 153; Dist. Ex. 12).⁶ The letter also advised that a district staff person was available to discuss the recommendations or that another meeting could be arranged to discuss the CSE's recommendations (id.). The letter further advised the student's mother that the recommended services would be put into effect if the district "did not hear from [her] by August 27, 2008," and advised her of her rights regarding an additional CSE meeting, mediation, or an impartial hearing (id.). According to the August 13, 2008 letter, a copy of the student's March 2008 IEP was delivered to the student's mother as an attachment (id.).

By letter dated September 3, 2008 to the CSE chairperson, the student's mother acknowledged receipt of the August 13, 2008 letter from the district and further advised that she was "working on arranging a visit" to the recommended placement to "determine its appropriateness" (Dist. Ex. 13). The student's mother further informed the district that until she was able to make that determination, the student would attend York Prep "where he [would] receive appropriate special education services," and requested that the district contact her with any questions (id.).

By letter dated September 12, 2008 to the CSE chairperson, the student's mother advised the district that she had visited the recommended placement for the 2008-09 school year and that it was inappropriate for the student because the students in the class were "lower functioning" than her son, and she did not believe that he would be academically challenged (Dist. Ex. 14). Additionally, although she acknowledged that her son required "individualized special education support in small classes," the student's mother indicated that she believed that the recommended placement was "too restrictive" for the student and that he required a more challenging curriculum (id.). She added that the student needed "more opportunities to mainstream during the academic portion of the day" and exposure to mainstream peers, which she indicated he would not receive in the district's placement (id.). In her letter, the student's mother rejected the recommended placement and informed the district that the student would attend York Prep, for which she would seek tuition reimbursement (id.). Her letter also invited the district to contact her with any related questions (id.).

The student attended York Prep during the 2008-09 school year, where he received instruction in general education English, math, Spanish, history, life science, visual arts, drama, music and physical education, and participated in the Jump Start program (Tr. pp. 150-51, 215, 218; Parent Ex. E). The hearing record describes York Prep as a private college preparatory day school offering "a traditional curriculum" for students in grades six through twelve (Dist. Ex. 15 at p. 1). According to a York Prep teacher, approximately one third of students attending York Prep "have some sort of documented learning issue or disability" and participate in the Jump Start program (Tr. pp. 210, 213). The student's participation in Jump Start during the 2008-09 school year included a daily 30-minute morning "check-in" session with a Jump Start teacher and 11 other students, a four day per week 45-minute study hall supervised by a Jump Start teacher, and twice weekly individual sessions with a Jump Start teacher (Tr. p. 211).

On December 8, 2008, by due process complaint notice, the parents, through their attorney, requested an impartial hearing (Dist. Ex. 1). The parents maintained that "the [March 2008] IEP

⁶ It is presumed within the context of the hearing record that the August 13, 2008 letter served as the final notice of recommendation (FNR) (see Dist. Exs. 12; 13).

contained multiple procedural and substantive errors," which resulted in a denial of a free appropriate public education (FAPE)⁷ to the student (*id.*). Specifically, the parents raised the following allegations regarding the March 2008 CSE meeting and IEP: (1) the March 2008 CSE was invalidly composed; (2) the goals and objectives on the IEP did not appropriately address the student's special education needs; (3) the CSE did not follow the proper procedures in convening the meeting; and (4) the CSE did not receive or discuss appropriate documentation in making its recommendation (*id.*). Next, the parents argued that the recommended 12:1+1 placement was not appropriate to address the student's unique special education needs and that the student would not be able to make appropriate progress in that placement (*id.*). They further contended that the student would not be appropriately grouped in the placement, given that the recommended class contained students who exhibited significant behavioral and emotional concerns, which would have prevented the student from making progress (*id.*). The parents also argued that the students in the recommended class functioned at a lower level than the student and that the student would not have been challenged (*id.*). Next, the parents maintained that the recommended school was too large and distracting for the student, and that the recommended program would not have provided the student with any mainstreaming opportunities during the academic portion of the school day (*id.*). According to the parents, it would have been beneficial for the student to be exposed to mainstream peers and a more challenging curriculum (*id.*). Lastly, the parents asserted that in order to make academic progress, the student required a small, structured class in a small, nurturing school where he could receive intensive individualized and small group support throughout the school day (*id.*).

The parents further maintained that the Jump Start program at York Prep provided the student with appropriate special education services (Dist. Ex. 1). They noted that the student's current school was "York Preparatory School 'Jump Start'" (*id.*). As relief, the parents requested tuition reimbursement, as well as the provision of transportation and related services (*id.*).

On December 10, 2008, the district responded to the parents' due process complaint notice (Dist. Ex. 2). Among other things, the district asserted that the March 2008 CSE considered a 12:1⁸ special class as a program option for the student, but rejected it having determined that it was not supportive enough for the student (*id.* at p. 3). The district maintained that the placement offered to the student was reasonably calculated to enable the student obtain meaningful educational benefits (*id.*).

An impartial hearing commenced on May 28, 2009, and concluded on November 23, 2009, after four days of testimony (IHO Decision at p. 1). By decision dated February 4, 2010, the impartial hearing officer awarded the parents tuition reimbursement for York Prep for the 2008-

⁷ 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).

⁸ It is presumed within the context of the hearing record that a 12:1 special class is composed of 12 students and 1 special education teacher.

09 school year (id. at p. 9). Specifically, the impartial hearing officer found that the district offered a placement that was too restrictive for the student (id.). He went on to find that the student could have been educated in a general education classroom with the use of supplemental aides and services, further concluding that the district's recommended placement would not have mainstreamed the student "to the maximum extent appropriate" (id.). Additionally, the impartial hearing officer determined that as a result of the limited mainstreaming opportunities, the recommended 12:1+1 classroom would have reinforced the student's emotional problems (id.). Lastly, the impartial hearing officer added that the recommended classroom would not have benefited the student academically because the student was already functioning at grade level (id.). Based on the foregoing, the impartial hearing officer concluded that the district did not offer the student a FAPE during the 2008-09 school year (id.). Next, without articulating a basis for his conclusions, the impartial hearing officer found that York Prep was appropriate and that the student made progress in that program (id.). Lastly, with respect to equitable considerations, although the impartial hearing officer found that the parents had decided "early on" to send their son to a private school and to then seek tuition reimbursement from the district, he determined that the parents cooperated with the CSE, and that, ultimately, equitable considerations weighed in their favor (id.).

The district appeals, and requests that the impartial hearing officer's decision be vacated in its entirety. The district first argues that the impartial hearing officer erred in finding that the proposed district program was overly restrictive, inappropriate, and resulted in a denial of a FAPE to the student. Specifically, the district contends that the student was offered a program in the least restrictive environment (LRE) for the following reasons: (1) the hearing record reflects that the student could not have been satisfactorily educated in a general education class with supplemental aides and services; (2) the March 2008 CSE believed that the recommended 12:1+1 program would have addressed the student's social and emotional needs; (3) the student's difficulties in coping with frustration and anxiety demonstrated a need for more individualized instruction and supervision within a 12:1+1 class, rather than a less restrictive 12:1 program; and (4) the recommended program offered the student mainstreaming opportunities. The district also claims that the student would have been functionally grouped in the recommended class.

Next, the district contends that the parents failed to establish that York Prep was appropriate because the school failed to provide the student with any related services or instruction specifically designed to meet his unique needs. More specifically, the district notes that York Prep did not provide the student with counseling and speech-language therapy, although it is undisputed that the student needs such services. The district further maintains that there was no objective evidence of the student's progress at York Prep. The district also argues that the parents did not show that the general education portion of the student's program at York Prep was appropriate. The district further maintains that equitable considerations preclude an award of relief to the parents for the following reasons: (1) the parents failed to provide the district with adequate and timely notice of the student's enrollment in York Prep; and (2) the parents had no intention of enrolling the student in a public school for the 2008-09 school year. The district also contends that the student's mother did not raise any concerns at the March 2008 CSE meeting, nor did she tell the CSE that the student was already enrolled at York Prep and that the parents had paid non-refundable money to the school prior to the CSE meeting. Lastly, the district asserts that the parents abandoned any claims raised in the due process complaint notice, except for their arguments regarding LRE and grouping, because they failed to raise any other claims at the impartial hearing.

The parents submitted an answer in which they request that the impartial hearing officer's decision be affirmed in its entirety. The parents first argue that there is no objective evidence in the hearing record to show that a FAPE was offered to the student during the 2008-09 school year. Among other things, the parents allege the following: (1) the March 2008 CSE declined to consider anything less restrictive for the student other than a 12:1 program; (2) the recommended classroom was actually a 6:1+1 classroom; (3) the students in the recommended program all performed at a level significantly below the student; (4) the district has failed to demonstrate that the proposed half-filled 12:1+1 class that was mainstreamed for foreign language and physical education constituted the student's LRE, and that evidence of the student's progress in a general education program only underscores the district's failure to meet that burden; and (5) the student would not have been functionally grouped in the recommended class. With respect to the appropriateness of York Prep, the parents assert that the school provided the student with instruction designed to meet the student's unique needs and there is ample evidence in the hearing record to demonstrate the progress that the student achieved there. Additionally, the parents maintain that the hearing record shows that the student was capable of appropriately progressing in an educational environment that provided consistent exposure to mainstream peers during the school day. Finally, the parents allege that equitable considerations favor an award reimbursement for the following reasons: (1) they cooperated and acted in good faith with the district and did not do anything to preclude the district from offering a FAPE to the student; and (2) they provided adequate notice under the circumstances and they would have accepted an appropriate public placement.

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 student's recommended program must 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; Patskin, 583 F. Supp. 2d at 428). 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).

A private school placement must be "proper under the Act" (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), 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"]]). Whether a private school offers related services to meet a student's special education needs is also a consideration in determining the appropriateness of the placement (see Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]. A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

The 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 (see Application of the Bd. of Educ., Appeal No. 08-016).

The impartial hearing officer found that the district did not offer the student a FAPE, because he determined that the recommended program was too restrictive for the student and would not have offered him sufficient mainstreaming opportunities (IHO Decision at p. 9). A

review of the hearing record reveals that for the 2008-09 school year, the March 27, 2008 CSE, based upon information it had before it, offered the student a FAPE in the LRE. As detailed below, the hearing record demonstrates that in developing the student's program, based upon evaluations and information then in existence, the March 2008 CSE concluded that the student's combined academic, social/emotional, and speech-language needs warranted greater individualized support in a small, supportive environment than could be offered in a less restrictive setting.

The district's school psychologist, who also acted as district representative at the March 2008 CSE meeting, testified that all attendees participated during the meeting, which lasted for approximately one hour (Tr. pp. 20, 27-28). Specifically, the hearing record reflects that the student's mother attended the meeting and participated by describing her concerns about her son's deficits and his difficulty managing frustration and anxiety (Tr. pp. 42-43, 152). Likewise, the hearing record shows that the student's mother understood the March 2008 CSE's program recommendation and she did not raise any objections to the proposed program at the time of the CSE meeting (Tr. pp. 43, 153). As noted above, for the 2008-09 school year, the district offered the student placement in a 12:1+1 special class program in a community school with related services of speech-language therapy and counseling (Dist. Ex. 3 at pp. 1, 11).

The March 2008 CSE had available to it the student's then current private school's February 2008 educational, counseling, OT and speech-language therapy progress reports, as well as the student's January 2006 private psychological evaluation report (Tr. pp. 29, 67-69). The student's March 2008 IEP present levels of academic performance reflected information about the student's reading, math, and written language skills and needs from the February 2008 educational progress report (compare Dist. Ex. 3 at pp. 3-5, with Dist. Ex. 8). Specifically, the March 2008 IEP indicated that the student was academically "an active participant," and benefitted from the use of a structured outline for summarizing material that was read (Dist. Ex. 3 at p. 3; see Dist. Ex. 8 at p. 1). The March 2008 IEP further noted that the student needed teacher assistance for reading multisyllabic words, brainstorming and outlining ideas for writing activities, editing written work, and selecting appropriate strategies to complete math problems (Dist. Ex. 3 at p. 3; see Dist. Ex. 8). The March 2008 CSE offered the student program modifications such as story prompts, an editing checklist and use of a number line; supports that according to the student's private school teacher, had been beneficial to the student (Dist. Exs. 3 at pp. 3; 8). Information contained in the March 2008 IEP regarding the student's social/emotional needs also reflected difficulties described by the private school social worker in her February 2008 counseling progress report (Dist. Ex. 3 at p. 4; see Dist. Ex. 11). The March 2008 IEP indicated that the student had demonstrated improvement in his ability to "cope" with transition and change, was more tolerant of others and more "flexible, despite his rule-based approach to situations;" however, the IEP further noted that the student was "still dealing with his frustration and his tendency to be upset" (Dist. Ex. 3 at p. 4). The March 2008 CSE determined that the student's behavior did not seriously interfere with instruction and could have been addressed by a special education teacher and that he continued to need "a well structured, supportive, monitored educational environment," in addition to related services of counseling and speech-language therapy (id.).⁹

⁹ The March 2008 IEP further noted that the student was administered medication daily "to reduce anxiety and decrease perseverative behaviors" (Dist. Ex. 3 at p. 5).

According to the school psychologist, the March 2008 CSE discussed and considered the annual goals from the student's private school progress reports and then current information about the student when it developed the student's IEP annual goals (Tr. p. 40; Dist. Exs. 8; 9; 11). Additionally, the student's teachers from the then current private school participated in the discussion of the proposed goals for the student (Tr. p. 44). The school psychologist testified that the annual goals developed by the CSE were "specifically tailored, designed, based on [the student's] needs in the areas of reading, decoding, ability to manage his anxiety, ability also to cope with his frustration and to regulate it, as well as . . . language deficits" (Tr. pp. 40-41). The March 2008 IEP contained annual goals for the student in the areas of auditory processing of information, expressive language, receptive language, pragmatic language, reading decoding, written language, math word problems, and social/emotional skills (Dist. Ex. 3 at pp. 6-10). The March 2008 IEP also provided the student with one session per week of both group and individual counseling, and two sessions per week of small group speech-language therapy to address language and social/emotional needs (Tr. p. 30; Dist. Ex. 3 at pp. 11, 13). Additionally, the hearing record reveals that staff from the student's then current private school agreed with the level and type of related services recommended at the time of the March 2008 CSE meeting (Tr. p. 44).

The hearing record reflects that the school psychologist who attended the March 2008 CSE meeting had conducted a classroom observation and a vocational assessment of the student and was familiar with the student's academic, social, and related service needs as described in the progress reports that were before the March 2008 CSE (compare Tr. pp. 34-35, with Dist. Exs. 8-11). According to the school psychologist, the student exhibited deficits in decoding multisyllabic words, writing expository and creative text, solving math word problems, coping with frustration and anxiety, interacting with peers, and also with expressive and receptive language skills (Tr. pp. 34-35). He testified that the March 2008 CSE considered the student's deficits during the annual review and explained how the 12:1+1 program would have addressed those deficits (Tr. pp. 35-40). Specifically, he testified that the 12:1+1 program would have provided more support to implement strategies the student needed to develop reading, writing and language skills, and offered individualized attention, small group instruction and "skills or strategies" to help him solve word problems, as well as tools such as a graphic organizer and number line (Tr. p. 36). To address the student's auditory processing deficits, the school psychologist testified that the 12:1+1 program would have provided an "educational setting with minimum distractions and minimum background noise that would [have] interfere[d] with his ability to process information" (Tr. pp. 36-37).

Notwithstanding the parents' claim that the student was capable of progressing in a less restrictive environment given the academic progress that the student attained during the 2008-09 school year at York Prep, the hearing record reveals that such evidence was not before the March 2008 CSE and therefore, was not a relevant factor in developing a program for the student at that time (J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]). As noted above, the March 2008 CSE developed an individualized program for the student based on information that was before it at the time of the meeting (see North Colonie, 586 F. Supp. 2d at 84 citing J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]) [holding that a determination of whether an IEP is reasonably calculated to enable a student to receive educational benefits is a necessarily prospective approach and courts must refrain from engaging in "Monday morning quarterbacking"]. Accordingly, retrospective information should not be considered because it has no bearing on whether the IEP was reasonably calculated to benefit the student at the time that it was developed (Antonaccio v. Bd. of Educ. of Arlington Cent.

Sch. Dist., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]); but see D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 (2d Cir. 2005) [noting that there may be value in distinguishing between IDEA claims that dispute the validity of a proposed IEP, on one hand, and suits that question whether an existing IEP should have been modified in light of changed circumstances, new information or proof of failure]; see also Application of the Bd. of Educ., Appeal No. 06-017 [finding a denial of a FAPE, where the district failed to timely revise a student's IEP, given the change in the student's educational needs]). Additionally, as to the parents' preference for York Prep, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (Application of a Student with a Disability, Appeal No. 08-043; see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *8 [S.D.N.Y. 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054).

During the 2008-09 school year, the district's recommended class was composed of a special education teacher, a paraprofessional, and six students eligible for special education services as students with emotional disturbances or learning disabilities (Tr. pp. 76, 79-80). According to the hearing record, four separate teachers instructed the special class students; one special education teacher provided instruction in social studies and English, one special education teacher instructed students in math and science, and one teacher each provided instruction in foreign language and physical education (Tr. pp. 80-81). Students in the special class traveled together to lunch and to the different classes throughout the day (Tr. pp. 81-82). The special education teacher who taught English and social studies in the proposed class testified that all of the teachers and the paraprofessional met with each other daily to discuss lesson plans (Tr. pp. 81, 107-08). He stated that the recommended program followed the New York State standards, and that he modified the seventh grade curriculum to meet the needs of the students as identified by their IEPs (Tr. pp. 84-85, 129). Classroom-based and formal assessments were used to monitor and adjust instructional practices and the recommended program offered review, reinforcement, and remediation of skills (Tr. pp. 94-97).

The special education teacher from the recommended class had reviewed the student's IEP, and the hearing record reflected information regarding how the special education teacher assisted students who exhibited similar needs in his classroom (Tr. p. 90). For example, the special education teacher testified that when a student exhibited frustration, the student would be provided with a short break, tasks broken down into shorter segments, and a "code" alerting the teacher that the student was becoming frustrated (Tr. pp. 90-91). Consistent with the recommendation from the January 2006 private psychological evaluation report that indicated the student needed among other things, a "small structured classroom, high teacher-student ratio," and an "individualized prescriptive program," the proposed placement offered the opportunity for small group instruction and individual support provided by the paraprofessional under the direction of the special education teacher (Tr. pp. 92, 115-16). The special education teacher further testified that he used visual, auditory and kinesthetic modalities in his classroom, and would have been able to provide prompts, graphic organizers, editing checklists, and brainstorming activities such as those recommended in the student's March 2008 IEP (Tr. pp. 79, 85-90; Dist. Ex. 3 at p. 3). Although the student did not attend the district's proposed program, the special education teacher testified how he and other school staff such as the speech-language therapist and counselor, would have implemented the student's annual goals (Tr. pp. 100-07). He further stated that he would have

been able to implement the student's IEP testing accommodations in his class (Tr. p. 109). The special education teacher testified that the recommended placement had available counselors and speech-language therapists on staff who could have implemented the student's related services recommendations (Tr. p. 100). In addition, he collaborated with the speech-language therapists during bi-weekly meetings, and also spoke with them daily (Tr. p. 123). Under the circumstances presented above, the hearing record reflects that at the time of the CSE meeting, the March 2008 CSE properly identified the student's needs, developed a special education program that addressed those needs, and that the student's March 2008 IEP could have been implemented in the placement proposed by the district.

Turning to the parents' assertion that the recommended district program was too restrictive for the student, the school psychologist described the CSE's recommended program of a 12:1+1 special class as "a relatively small class that [would] provide [the student] . . . with much more attention - - that is individualized instruction and attention, and intensive remediation in appropriate academic areas" (Tr. p. 31). The school psychologist testified that he believed that the recommended program was appropriate for the student because although there was evidence that the student had made gains in particular academic areas, the student continued to have difficulties in other areas such as reading, and needed "intensive academic remediation" (Tr. p. 32; see Tr. pp. 58-59). Notwithstanding the parents' claim that the recommended program failed to offer the student sufficient mainstreaming opportunities, a review of the hearing record indicates otherwise. First, the hearing record shows that students at the district's recommended placement were mainstreamed for foreign language and physical education (Tr. p. 81). The district's special education teacher further explained that additional mainstreaming opportunities were available in other subjects, depending on a student's strengths and mastery of a subject (Tr. p. 98). Specifically, the special education teacher testified that he, along with the math/science special education teacher, the speech-language therapist, the assistant principal of instruction and the parents, convene a meeting to discuss the strengths of a student and to make decisions about opportunities for that student to be mainstreamed in a particular subject area (id.). However, the school psychologist acknowledged that the student continued to exhibit difficulty coping with frustration and anxiety and that the CSE also considered the student's receptive and expressive language deficits when developing program recommendations (Tr. p. 32). The hearing record reflects that the March 2008 CSE considered a less restrictive 12:1 program for the student; however, it determined that such a program provided "insufficient support" because in addition to curriculum modifications and a small class placement, the student required "a high degree of adult attention and intervention to attend to task and negotiate social interactions" (Tr. p. 42; Dist. Ex. 3 at p. 12). The school psychologist testified that the March 2008 CSE recommended a 12:1+1 program for the student due to

deficits that [the student] ha[d] in receptive and expressive language areas, and also the connection between language deficits and reading difficulty that he ha[d], also his difficulty with managing and dealing with frustration as well as anxiety, as well as his specific deficits in decoding of words, and of reading comprehension, and even in the area of pragmatic language skills. And based on those deficits, and the need for continuous support and intensive support, such as one to one in certain situations, as well as [a] smaller group setting, we found that it would be almost impossible or very difficult

for him to function in a less restrictive environment than what we [were] recommending

(Tr. p. 67).

Given all of the aforementioned factors, the March 2008 CSE concluded that the student's needs warranted "much more individualized instruction and supervision and support within a . . . special class as opposed to a less restrictive setting" (Tr. pp. 32, 59-60). The school psychologist who participated in the March 2008 CSE meeting further stated that given the supports of the 12:1+1 program, he could not think of a reason that the student would not successfully function in a community school (Tr. p. 33).

Moreover, the student's mother testified that she selected York Prep for her son based in part, upon recommendations from the student's teachers at his former private school (Tr. pp. 158-59). She stated that teachers from that private school believed that the student "would be able to grow at York [Prep], the type of placement. It's a mainstream school, but it has some support in the Jump Start program, and he would be able to handle the academics" (Tr. p. 159). The school psychologist posited that at the March 2008 CSE meeting the student's mother may have "expressed interest in York Prep" for the student; however, he further noted that during the March 2008 meeting, staff from the student's then current private school did not recommend York Prep as a potential placement for the student (Tr. pp. 41-42, 61). The hearing record does not show that at the March 2008 CSE meeting, the private school staff indicated to the CSE their belief that the student could have been successful in a general education placement with special education supports, nor does documentary evidence from the student's private school available to the March 2008 CSE recommend such a placement (Tr. pp. 43-44, 71-72; Dist. Exs. 8-11; see Tr. pp. 41-42). Rather, both the student's private school head teacher and educational director concurred in February 2008 that the student "continue[d] to need a 12-month therapeutic special education setting" (Dist. Ex. 8 at p. 2). Similarly, despite the student's mother's interest in York Prep at the time of the March 2008 CSE meeting, information available to the March 2008 CSE did not reflect the parents' assertion that the student would have succeeded in a general education program (Dist. Exs. 8-11; see Tr. pp. 61-62). In particular, the January 2006 private psychological evaluation report indicated that the student had made "significant progress" while attending the private school, which provided him with the needed "small structured classroom, high teacher-student ratio, individualized prescriptive program and school staff with special expertise in educating intelligent children with special educational needs;" features offered in the proposed district placement (Dist. Ex. 7 at p. 10). Neither parent testified that while at the March 2008 CSE meeting, they voiced disagreement with the district's recommendations for any reason, including that the program was too restrictive (Tr. pp. 147-80; see Tr. p. 43).

In addition, the hearing record further reflects that the private special education school the student attended through sixth grade consisted of approximately 40-50 students (Tr. pp. 62-63, 148-49). Depending on the year, the number of students in the student's class ranged from six to eleven (Tr. p. 149). The student's mother testified that there were two head teachers providing instruction during the school year the student had eleven students in the class, and in the other school years instruction was provided by a head teacher and an assistant teacher (id.). During the 2007-08 school year, the student's class was composed of nine or ten students and three teachers (Dist. Exs. 5 at p. 1; 10 at p. 1). Testimony from the school psychologist, un rebutted by the parents,

reflected that students who attended the private school "typically" exhibited "marked behavioral issues" and it served students who had "marked difficulty dealing and coping with their feelings and also acting out inappropriately in classroom settings, in school settings as well" (Tr. pp. 62-63). In light of the foregoing, the hearing record reflects that the March 2008 CSE's recommendation of a 12:1+1 special class in a community school was appropriate for the student, given its knowledge of the student's needs, the restrictiveness of the program the student had attended for the previous six years, and the level of need exhibited by the students who attended that private school.

Lastly, the hearing record supports the district's assertion that the student would have been functionally grouped in the recommended district placement. Although the student's mother deemed students in the recommended class to be "lower functioning" than her son, as detailed below, her observation is not substantiated by the hearing record. Information available to the March 2008 CSE indicated that as of February 2008, the student's reading skills were at a 5.6 grade level "with maximum one to one support and structure;" and that his math skills were at a 6.4 grade level "with support and modification," indicating to the school psychologist that without that level of support, it would have been difficult for the student to achieve those grade levels (Tr. pp. 63-66; Dist. Ex. 8 at p. 1). Although the student's academic achievement and cognitive skills were assessed to be in the average to high average range, according to the school psychologist, the student's inability to cope with his anxiety interfered with his ability to demonstrate his academic skills (Tr. pp. 50-52, 54-55, 58-60, 64-66). The students attending the recommended class during the 2008-09 school year were functioning at approximately a fifth to sixth grade level in reading, writing, and math (Tr. pp. 79-80, 118, 121). Based on his review of the March 2008 IEP, the special education teacher for the recommended class concluded that the student "fit[] the academic profile of most of the students" who were in his classroom (Tr. pp. 99, 108). In addition, the special education teacher testified that he followed a seventh grade curriculum, which was broken down into fifth, sixth, and seventh grade levels depending on the students' needs (Tr. pp. 118-19, 129). He further testified that he addressed differences in the students' academic functioning levels by creating lesson plans with differentiated instruction in mind, providing different work to students who functioned at different skill levels (Tr. p. 108). Accordingly, the hearing record shows that the student would have been appropriately grouped with other students in the proposed placement according to their academic skill levels, and that the special education teacher could have modified the curriculum to meet the student's needs.

Based on the above, the hearing record demonstrates that the district's recommended program for the 2008-09 school year offered the student a FAPE because it offered an individualized educational program designed to meet the unique needs of the student and was reasonably calculated to confer educational benefits in the LRE. Having determined that the district offered the student a FAPE in the LRE, I 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 SUSTAINED.

Dated: **Albany, New York**
 April 29, 2010

PAUL F. KELLY
STATE REVIEW OFFICER