



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-063

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 Board of Education of the Niskayuna Central School District

Appearances:

Law Offices of H. Jeffrey Marcus, P.C., attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for respondent, Susan T. Johns, 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 Hampshire Country School (HCS) for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered a free appropriate public education (FAPE) for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending HCS (Joint Exs. 70 at pp. 1, 2; 79). HCS is an out-of-State residential private school which has not been approved by the Commissioner of Education 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 eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1 [zz][10]).

The hearing record reveals that the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD); an oppositional defiant disorder (ODD); a mood disorder, not otherwise specified (NOS); an intermittent explosive disorder; a bipolar disorder; an anxiety disorder, NOS; and an alcohol related neurodevelopmental disorder (Tr. pp. 372-73; Joint Exs. 24 at p. 1; 34 at pp. 1-2; 36 at pp. 16-17; 69; 71; 72; 74). As a preschooler, the student received "itinerant special education services" (Joint Ex. 36 at p. 4). During kindergarten, the student

received related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy, as well as resource room services and an aide (id.). During the student's first and second grade school years, he attended a district elementary school where he continued to receive resource room services and the support of an aide (id.).¹

A "triennial" evaluation report from a district psychologist dated March 1, 2002 indicated that the results of an administration of the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) revealed that the student demonstrated average cognitive functioning (Joint Ex. 4 at p. 1). The district psychologist reported that an administration of the Kaufman Test of Educational Achievement (K-TEA) revealed that the student possessed reading and writing skills in the high average range and mathematics skills in the low average range (id. at pp. 2-4). The district psychologist further reported that the student had difficulty with transitions and that his low self-esteem inhibited his ability to work effectively on new tasks and problems (id. at pp. 4, 6). According to the district psychologist, the student was highly active and distractible within the classroom setting (id. at p. 5). The district psychologist opined that the student required an instructional assistant for organizational/memory deficits, resource room services to assist with re-teaching of concepts, and counseling to address his anxiety within the school environment (id.). The district psychologist also reported that the student "demonstrate[d] difficulty with transitions. Therefore, careful planning needs to be involved when changes in program and personnel occur" (id. at p. 6).

By letter dated October 2, 2002, one month after the student started third grade, the parent notified the district that she was withdrawing her son from the district's elementary school and enrolling him in a parochial school (Joint Exs. 6 at p. 1; 36 at p. 4). The student completed third and fourth grade at this parochial school (Joint Ex. 36 at p. 4).

A special education annual review report was completed on February 25, 2003 and included an observation, a teacher interview, and formal testing with the Detroit Tests of Learning Aptitude-Fourth Edition and the K-TEA (Joint Ex. 9 at p. 1). The evaluator reported that the student possessed low self-esteem, anxiety, lacked organizational skills, and was distractible (id. at pp. 1-2, 4). The report noted that the student received three hours of special education services at the parochial school (id. at p. 1). The report further noted that the student also received private counseling to address anxiety and behavior, and that he was taking several medications to manage ADHD and ODD (id.). The evaluator reported that cognitive and academic testing of the student yielded overall scores that indicated average abilities (id. at pp. 1-4).

An OT evaluation summary dated April 9, 2003 reflected that the student had average visual perceptual, visual motor, and fine motor skills and did not require OT services (Joint Ex. 10 at p. 1).

By letter dated March 12, 2004, the student's private psychologist reported that despite "high doses" of medication, the student continued to have difficulty focusing and maintaining self-

¹ In a social history update dated October 31, 2001, the parent indicated to the district that the student was anxious, lacked confidence, and exhibited ADHD and "oppositonality" (Joint Ex. 3 at pp. 1, 4). The parent also reported that the severity of the student's symptoms varied depending on the time of day, and that his behavior had "improved greatly" with medication (id. at p. 1).

control (Joint Exs. 14; 73). The psychologist requested that the district conduct testing in the areas of reading, written language, and OT (id.).

On March 31, 2004, the student was administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) at the parochial school (Joint Ex. 16 at pp. 2-4). The student's performance in reading, math fluency, mathematics calculation, written language, and written expression were all reported to be average (id.). The student's academic skills, his ability to apply those skills, and his fluency with academic tasks were also in the average range (id.). The evaluator also reported that the student's oral language skills were low average when compared to others at his age level (id.).

An OT evaluation summary dated April 30, 2004, indicated that the district's Committee on Special Education (CSE) had requested an OT evaluation after concerns were raised about the student's handwriting (Joint Ex. 15). The occupational therapist reported that the student had the underlying skills to write legibly, and therefore he did not require OT services (id.).

At the end of the student's fourth grade year (the 2003-04 school year), the parochial school that the student was attending closed and he transferred to a second parochial school for fifth grade (the 2004-05 school year) (Joint Exs. 21; 36 at p. 4).

In a social history update dated December 3, 2004, the parent reported that among his other diagnoses, the student had received a diagnosis of a bipolar disorder and that he was taking a "cocktail" of medication (Joint Ex. 19 at p. 1). She also reported that the student's move to the first parochial school in October 2002 resulted in him having less anxiety and improved behavior (id.). However, the parent reported that the student still possessed "high performance anxiety" (id.). The parent also indicated that the student's first parochial school had "closed," that he had transferred to a second parochial school, and that he appeared to be adjusting well at the second parochial school (id.).

In a "triennial" evaluation report dated January 3, 2005, the district's psychologist reported that an administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) revealed that the student's cognitive abilities were in the "low side of the average range to average range with the exception of processing speed" with a percentile rank of 4 (Joint Ex. 22 at p. 2). The test also revealed that the student's processing speed score was in the "borderline" range, whereas his prior WISC-III results indicated a processing speed score in the "average" range (id. at pp. 2, 7). The evaluator opined that the student's processing speed score was "a marked drop from three years ago" (compare Joint Ex. 22 at pp. 2, 7, with Joint Ex. 4 at pp. 1, 7).² The psychologist also reported that the student's Wechsler Individual Achievement Test: Second Edition (WIAT-II) scores revealed reading comprehension skills in the low average range (Joint Ex. 22 at p. 2). The evaluator further reported that the student's "reading comprehension score fell significantly over the past three years" (id.). The WIAT-II results indicated that the student's total math and written language scores were in the low average range (id. at p. 3). The evaluator reported that the student continued to demonstrate a weakness in math skills and exhibited a decrease in performance in the areas of written language and reading comprehension compared to

² The psychologist stated that this processing speed score variability may have been related to the student's level of distractibility on any given day (Joint Ex. 22 at p. 2).

testing completed three years ago (id. at pp. 2, 3). Results on the Behavior Assessment System for Children: Second Edition (BASC-2) Teacher Rating Scales indicated that the student's T-scores in the areas of internalizing problems, school problems and on the behavioral symptoms index were within the clinically significant range (id. at p. 5). The school psychologist further reported that the scores were significantly different than the scores obtained three years ago when the student was in a resource room program (id.). The psychologist recommended that the student be considered for a "special education skills class" in order to provide him with intensive teaching in reading and in math (id. at pp. 5-6). She also recommended school counseling services in order to provide the student with additional social/emotional supports (id. at p. 6).³

A report completed by a district special education teacher dated March 20, 2005, reflected that the student was receiving six hours of special education consultant teacher services per week (Joint Ex. 26 at p. 5). The student was reported to be performing below grade level in all areas (id.). He was reported to be struggling with math, written expression, and reading comprehension (id. at pp. 5-6). The student was also reported to have anxiety, low self-esteem, a high degree of distractibility, and weak organizational skills (id. at pp. 6-7).

For the 2005-06 school year, the student was retained in fifth grade and attended a third parochial school (Joint Exs. 27 at p. 3; 36 at pp. 4, 6). According to the parent, she wanted the student to have a "fresh start" at a new school and hoped that the student would continue at this third parochial school through the eighth grade (Tr. p. 384; Joint Ex. 36 at p. 4).

A private neuropsychological evaluation completed in March and April 2006, revealed that the student demonstrated average cognitive ability, and age-appropriate reading and math skills (Joint Ex. 36 at pp. 11, 16, 17).⁴ The psychologist reported that the student exhibited deficits in written expression, and significant deficits in "executive function," including difficulty in shifting mental set, reduced working memory, diminished strategizing/planning, and poor impulse inhibition (id. at pp. 16, 17). The psychologist also reported that the student's information processing speed was "extremely variable," he had both verbal and visual information memory impairments, and his visual construction skills were weak (id. at p. 16).⁵ The psychologist also indicated that the student exhibited anxiety, and oppositional and aggressive behavior (id. at p. 17).

On June 20, 2006, the CSE convened to discuss the student's upcoming 2006-07 school year (Joint Exs. 39 at p. 1; 40 at p. 1). The CSE proposed two possible programs; either a 9:1+2 Board of Cooperative Educational Services Skills Development II special class (BOCES SDII) with one 30-minute session of psychological counseling per week, or, if the student continued at the parochial school, 7½ hours per week of consultant teacher services (Joint Ex. 39 at p. 3). The

³ A performance profile dated March 2005 from the student's second parochial school, revealed that the student's specific mathematics skills scores were in the below average to average range, the student's cognitive skills performance ratings were in the average range, and his specific reading skills ratings were in the "low" to above average range (Joint Ex. 23).

⁴ A letter dated June 9, 2006 from a teacher at the student's third parochial school noted that the student struggled with reading comprehension (Joint Ex. 38).

⁵ The psychologist noted that the student exhibited weak visual construction skills, although this weakness appeared to be secondary to poor impulse control (Joint Ex. 36 at p. 16).

CSE also recommended extended school year (ESY) services, which consisted of three 45-minute reading classes per week (id.).⁶

A report dated August 7, 2006 from the student's summer reading teacher indicated that the student received two 45-minute tutoring sessions per week during summer 2006 (Joint Ex. 42 at p. 2). The teacher reported that the student was a fluent reader and read quickly, but that his failure to utilize phrasing and intonation negatively affected his comprehension (id. at p. 3).

On August 17, 2006, the CSE reconvened and again recommended that the student attend the 9:1+2 BOCES SDII special class for the 2006-07 school year (Joint Exs. 43 at p. 3; 44 at p. 1). For related services, the CSE recommended one 30-minute session of psychological counseling per week and five 15-minute sessions of nursing services (Joint Ex. 43 at p. 3).

In September 2006, the parent enrolled the student at HCS for the 2006-07 school year (Joint Exs. 45; 55 at p. 1).⁷

On May 14, 2007, the CSE reconvened for an annual review and to discuss the student's upcoming 2007-08 school year (Joint Exs. 49 at p. 1; 50 at p. 1). The CSE recommended a 12:1+2 BOCES SDII special class with one 30-minute session of psychological counseling per week (Joint Ex. 49 at p. 3). The CSE also recommended ESY services for summer 2007, which consisted of two 90-minute 15:1 special class sessions per week (id.).

The parent accepted the district's recommended ESY services during summer 2007, but did not return to the district for the recommended 12:1+2 BOCES SDII program (Joint Ex. 49 at p. 3). By letter dated October 21, 2007, the parent advised the district that the student was again enrolled at HCS for the 2007-08 school year (Joint Ex. 52).

During March and April 2008, a district psychologist conducted a "triennial re-evaluation" of the student (Joint Ex. 55). Administration of the WJ-III Tests of Cognitive Ability (WJ-III COG) yielded results indicative of average cognitive ability with a weakness in working memory (id. at p. 4). The WJ-III COG yielded standard (and percentile) scores of 90 (25) in general intellectual ability, 94 (35) in verbal ability, 102 (55) in thinking ability, and 81 (11) in working memory (id.). Administration of the WJ-III ACH yielded standard (and percentile) scores of 83 (13) in broad reading and 83 (13) in broad math (id. at p. 8). The psychologist reported that the student's decoding skills, his vocabulary, and his ability to reason using lexical knowledge were average, his writing skills were in the low average to average range, his phonetic coding skills were low average, and his reading comprehension and reading fluency were significantly below average (id. at pp. 4, 6, 7). Administration of the Test of Written Language – Third Edition (TOWL-3) yielded standard (and percentile) scores of 87 (19) in overall writing, 83 (13) in contrived writing, and 94 (35) in spontaneous writing (id. at p. 9). The school psychologist indicated that the student's capitalization, spelling abilities, contextual language, and story construction skills were average (id. at p. 7). Regarding math skills, the psychologist reported that

⁶ A June 2006 report from the student's consultant teacher reported that the student continued to have difficulty with math and organizational skills (Joint Ex. 41 at p. 1). The consultant teacher opined that the student required a high level of prompting and modification in order to be successful (id.).

⁷ The student has remained at HCS since September 2006 (Joint Ex. 55 at p. 1).

the student demonstrated average math problem solving skills, low average calculation skills, and significantly below average math fluency skills (*id.*). The psychologist reported that the student's ability to visualize spatial relationships, his categorical reasoning skills based on principals of inductive logic, his short-term auditory memory of numbers and words, and his long-term retrieval were all average (*id.* at p. 4). To assess the student's behavior, the psychologist administered the BASC-2 Parent Rating Scales, which yielded clinically significant T-scores on the anxiety scale and on the somatization scale (*id.* at p. 12). The psychologist opined that these scores indicated that the student frequently displayed behaviors stemming from worry, nervousness, and/or fear (*id.* at p. 11). The student also possessed a high number of health-related concerns (*id.*). The psychologist also reported that the BASC-2 Teacher Rating results indicated that the student was at-risk for attention problems and hyperactivity (*id.*). Additionally, results from an administration of the Conners' Parent Rating Scales-Revised yielded T-scores of 68 on the anxious-shy subscale (moderately atypical) and 76 on the psychosomatic subscale (markedly atypical) (*id.* at p. 14). The psychologist opined that the district's recommended BOCES SDII program with counseling as a related service would be appropriate in meeting the student's needs (*id.* at p. 16).

A career assessment conducted by the district during April and May 2008 revealed that the student expressed an interest in pursuing a career in the field of childcare management (Joint Ex. 54 at pp. 1, 5, 10).

On June 5, 2008, the CSE convened to develop an individualized education program (IEP) for the 2008-09 school year (Joint Exs. 57 at p. 1; 58 at p. 1). Attendees included: the parent, a CSE chairperson, an additional parent member, a school psychologist, a district special education teacher, a district "SS/Eng" teacher, a teacher from a specific district middle school, a district administrator for student support services, a note taker, and the HCS headmaster by telephone (Joint Ex. 57 at p. 8). The CSE indicated that the student demonstrated weaknesses in executive functions, organization, and attention which affected his academic achievement and social interaction in a large group setting (*id.* at p. 3). Additionally, the CSE indicated that the student displayed weaknesses in written expression, reading comprehension, math calculation, and math fluency which resulted in "limited success in learning and achievement" (*id.*). The CSE determined that the student remained eligible for special education services as a student with an OHI (*id.* at p. 1). The CSE recommended a 12:1+2 BOCES SDII special class, along with one 30-minute session per week of group counseling services (*id.*). The IEP provided annual goals and short-term objectives in the areas of study skills, reading, writing, mathematics and in social/emotional/behavioral functioning (*id.* at pp. 9-11). The IEP further recommended several testing accommodations including: having directions and questions read, extending the time provided for the test, administering tests in a location with minimal distractions, providing for the use of a calculator, and providing for breaks (*id.* at pp. 2, 3). Additionally, the CSE made the same recommendation (the 12:1+2 BOCES SDII class and one 30-minute session of weekly counseling) for ESY services for summer 2008 (*id.* at pp. 1-2).

By letter dated August 12, 2008, the parent advised the district that she did not agree with the proposed BOCES SDII special class placement and that the student would attend HCS for the 2008-09 school year (Joint Ex. 59 at pp. 1-2). Additionally, the parent stated that the district did not inform her of the exact class that would be available for her son and she therefore could not visit the recommended placement (*id.*). The parent also stated that she understood the recommended program to be located in the district's larger middle school and that such a placement would have been overwhelming for her son (*id.*).

By due process complaint notice, dated August 15, 2008, the parent, through her attorney, requested an impartial hearing for the student for the 2006-07, 2007-08, and 2008-09 school years seeking tuition reimbursement for HCS (Joint Ex. 1 at pp. 1-3). In the due process complaint notice, the parent alleged that the district's proposed BOCES SDII special class placement was too large, did not have students with similar needs or abilities, failed to offer sufficient individualized attention to the student, and would be distracting for the student (*id.* at pp. 2-4). The parent also alleged that she was denied the opportunity to meaningfully participate in the decision-making process because the district failed to offer the BOCES SDII special class at a specific school which prevented her from being able to fully evaluate the recommended placement (*id.* at p. 3). The parent further alleged that the IEP goals were inadequate because they did not address identified needs of the student and were not sufficiently specific, that the post-secondary transition plan was inadequate, that the district failed to conduct a functional behavioral assessment (FBA), and that the district failed to provide transitional services to the student to ease the change from the student's current private placement to the proposed district placement (*id.* at pp. 3-5). The parent also asserted that the parent's unilateral placement of the student at HCS was appropriate and that equitable considerations supported the parent's request for reimbursement (*id.* at pp. 4-5).

By letter dated August 26, 2008, the district, through its attorney, answered the parent's due process complaint notice (Joint Ex. 2). The district alleged that it had offered the student a FAPE for the school years at issue, that HCS was not an appropriate placement or the least restrictive environment (LRE) for the student, and that the equities did not favor an award of reimbursement to the parent (*id.*).

In a letter dated January 6, 2009, the student's private psychologist reported that the student had weaknesses in attention, processing speed, and in his working memory (Joint Ex. 65 at p. 1). The psychologist opined that the student should remain at HCS because of "the value of the level of social-emotional and academic support that he receives there" (*id.* at pp. 1-2). The psychologist reported that prior to attending HCS the student was fearful, depressed, angry, and had low self-esteem (*id.* at p. 1). However, since attending HCS, the student had learned to be respectful, developed connections with peers, developed increased self-control, developed increased self-esteem and was able to function without any psychotropic medications (*id.*).

The impartial hearing began on January 14, 2009 and concluded on March 3, 2009, after three days of testimony (Tr. pp. 1, 174, 355, 456). On the first day of the impartial hearing, the parent withdrew her reimbursement claims for the 2006-07 and the 2007-08 school years (Tr. p. 13). On April 25, 2009, the impartial hearing officer rendered her decision on the remaining reimbursement claim concerning the 2008-09 school year (IHO Decision at p. 1). The impartial hearing officer determined that the district failed to offer a FAPE to the student for the 2008-09 school year (*id.* at pp. 2, 16-18). The impartial hearing officer found that the district's failure to identify a site-specific placement at which the student's IEP would be implemented resulted in a denial of a FAPE because this failure negatively impacted the parent's participation in the IEP formulation process and her opportunity to assess the recommended placement (*id.*). The impartial hearing officer also found that the district's failure to develop a transition plan for the student's

transition from the private HCS placement to the district's proposed public placement was a denial of a FAPE (id. at p. 18).⁸

The impartial hearing officer then found that the parent failed to prove that the HCS program was appropriate (id. at pp. 2, 20). The impartial hearing officer determined that the student's needs were primarily academic and secondarily social/emotional; and although HCS had addressed the student's social/emotional needs, it was not clear from the hearing record whether the student had progressed academically (id.). Additionally, the impartial hearing officer determined that HCS was not in the LRE and that HCS failed to provide educational services specially designed to address the student's needs (id.).⁹ Accordingly, the impartial hearing officer denied the parent's request for tuition reimbursement at HCS for the 2008-09 school year.

The parent appeals and asserts that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE; however, she asserts that the impartial hearing officer erred in determining that the district: (1) met its obligations to address the student's behavioral needs; (2) placed the student in a class with other students of similar needs and abilities; and (3) provided appropriate and adequate goals. The parent also asserts that the impartial hearing officer erred in determining that the HCS program was inappropriate, arguing that HCS provides needed repetition, a slower teaching pace, small classes to minimize distraction, and classes that contain students with similar needs. In addressing the impartial hearing officer's LRE concerns, the parent asserts that the student's academic needs justify the intensive student to teacher ratio at HCS.¹⁰ The parent also asserts that the impartial hearing officer erred by improperly relying upon information outside of the hearing record to support her conclusion that the primary focus of HCS was social rather than academic. The parent further asserts that the student made academic progress at HCS as indicated by his passing grades and by his increased Stanford testing scores. According to the parent, the student made social progress as indicated by his diminished anxiety, his improved sleep, his improved eating, and also by his ability to function without any medication. Lastly, the parent asserts that the impartial hearing officer correctly determined that the equities favored reimbursement because the parent cooperated with the district, provided all evaluative material to the district, attended CSE meetings, was timely in advising the district of her concerns about the proposed placement, and was timely in advising the district of her intention to seek reimbursement for the HCS placement.

The district answers and cross-appeals, asserting that the impartial hearing officer erred in finding that the district failed to specify the location of the student's BOCES SDII program and that this alleged failure negatively impacted the parent's participation and resulted in a denial of a

⁸ Despite finding that the district had failed to offer the student a FAPE, the impartial hearing officer also found that the district: (1) met its obligations to address the student's behavioral needs; (2) placed the student in a class with other students of similar needs and abilities; (3) appropriately addressed the impact of the student's behavior on his educational performance; and (4) provided appropriate and adequate goals (IHO Decision at p. 2).

⁹ The impartial hearing officer also found that the parent had cooperated with the CSE, had attended CSE meetings, had given timely notice of her unilateral placement of the student at HCS, and that if the parent had succeeded in proving that the HCS program was appropriate, the impartial hearing officer would have found that the equities favored the parent's claim for tuition reimbursement (IHO Decision at p. 2).

¹⁰ The parent further asserts that the impartial hearing officer failed to consider the parent's unsuccessful efforts to find a less restrictive private placement for the student before placing him in a residential placement.

FAPE. The district further asserts that the IEP clearly reflected the school at which the BOCES SDII special class program would occur. The district also asserts that even if the site of the program was unclear: (1) the site would have been decided upon by the end of the summer; (2) the program remained unchanged; (3) the class profile was unchanged; and (4) the parent suffered no prejudice. The district asserts that it was not obligated to provide a transition plan for the student's transfer from HCS to the district's public school and further, that the student's successful participation in district summer programs indicated that no such transition plan was needed. The district also asserts that: (1) an FBA and behavioral intervention plan (BIP) were not required; (2) the recommended program contained students with similar needs and abilities; and (3) the IEP provided appropriate goals. The district also asserts that the impartial hearing officer correctly determined that the HCS program was inappropriate. According to the district, the HCS residential program was not in the LRE, it did not offer special education instruction, and the student's academic performance deteriorated while he was at HCS. Lastly, the district asserts that equitable considerations do not favor the parent because the parent was determined to keep the student at HCS and there is no evidence that the parent attempted to find an alternative placement in the LRE, other than evidence that the student took entrance exams at two local parochial schools.

In her answer to the cross-appeal, the parent asserts that the district was not aggrieved by the impartial hearing officer's decision and therefore has no right to appeal.

In the district's reply to the parent's answer to the cross-appeal, the district asserts that a responding party may cross-appeal when the responding party might otherwise suffer a reversal on the appeal if the ground upon which they were successful in the decision below was reversed on appeal.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; see also 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]), 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 the 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 (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have

borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

I will first address a procedural matter raised in the district's answer and cross-appeal. The district objects to the parent's attempt to introduce an additional one-page document that contains information that was not available at the time of the impartial hearing. The district has also attached additional evidence to its answer and cross-appeal. The district's additional evidence consists of an excerpt from the parent's post-hearing memorandum of law to the impartial hearing officer. The parent has not objected to the introduction of this additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Student with a Disability, Appeal No. 08-077; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). Under the circumstances presented herein, I will accept the additional evidence and give it consideration.

Next, I will address the parent's argument that the district was not aggrieved by the impartial hearing officer's determination that it failed to offer the student a FAPE because the impartial hearing officer declined to award the parent tuition reimbursement. As a general rule, a party who has successfully obtained the full relief sought is not aggrieved and may not appeal "even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor" (Parochial Bus Sys. Inc. v. Board of Educ., 60 N.Y.2d 539, 545 [1983]; Application of the Dep't of Educ., Appeal No. 09-051; Application of the Dep't of Educ., Appeal No. 09-019). However, where, as here, the responding party has no right to appeal, an exception provides that the responding party may nevertheless cross-appeal to seek "review of a determination incorrectly rendered below where, otherwise, he [or she] might suffer a reversal of the final judgment or order upon some other ground" (Parochial Bus Sys Inc., 60 N.Y.2d at 545). In this case, the district is not aggrieved by the impartial hearing officer's conclusion that the parent did not prove that HCS was appropriate and is therefore not entitled to tuition reimbursement; however, the parent by appealing has opened the door for the district to seek review of the impartial hearing officer's determination that it failed to offer a FAPE to the student for the 2008-09 school year. Accordingly, I will consider the district's cross-appeal.

Next, I will address the district's assertion in its cross-appeal that the impartial hearing officer erred in concluding that the district failed to identify a site-specific placement at which the student's IEP would be implemented and that this failure negatively impacted upon both the parent's participation in the IEP formulation process and in her opportunity to assess the recommended placement (IHO Decision at pp. 2, 16-18).

I note that the IDEA requires that a valid IEP be in effect "at the beginning of each school year" and a school district's delay does not violate the IDEA so long as the school district "still has time to find an appropriate placement ... for the beginning of the school year in September" (20 U.S.C. § 1414[d][2]; Tarlowe, 2008 WL 2736027, at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 428560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; K.Y. v. Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).¹¹ This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

In this case, the June 5, 2008 IEP offered a program to the student along the continuum in the 12:1+2 BOCES SDII special class (Joint Ex. 57 at p. 1; see 8 NYCRR 200.6[h][4]). The IEP indicated that the BOCES program would take place at a specific district middle school (Site 1) (Joint Ex. 57 at p. 1). However, the district's administrator testified that the location of the 12:1+2 BOCES SDII special class would have been either the district middle school where it had been located previously (Site 1), or another specific middle school within the district (Site 2) (Tr. pp. 58-59). He further testified that although the location of the program would not have been definite until the end of the summer, the program, the teacher of the BOCES SDII special class, and the students who comprised the class would remain the same, only the school that the program was housed in would have changed (*id.*). When the 2008-09 school year began, the BOCES SDII special class was located at Site 1, the same district middle school where it had been located for the previous 11 years (Tr. pp. 58, 130). This middle school was the one listed on the student's IEP (Joint Ex. 57 at p. 1).

There is no evidence in the hearing record that the lack of a definite site for the BOCES SDII class placement inhibited the parent's participation in the IEP process. The hearing record

¹¹ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

reveals that the parent participated in preparation of the evaluative reports used to develop the IEP prior to the CSE meeting, and she also participated in the IEP formulation process at the CSE meeting (Tr. pp. 66-67, 88, 100-03, 312-13, 333, 339; Joint Exs. 57 at p. 6; 58).¹² The hearing record also reveals that the CSE incorporated the evaluative information provided by the parent both prior to the CSE meeting and at the CSE meeting in devising the program, the annual goals, and the services recommended in the IEP (Tr. pp. 85-88, 95, 109; Joint Exs. 56; 57 at p. 6; see K.Y., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78). The IEP reveals that an additional parent member also attended the CSE meeting (Joint Exs. 57 at p. 8; 58 at p. 4). Furthermore, the hearing record shows that the parent did not ask at the CSE meeting to observe the recommended class nor did she have any questions about the class that was being recommended (Tr. p. 67).

There is no evidence in the hearing record that the student's special education and related service needs could only be met in a specific classroom or school building. To the contrary, as discussed below, the hearing record shows that the student's special education and related service needs would have been met in the LRE in the district's recommended program. Under the facts in this case, I find that the district did not deny the student a FAPE by not determining at the June 5, 2008 CSE meeting the specific district school that the student was recommended to attend and at which his IEP would be implemented. Furthermore, I find that the failure to identify a specific school at the time of the CSE meeting did not impede the parent's meaningful participation in the CSE process. Lastly, I find that even if the parent was unable to visit the recommended classroom because of a lack of a site-specific placement, her inability to do so did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

I now turn to the district's assertion in its cross-appeal that the impartial hearing officer erred in concluding that its failure to provide a transition plan for the student to address his needs in transferring the student from the private HCS placement to the district's proposed public placement resulted in a denial of a FAPE (IHO Decision at pp. 2, 18).¹³

Neither federal nor State law requires a transition plan for the movement of a student from a unilateral placement by a parent to a CSE recommended placement. However, appropriate services should be identified and offered if a particular student's needs require such services.¹⁴ In this case, the hearing record reveals that the district's program included features that were designed

¹² At the June 5, 2008 CSE meeting, the parent informed the CSE about the student's social history and social development at HCS, his interest in working in the child care management field, his continued anxiety difficulties, his cessation of medication management needs, and the remission of his bipolar disorder (Tr. p. 66; Joint Exs. 57 at p. 6; 58 at pp. 4, 6).

¹³ According to the impartial hearing officer, the student's anxiety issues and his difficulty with transitions necessitated a school-to-school transition plan to improve the likelihood that the student would succeed in the BOCES SDII special class placement (IHO Decision at p. 18).

¹⁴ In the instant case, the issue of the absence of a school-to-school transition plan was first raised in the parent's due process complaint notice (Joint Ex. 1 at p. 4). The issue was not raised at the time of the June 5, 2008 CSE meeting, nor was it raised when the parents rejected the placement prior to the commencement of the school year (Joint Exs. 57; 58; 59).

to ease this school-to-school transition. The district's special education teacher who participated in the June 5, 2008 CSE meeting testified that part of the reasoning behind the recommendation for the 12:1+2 BOCES SDII program was to provide the student with a student to teacher ratio that was similar to the ratio provided at HCS and that this would hopefully ease any anxiety and difficulty the student may experience with transitioning to public school (Tr. p. 113). The district's special education teacher also testified that the BOCES SDII class was also able to provide opportunities for mainstreaming to assist the student in confronting his anxiety and difficulty with transitioning into larger unfamiliar environments (Tr. pp. 113-14; see Tr. pp. 132-33). The special education teacher from the recommended BOCES class further testified that students in the proposed program have a teacher assistant with them in the hallway at lunchtime and that if the noise level in the cafeteria is too high for a student, the student can eat in her classroom (Tr. pp. 133-34). She further testified that there is a teacher assistant in the cafeteria with the students to help them with their social interactions (Tr. p. 134). Furthermore, the hearing record shows that the CSE provided counseling services and specific goals to address the underlying emotional, social, and behavioral reasons that caused the student's anxiety and alleged difficulty with transitions (Tr. pp. 111, 340; Joint Ex. 57 at pp. 1, 2, 11). Additionally, the HCS headmaster testified that the student has no difficulty transitioning between HCS classrooms (Tr. p. 197). Moreover, testimony from the parent revealed that during the summer months, the student had no difficulty transitioning into two summer programs, being transported by bus to one of the summer programs, and participating in additional summertime activities at a local church (Tr. pp. 436-37).

As such, under the circumstances of this case, I find that the lack of specified services on the IEP to assist the student in transitioning from HCS to the district's public school program did not impede the student's right to a FAPE, significantly impede the parent's meaningful participation in the decision-making process regarding the provision of a FAPE to the student, or cause 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]; see E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419), or render the offered IEP inadequate on substantive grounds (34 C.F.R. § 300.513[a]; 8 NYCRR 200.5[j][4][i]).

I will now turn to an analysis of the specific components of the district's program and proposed placement in order to determine whether they were reasonably calculated to confer educational benefits to the student.

The district's recommended 12:1+2 BOCES SDII special class contains one special education teacher and two teacher assistants (Tr. pp. 131-32). The BOCES SDII special class has been taught by the same teacher for the last 23 years (Tr. p. 130). The teacher testified that she is New York State certified in both special education and elementary education (id.). For the last 11 years, the class has been located at one of the district's middle schools (Site 1) (id.). The class is composed of students who are in the sixth grade to eighth grade range (Tr. p. 134). However, the reading and math abilities of the students typically range from second grade to their grade levels (Tr. p. 132). Class instruction is provided according to the New York State curriculum (Tr. p. 139). According to the BOCES teacher, all of the students in the class require small group intensive instruction for reading and math (Tr. p. 132). In reading, all of the students require reading comprehension instruction and approximately fifty percent of the students require instruction in decoding (id.).

The BOCES SDII class also has a part-time social worker (Tr. pp. 52-53). The social worker is in the classroom for 2 ½ days per week (Tr. pp. 52-53, 138, 282). She observes the students and assists them within the classroom by teaching strategies for coping with anger, anxiety, and frustration (Tr. pp. 283-84, 289). She also works with the teacher to address student conduct and attention issues, and with the teacher assistants to provide suggestions on how to better interact with the students (Tr. pp. 283-84, 286-88). The social worker also testified that the students are provided with social opportunities with other students through the use of the "Best Buddies" program, a program designed to foster social interactions and friendships with other mainstream students (Tr. pp. 289, 295).¹⁵ The BOCES SDII class also has a classroom behavior plan whereby the students are rewarded for showing appropriate behaviors (Tr. p. 136). Examples of appropriate behaviors include: being ready for class, being respectful, or completing work (*id.*). If the students behave appropriately, they are rewarded with free time during which they can talk with friends, play games, use the computer, or have a snack (Tr. pp. 136-37).

All of the students attend a "special" class such as music, art, or physical education, and approximately fifty percent are mainstreamed for one of these "special" classes (Tr. pp. 133-34). The students who attend these mainstream classes are accompanied by one of the teacher assistants who assist them with writing, attention, and behavior (Tr. pp. 132, 133). In addition, approximately 1/3 to 1/2 of the students attend a general education class for science or social studies with a teacher assistant (Tr. p. 133). The students receive modified tests and materials for these general education classes (*id.*). The BOCES SDII teacher testified that she instructs those students who do not attend the mainstream classes (Tr. p. 135). Many students in the BOCES SDII class also have an opportunity to be mainstreamed in the student lunchroom (Tr. pp. 133-34). The teacher assistants accompany those students who attend lunch in the lunchroom and help the students with social interactions (*id.*). For those students who have difficulty with the noise level of the lunchroom, lunch is provided in the classroom (*id.*).

I find that the evidence in the hearing record establishes that the district's recommended special education program was reasonably calculated to confer both academic and social/emotional educational benefits to the student. Moreover, I agree with the impartial hearing officer that the student would have been placed with students of similar needs and abilities in the district's recommended program. The hearing record reflects that the June 5, 2008 CSE considered, and relied upon the student's HCS reports and the reports of both current and prior evaluations for an accurate assessment of his functioning, academic levels, and social/emotional needs (Tr. pp. 85, 299-300, 319-33; Joint Exs. 53; 54; 55; 56; 57 at pp. 4-6, 8). In making its recommendations, the CSE utilized updated cognitive and academic testing results and classroom observation information provided by the district psychologist (Tr. pp. 299-300; Joint Exs. 54; 55; 57 at pp. 4-5). The CSE also considered input from the student's HCS headmaster and the parent, both of whom participated at the CSE meeting (Tr. pp. 54, 60-61, 66, 85-88; Joint Exs. 57 at pp. 6, 8; 58 at pp. 2, 10). The CSE also considered different types of class settings, including a less restrictive

¹⁵ The social worker further testified that the students in the Best Buddies program have lunch every other week, which she supervises (Tr. p. 295).

general education setting with support services and a more restrictive special class program (Joint Ex. 57 at p. 8).¹⁶

The hearing record also reveals that, with respect to academics, the CSE developed four annual goals to specifically address the student's study skills, three annual goals to address his reading skills, one annual goal to address his writing skills, and four annual goals to address his mathematics skills (Tr. pp. 89-95; Joint Ex. 57 at pp. 9-10). The CSE also developed two annual goals and recommended counseling to address the student's social/emotional and behavioral needs (Tr. pp. 95, 110-11, 113-15; Joint Ex. 57 at pp. 1, 2, 11). The CSE also considered the student's post-secondary transition needs and provided a transition plan to help transition the student into a vocation that he was interested in (Tr. p. 107; Joint Ex. 57 at pp. 4, 7-8).

Both the BOCES SDII teacher and the BOCES social worker testified that based upon their review of the student's IEP; the student's testing results, academic needs, and social needs were similar to the other students in the class (Tr. pp. 141-149, 150-53, 285, 287-92). According to the BOCES teacher, the student's distractibility would be addressed in the BOCES SDII class through the use of verbal or visual cues and gestures, his retention problems would be addressed through re-teaching and through the use of manipulative objects such as flashcards, and his weakness in executive functions would be addressed with the use of visual aids, graphic organizers, by teaching him at his own pace, and by dividing up large tasks into smaller tasks (Tr. pp. 141-44). She further testified that the student's difficulty with completing homework assignments would have been specifically addressed in the BOCES SDII class because time is allotted in the class to complete homework (Tr. p. 137). The BOCES SDII teacher also testified that the program modifications recommended in the June 5, 2008 IEP were typical modifications utilized in her BOCES SDII classroom (Tr. pp. 148-49; Joint Ex. 57 at p. 2). The BOCES SDII teacher further testified that the pre-teaching, reinforcement of vocabulary and use of graphic organizers recommended in the IEP were all utilized within the BOCES SDII classroom (Tr. pp. 151-52; Joint Ex. 57 at p. 5). She testified that the student's management needs and IEP goals could all be addressed in the BOCES SDII classroom (Tr. pp. 153-56). The BOCES social worker also testified that the BOCES SDII class would be appropriate to address the student's social/emotional and behavioral needs (Tr. pp. 285, 287-92; Joint Ex. 57 at p. 11).

Regarding the parent's argument that the goals were insufficient and did not address the student's needs, a private neuropsychological evaluation was conducted in March and April 2006 and the district school psychologist completed reevaluations in January 2005 and March 2008 (Joint Exs. 22 at p. 1; 36 at p. 1; 55 at p. 1). The private psychologist and district school psychologist both reported that the student demonstrated weaknesses in the areas of math, reading, and writing as well as difficulties with social/emotional functioning (Joint Exs. 22 at p. 1; 36 at p. 1; 55 at p. 1, 7). Specifically, in her 2005 reevaluation, the district school psychologist reported that the student continued to demonstrate a weakness in math skills and exhibited a decrease in performance in the areas of written language and reading comprehension compared to testing completed three years prior (Joint Ex. 22 at p. 3). The district school psychologist completed a reevaluation in March 2008 including an administration of the TOWL-3 which indicated that the

¹⁶ The CSE determined that the general education setting was inappropriate because the student's current academic, social, and emotional needs required a more intensive setting (Joint Ex. 57 at p. 8). A special class program was also deemed inappropriate because it would have been overly restrictive (*id.*).

student's contextual language and story construction skills were average, with contrived writing skills in the low average range (Joint Ex. 55 at p. 7). The private psychologist indicated in 2006 that the student exhibited oppositional behavior, anxiety, and aggressive behavior (Joint Ex. 36 at p. 17). The June 5, 2008 IEP included 15 annual goals with corresponding short-term objectives that addressed the student's needs in the areas of study skills, reading, writing, mathematics, and social-emotional functioning (Joint Ex. 57 at pp. 9-11). Based on the information above, I agree with the impartial hearing officer that the hearing record demonstrates that the annual goals appropriately addressed the student's identified academic and social/emotional needs and were measurable.

Finally, the parent asserts that the CSE failed to sufficiently address the effect of the student's behavior. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *8 [S.D.N.Y. July 3, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations. In addition to the federal requirement, State regulations require that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]). Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]). The hearing record reveals that the decision of the June 5, 2008 CSE to proceed without conducting an FBA¹⁷ or developing a BIP¹⁸ was made after considering the district psychologist's "triennial" re-evaluation (Joint Exs. 53 at pp. 1-2; 55 at pp. 3, 11-15; 57 at pp. 6, 7).¹⁹ The June 5, 2008 IEP enumerates the student's behavioral concerns and illustrates that the CSE incorporated several strategies such as counseling and social/emotional/behavioral goals to address the student's underlying problems with executive

¹⁷ In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

¹⁸ In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

¹⁹ The district psychologist noted in her 2008 "triennial" re-evaluation that if the student were to return to the public school, the CSE should consider conducting an FBA (Joint Ex. 55 at p. 17).

functions, self-regulation, and anxiety (Joint Ex. 57 at pp. 1, 2, 6, 7, 11). Additionally, the proposed BOCES SDII class provided a classroom rewards-based behavioral system (Tr. pp. 136-37). In light of the foregoing, I find that the decision of the CSE not to conduct an FBA or develop a BIP did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause 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]; see A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *11; see also K.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008]), or render the offered IEP inadequate on substantive grounds (34 C.F.R. § 300.513[a]; 8 NYCRR 200.5[j][4][i]). I agree with the impartial hearing officer that the IEP, as formulated, adequately addressed the student's behavioral needs.

Based on the above, I find that the June 5, 2008 IEP accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). Therefore, I find that the June 5, 2008 CSE offered the student a FAPE for the 2008-09 school year.

Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parent's placement at HCS was appropriate and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have examined the parties' remaining contentions and find that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

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

Dated: Albany, New York
July 29, 2009

PAUL F. KELLY
STATE REVIEW OFFICE