



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-001

**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, G. Christopher Harriss, Esq., of counsel

Educational Advocacy Service, attorneys for respondents, Jennifer A. Tazzi, 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 the parents for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Winston Prep, a school for adolescents with learning difficulties (Tr. p. 87). Winston Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student was also receiving counseling once per week from a private provider outside of Winston Prep (Tr. p. 253). The student had been previously given a diagnosis of an attention deficit hyperactivity disorder (ADHD) and was reportedly described as having visual processing deficits, difficulty completing tasks within a time limit, and difficulty with organizing and applying rote information to more complex processing tasks (Dist. Ex. 7 at pp. 1, 7). In addition, the student struggled with social cues and with advocating for himself (Tr. p. 136). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

An undated private neurodevelopmental evaluation report indicated that when the student was almost 13 years old, he underwent a private comprehensive evaluation conducted by both a developmental pediatrician and a school psychologist on April 5, 7, and 17, 2006 (Dist. Ex. 7 at p. 1).¹ According to the private evaluation report, the purpose of the neurodevelopmental evaluation was to determine the student's developmental status at the time and to "better define his educational and therapeutic needs" (id. at pp. 1, 10). The private evaluation report indicated that at the time of the evaluation, the student received medication for attention difficulties and was enrolled in seventh grade at a private school (id. at p. 1). The report further reflected that the student attended a general education classroom taught by a regular education teacher, in which a special education consultant teacher was "available" (id.). The private evaluation report also noted that when bored, frustrated or overwhelmed, the student experienced behavioral difficulties in school (id.). In addition, the private evaluator reported that the student made academic progress at an appropriate rate (id.). The private evaluation report also indicated that the student's mother felt at that time that the student might benefit from a different learning environment (id.). One of the private evaluators indicated in the report that she had the opportunity to speak with the private school staff on a number of occasions and like the student's mother, she was of the opinion that the student's then current private school was a "poor fit" for him as it lacked a number of resources including a psychologist, and therefore did not meet the student's needs (id. at pp. 1, 8).

The private evaluating school psychologist administered various formal and informal evaluation measures (Dist. Ex. 7 at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC – IV) yielded a full scale IQ score of 105 in the average range, a verbal comprehension composite score of 104 in the average range, a perceptual reasoning composite score of 119 in the high average range, a working memory composite score of 107 in the average range, and a processing speed composite score of 75 in the low range (id. at pp. 1, 3-5, 7). Results from administration of the Woodcock – Johnson Tests of Achievement – Third Edition (WJ – III ACH) revealed the student's "very strong" skills in all academic areas except in writing fluency, a task that required the student to quickly write short sentences about a picture (id. at pp. 5, 12). The private evaluators indicated that the student was challenged most when required to work on tasks within a set time limit, and indicated that the student's difficulty on the WJ – III ACH was congruent with his poor performance on the processing speed subtests of the WISC – IV (id. at p. 5). Additional formal measures of receptive and expressive vocabulary yielded average results (id. at pp. 6, 16).

Overall, the private evaluators described the student as functioning in the average range of intellectual ability, although his skills ranged from high average to low (Dist. Ex. 7 at p. 7). Significant difficulty was seen in the area of processing speed and the private evaluators surmised that the student appeared to have a visual processing deficit (id.). According to the private evaluators, the student demonstrated strength in his ability to recall information presented orally as well as his ability to solve mathematical calculations (id.). The private evaluation report described the student's academic skills in the areas of reading, writing, mathematics, spelling, understanding directions, and memory as "within age appropriate limits" (id.). In addition, the private evaluation report indicated that the student's greatest challenge involved his ability to

¹ Although this exhibit was grouped with the district exhibits, it was labeled as "Parent Exh. 7" (Dist. Ex. 6 at p. 1). For purposes of this decision, the exhibit will be referred to as "Dist. Ex. 7."

complete tasks within time limits (id.). The private evaluators also determined that the student was generally better at learning verbal material than visual material (id.). Strength was noted in the student's ability to learn narratives and in learning and retaining verbal information without an organizing context (id.). The student's ability to learn visual information was within average limits, but he appeared to have difficulty organizing and applying rote skills to more complex processing tasks (id.). The private evaluators also reported that the student's visual motor skills were within the average range and his visual spatial skills and fine motor control were age appropriate (id.). The private evaluation report indicated that the student appeared to have some attention weaknesses within academic contexts when compared to his peers, characterized by teacher reports as physical restlessness, and had some weakness in cognitive skills and attention (id.). Additionally, the private evaluators noted that the student tended to pick at his nails or fingers when he became frustrated (id.). Furthermore, although the student was described as working at a "somewhat slow pace" during the evaluation, his motivation and focus were described as "fairly consistent" throughout the testing process in a 1:1 setting (id.). The student's performance on a computerized attention task was also described as "good" (id.). The private evaluators indicated that based on the neurodevelopmental evaluation, the student generally seemed to be functioning well, although he required some additional intervention to help him achieve his full potential (id. at p. 8).

Among other things, the private evaluators recommended that the student remain on medication for attention difficulties (Dist. Ex. 7 at p. 9). They also recommended various classroom modifications including the provision of verbal information to support visual information, provision of auditory cues, evaluation for visual tracking, provision of extended time limits on all standardized tests, and testing in a separate location (id. at pp. 8-9). The evaluators further recommended that the student be placed in a school with "small classes and specialized resources" to meet his needs, and suggested a few schools including Winston Prep (id. at p. 9).

A social history dated September 18, 2007, completed by a district social worker/educational evaluator when the student was in ninth grade, indicated that the student had been attending Winston Prep since the 2006-07 school year (eighth grade) (Tr. p. 244; Dist. Ex. 6 at p. 1).^{2,3} According to the social history report, the student's mother indicated that the student did not have an individualized education program (IEP), nor did he receive related services during the previous school year (Dist. Ex. 6 at p. 1). The social history report further indicated that an IEP was developed for the student for ninth grade (2007-08) on the same day that the social history was completed (id.).⁴ According to the social history report, the student's mother reported that the student had made progress at Winston Prep in both his school performance and attitude at school (id. at pp. 1-2). The report noted that the student experienced difficulty expressing himself in writing, had difficulty summarizing important points from his reading, and had organizational problems (id. at p. 1). The report further indicated that the student got distracted easily and received medication to help him focus (id.). In addition, the student's mother noted that although

² A review of the social history indicates that the student's mother acted as the informant (Dist. Ex. 6).

³ This exhibit was included with the district exhibits; however, it was labeled as "Parent Exh. 6" (Dist. Ex. 6 at p. 1). For purposes of this decision, the exhibit will be referred to as "Dist. Ex. 6."

⁴ A copy of the student's IEP for the 2007-08 school year is not included in the hearing record.

the student had some friends with whom he got along well, socializing was "not always easy" for the student and he required supervision during social situations so that he could be prompted to connect with others in a socially mature manner (*id.*). The student's mother also indicated that she had seen progress in the student's performance and attitude at school; however, the student tended to be "nervous" about his school performance, despite some improvement in controlling his anxiety (*id.* at p. 2). According to the report, the student's mother indicated her desire for the student to remain at Winston Prep at that time (*id.*). The social history report also indicated that the district was provided with a current medical report and that due process rights were "re-discussed" with the student's mother (*id.*). The social history report further noted that the student's mother was "very involved" in the student's education and the student's family had also worked with an educational advocacy service (*id.*).

On April 15, 2008, the student's mother signed an enrollment agreement with Winston Prep for the student's 2008-09 school year (Tr. p. 245; Parent Ex. N). The agreement stated that a deposit was required when the document was returned to the school and stipulated that "there [would] be no allowance for absence of early withdrawal" (*id.*). The agreement further stated that if it became necessary to withdraw the student at any time after the agreement was signed, the parent or guardian continued to be responsible for the balance of the entire tuition and fees (*id.*).

On June 10, 2008, the Committee on Special Education (CSE) convened for the student's annual review and to develop his program for the 2008-09 school year (Dist. Ex. 3; Parent Ex. C).⁵ The following individuals attended the June 2008 CSE meeting: a district special education teacher who also acted as the district representative, a district regular education teacher, and a district school psychologist (Tr. pp. 177-78; Dist. Ex. 3 at pp. 1-2). In addition, the parents, the student's Winston Prep "Focus" teacher, and the parents' educational advocate⁶ participated in the meeting via telephone (Dist. Ex. 3 at p. 2). The June 2008 CSE recommended continuing the student's eligibility for special education services as a student with an OHI as well as ten-month programming (Tr. pp. 202-03; Dist. Ex. 3 at p. 1). The June 2008 CSE also recommended a change in the student's placement from a "special class"⁷ to a collaborative team teaching (CTT) class (14:1) with related services of counseling one time per week for 40 minutes in a group of three and individual speech-language therapy two times per week for 40 minutes (Tr. pp. 222-23;

⁵ Dist. Ex. 3 consists of 14 pages. Parent Ex. C consists of 12 pages. Pages 1-12 of Dist. Ex. 3 and Parent Ex. C are duplicative; however, Dist. Ex. 3 at pp. 13-14 included a transition plan developed by the CSE that indicated the student's projected long term adult outcomes based on the student's preferences, needs and interests (compare Dist. Ex. 3, with Parent Ex. C). For purposes of this decision, citation to the June 2008 IEP will reflect Dist. Ex. 3.

⁶ The hearing record reflects that at some point during the CSE meeting, the student's mother requested that the parents' educational advocate be contacted and the educational advocate joined the June 2008 CSE meeting by telephone at the time the CSE was discussing its recommendations for the student (Tr. pp. 180-81, 235, 239). The hearing record further reflects that the June 2008 CSE was unaware that the educational advocate would be participating in the meeting until the student's mother requested that the advocate be contacted (Tr. p. 181).

⁷ As noted supra, the hearing record does not include any IEPs prior to the June 2008 IEP.

Dist. Ex. 3 at pp. 2, 12).⁸ The June 2008 CSE reviewed and agreed to recommendations for counseling and speech-language services, and reviewed and discussed annual goals and short-term objectives with respect to the student's needs in peer interactions, task attention, completion of and independence in various school related assignments, pragmatic language skills, reading comprehension on a critical and inferential level, and informational writing (Tr. pp. 242-44; Dist. Ex. 3 at pp. 3-9). The June 2008 CSE recommended the following program modifications: the use of graphic organizers and prompts and reminders (Dist. Ex. 3 at p. 3). In addition to testing accommodations of extended time (double) and a separate location, the June 2008 CSE added directions read and reread (id. at pp. 2, 12). The June 2008 IEP also included a transition plan that reflected the student's projected long term adult outcomes based on his preferences, needs, and interests (id. at pp. 13-14). The June 2008 IEP also reflected that the CSE considered a general education class with special education teacher support services (SETSS) and related services, and a special class in a community school with related services (id. at p. 11). However, the CSE rejected both those alternatives because, as to the former, the June 2008 CSE determined that a general education class with SETSS and related services would not provide sufficient support to the student, and as to the latter, the June 2008 CSE determined that a special class in a community school with related services was too restrictive for the student (id.). The hearing record reflects that although they did not object to the goals and related service recommendations, the parents and their educational advocate did not agree with the June 2008 CSE's recommendation for placement in a CTT class because the student "ha[d] ADHD," required "a lot of refocus," and he "might not be able to do his work in a CTT class" (Tr. pp. 203, 223, 242-43). The June 2008 IEP reflected that the projected initiation date of the recommended services was September 2, 2008 and that the IEP would next be reviewed on June 30, 2009 (Dist. Ex. 3 at p. 2).

By Final Notice of Recommendation (FNR) dated July 23, 2008, the district advised the parents of the specific district school where the student's June 2008 IEP would be implemented (Parent Ex. D). The July 2008 FNR also stated that if the parents wished to further discuss the CSE's recommendations and arrange for another meeting, they could contact the district staff person listed on the FNR (id.).

In a letter dated August 15, 2008 to the CSE chairperson, signed by the student's mother and the parents' advocate, the student's mother advised the district, among other things, that she had visited the recommended placement and did not find it to be appropriate (Parent Ex. E). According to the student's mother and the parents' advocate, the August 2008 letter would serve as the 10-day notice required by law (id.).⁹ The student's mother and her advocate further advised

⁸ "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

⁹ The Individuals with Disabilities Education Act (IDEA) allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were

that that the parents planned to enroll the student in Winston Prep for the 2008-09 school year (id.). Although the student's mother and her advocate indicated that the parents would make every effort to observe the placement offered by the district, they further advised that in the event that the recommended placement was not deemed appropriate, the parents would request an impartial hearing in order to secure tuition reimbursement for the student's 2008-09 school year at Winston Prep (id.).

The hearing record reflects that the student continued at Winston Prep for the 2008-09 school year (tenth grade); however, the student did not receive related services at Winston Prep (Tr. pp. 244, 252). The student's mother testified that beginning in fall 2008, the student received once weekly counseling from a provider outside of Winston Prep (Tr. p. 253). An undated Winston Prep "Fall 2008 Report" regarding the student reflected the private school's plan regarding objectives and methodologies to be used with the student to meet established objectives in the student's "Focus" class and in the subject areas of essential reading, writing and language skills, geometry, biology, United States history: 1900-1950, art and ideas, and physical education during the 2008-09 school year (Parent Ex. I at pp. 1-6). The Focus teacher's general description of the student indicated that the student began his "sophomore year" at Winston Prep by displaying a "sincere desire to learn" (id. at p. 1). The report noted that formal and informal assessment, review of previous reports, and collaboration with family and teachers revealed the student's particular areas of strength in visual and verbal analytical skills (id.). Weaknesses were noted in the student's attention, impulse control, and organization (id.). The report also indicated that the student's challenges in these areas undermined the effectiveness of the student's otherwise strong memory and slowed his processing speed (id.). The student's reading comprehension was described as "strong," although the student tended to be more concrete and displayed difficulty with inferential and predictive reading skills (id.). In addition, the report reflected that the Focus teacher planned to put an emphasis on the student's reading comprehension, written expression, and academic and social problem solving (id.). Multiple objectives for the student listed within the academic areas of essential reading, writing and language skills, geometry, biology, history, art and ideas, and physical education were consistent with the broader objectives targeted for him by the Focus teacher (see id. at pp. 1-6).

The hearing record also reflects that per the educational advocate's request, the student's mother initially contacted the proposed district school at the end of September 2008 (Tr. pp. 250-51). The student's mother visited the recommended CTT class on October 6, 2008, and returned to the proposed school on October 8, 2008 to meet with the special education teacher of the recommended class (Tr. pp. 231-32, 254).¹⁰

By letter dated October 10, 2008, through their advocate, the parents advised the district that the student's mother had visited the recommended placement and did not find it appropriate for the student (Parent Ex. G). According to the parents' advocate, the student's mother had

rejecting the placement proposed by the public agency to provide a free appropriate public education [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]).

¹⁰ The hearing record reflects that the district's school year began on September 2, 2008, approximately one month prior to the student's mother's visit to the proposed school and class (Tr. p. 232).

determined that there were too many children in the class to enable the student to gain any educational benefit (id.). Additionally, the parents' advocate stated that the student's mother observed several instances of problem behaviors "without the adults in the class able to control outbursts and such" (id.). Although the parents' advocate indicated that this letter should not be considered a request for an impartial hearing, she further advised that the student would be attending Winston Prep and that the parents would be requesting an impartial hearing "in the near future" (id.).

An undated Winston Prep "Winter Progress Report 2008" regarding the student reflected that the student had "made steady gains" toward each targeted area addressed in his "Focus" class (Dist. Ex. 5 at p. 1).¹¹ The report indicated that goals in reading comprehension and fluency, written language, and academic problem solving and study skills were addressed in the Focus class during the semester (id.). The Focus teacher described the student as having remained "open to instruction" (id.). In addition, the teacher indicated that at that time, the student "work[ed] diligently at assigned tasks" and used feedback on a steady basis (id.). The report noted that the student took initiative to insert topics of interest into discussions, writing or research, and had started to develop a "better understanding of reading and delving deeper into exploring the nuances of the written word" (id.). The Focus teacher indicated in the report that although the student's work was strong, he tended to struggle with work that challenged his abilities and needed repeated prompting to remain focused and on task (id.). The report also highlighted the student's performance in his academic subject areas of "[c]ourage, [m]orality, and [f]amily in [l]iterature," language skills, writing, integrated mathematics, physics, medieval and renaissance history, commercial art, and physical education (id. at pp. 2-5).

An undated Winston Prep "Winter Progress Report 2009" regarding the student indicated that the student often required prompting to remain on task and that his performance had been "inconsistent" (Parent Ex. J at p. 1). According to the report, "throughout Focus [the student] has given strong indication of a potential for excellence, but then his resistance to work and following through with advocacy has brought his overall performance down considerably" (id.). The Focus teacher indicated that although the student was open to instruction and provided "meta-cognitive insight" to help the teacher develop assignments for him, it was difficult to assess why the student did not follow through in asking for help (id.). The student tended to "hide" his weaknesses from the teacher, something the Focus teacher described as a "considerable defense shield that [wa]s not easily penetrated" (id.). Goals and teaching strategies targeted written language, academic problem solving, and study skills (id.). The report also highlighted the student's performance in

¹¹ Although the hearing record includes an undated description of Winston Prep, the portion of the exhibit that describes the Focus program is illegible (Parent Ex. B at p. 1). However, testimony by a Winston Prep dean reflects that the role of the Focus teacher is to be a "point person" or "case manager" that the student's other teachers go to frequently for periodic updates about the student (Tr. pp. 96, 105). The Focus teacher supplements what other teachers are doing with the student and focuses on particular areas of difficulty, independent of the student's other classes (Tr. p. 106). Testimony by the student's 2008-09 Focus teacher indicated that he saw the student for 30-45 minutes per day depending on the schedule (Tr. p. 135). His role was to develop an understanding of the student and share that understanding with the student's team, including all of the student's concept teachers and everyone else involved with him, to create an effective environment for the student, and to maximize the student's educational experience at Winston Prep (Tr. p. 134). The Focus teacher further indicated that he would act as a liaison for the parents to communicate with Winston Prep (id.).

his academic subject areas of essential reading, writing and language skills, geometry, biology, history, art, and physical education (id. at pp. 2-5).

On January 15, 2009, through their educational advocate, the parents filed a due process complaint notice (Parent Ex. A). As relief, they requested, among other things, an order for tuition reimbursement for the student's tuition at Winston Prep for the 2008-09 school year (id. at p. 3). Initially, the parents noted that the June 2008 CSE's recommendation of a 14:1 CTT class reflected a change from the CSE's recommendation of a special 12:1+1 class with support services for the previous school year (2007-08) (id. at p. 1). Next, the parents claimed that although the student's mother visited the CSE's recommended placement, it proved to be inappropriate for the student's needs (id. at p. 2). According to the parents, the recommended placement was not reasonably calculated to confer educational benefits on the student (id.). The parents further alleged that the 14:1 classroom was too large and would not allow their son to receive the individual attention that he required in order to be appropriately educated (id.). The parents also noted that during the student's mother's observation, she observed several instances of "problem behaviors" by the students without the teacher being able to control such outbursts (id.).

In addition, the parents alleged that the June 2008 IEP was "procedurally improper and substantively incorrect" and resulted in a defective program recommendation and a denial of a free appropriate public education (FAPE) to the student for the following reasons: (1) the June 2008 CSE failed to secure the attendance of a speech-language provider at the meeting; (2) the June 2008 CSE failed to include a statement of the student's present levels of academic achievement and functional performance with respect to the student's speech-language needs; (3) the June 2008 CSE failed to include baseline data regarding the student's performance on objective tests with respect to reading, writing, and math; (4) the June 2008 CSE failed to develop appropriate and specific goals designed to meet each of the student's educational needs, including goals related to the student's speech-language needs; and (5) the June 2008 CSE failed to develop appropriate academic and functional goals designed to meet each of the student's educational needs that were specific and measurable (Parent Ex. A at p. 2). The parents also indicated that in the event that the district maintained that it offered the student a FAPE, they "reserve[d] the right to challenge the appropriateness of their son's entire IEP including, but not limited to, the appropriateness of the drafted annual goals" (id.). The parents maintained that the student should continue to attend Winston Prep as an appropriate placement for him (id. at pp. 2-3).

On January 16, 2009, the district responded to the parents' due process complaint notice (Dist. Ex. 2). The district noted that the June 2008 CSE recommended a 14:1 CTT classroom with related services and that the CSE's decision was made based upon a psychoeducational evaluation, a classroom observation, teacher progress reports and teacher estimates, an April 2006 private neurodevelopmental evaluation, and a medical record (id. at pp. 2-3). According to the district's response, the June 2008 CSE considered a general education program with related services as well as a general education program with SETSS, but determined that both programs would not have been supportive enough for the student (id. at p. 3). Likewise, the district alleged that the June 2008 CSE considered a special class for the student but determined that it was too restrictive (id.). Lastly, the district maintained that the recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits (id.).

On May 18, 2009, an impartial hearing convened and concluded on July 23, 2009, after four days of testimony (IHO Decision at p. 2). In a decision dated December 4, 2009, the impartial hearing officer first found that the June 2008 CSE's recommendation of a CTT classroom for the 2008-09 school year for the student represented a change to a less restrictive setting; however, she further noted that there was nothing in the reports considered by the CSE that warranted moving the student to such a setting (id. at p. 4). The impartial hearing officer added that the private neurodevelopmental evaluation relied upon by the June 2008 CSE specifically recommended that the student be placed in smaller classes, further noting that aside from a social history update, no new evaluations had been conducted, and that the student had been making progress in his small classes at Winston Prep (id.). The impartial hearing officer determined that although the student's cognitive functioning was in the average to above average range, his slow processing speed, impulsivity, distractibility and social skills deficits required that the student be placed in a small class setting (id.). Under the circumstances, the impartial hearing officer determined the student's "extremely delayed processing speed" would have made it impossible for the student to function in a CTT setting, further noting that the student's "ADHD issues (impulsivity and difficulty remaining on tasks) and social skills deficits would have compounded the problem" (id. at p. 5). Accordingly, the impartial hearing officer concluded that the district's recommendation that the student be placed in a full time CTT program for the 2008-09 school year was not reasonably calculated to enable the student to make meaningful educational progress (id.).

Notwithstanding the district's objection to the impartial hearing officer's consideration of the appropriateness of the district's recommended placement on the basis that the issue was beyond the scope of the impartial hearing, the impartial hearing officer first determined that the parents' due process complaint notice specifically referenced the student's placement (IHO Decision at p. 5). Next, the impartial hearing officer concluded that although the student's June 2008 IEP recommended that the student be placed in CTT classes for all periods, the recommended placement would not have provided the student with that level of support (id.). Concluding that the recommended placement would not have implemented the June 2008 CSE's recommendation for full-time placement in CTT classes, the impartial hearing officer found that the recommended placement would have provided the student with CTT classes for English, math, science, and social studies (id. at pp. 5-6). Although the impartial hearing officer noted that the student's regular education teachers would have been provided with a copy of the student's IEP and would have had the opportunity to consult with a special education teacher upon request, the impartial hearing officer found that this was a "much lower level of support than the support mandated by the IEP" (id. at p. 6). In light of the foregoing, the impartial hearing officer determined that the district did not establish that it offered the student an appropriate program during the 2008-09 school year (id.).

With respect to the parents' unilateral placement of the student at Winston Prep, the impartial hearing officer found that the student was placed in small classes there, in which the other students in his classes had similar functional levels and similar academic and management needs (IHO Decision at p. 6). She further noted that the student had the daily 1:1 support of a Focus teacher, whose role was to monitor the student and provide him with individualized support in his key areas of deficit, as reflected by the goals listed in the progress reports, which addressed reading, writing, organizational skills, study and homework skills, and social functioning (id. at pp. 6-7). In addition, the impartial hearing officer found that the Focus teacher implemented

specific methods and strategies to address these areas of weakness (id. at p. 7). She further found that the Winston Prep progress reports revealed that the student's teachers implemented "very specific methodologies and supports in order to address his unique special education needs" (id. at pp. 6-7). With respect to the Winston Prep progress reports, the impartial hearing officer explained that each of the student's teachers listed the goals on which they were working and the specialized instruction/methods being used to address the student's deficit areas (id.). Moreover, the impartial hearing officer found that the progress reports combined with the testimony of Winston Prep staff established that the student made academic, social and behavioral progress during the 2008-09 school year at Winston Prep, further noting that the student passed all of his classes during the 2008-09 school year and was on track to earning his high school diploma (id.). In light of the foregoing, the impartial hearing officer found that Winston Prep met the student's special education needs during the 2008-09 school year (id.).

Lastly, the impartial hearing officer concluded that there was nothing in the hearing record that would preclude reimbursement on equitable grounds (IHO Decision at p. 7). Contrary to the district's claim that the parents never intended to send the student to a public school for the 2008-09 school year, the impartial hearing officer found that the "unrebutted and credible testimony of [the student's] mother" established that they would have sent him to a public school had an appropriate program been offered (id.). She further concluded that the parents fully cooperated with the CSE (id.). Next, the impartial hearing officer also determined that the student's mother promptly advised the CSE that she disagreed with the recommendation for placement in a CTT program (id. at p. 8). Additionally, the impartial hearing officer noted that upon receipt of the FNR, the parents provided the district with written notice that they were rejecting the CSE's proposed placement, and that they would be unilaterally placing their son at Winston Prep and seeking tuition reimbursement (id.). The impartial hearing officer also noted that the student's mother visited the proposed district placement and sent an additional notice that she had observed the program and found that it was inappropriate for the student (id.). Having determined that the parents prevailed on all three prongs of the Burlington/Carter analysis, the impartial hearing officer ordered the district to reimburse them for the cost of the student's placement at Winston Prep for the 2008-09 school year (id.).¹²

The district appeals and requests an order annulling the impartial hearing officer's decision to the extent that it ordered the district to reimburse the parents for the student's placement at Winston Prep. The district maintains that it offered the student a FAPE during the 2008-09 school year in the least restrictive environment (LRE). Specifically, the district first contends that the June 2008 CSE's recommendation that the student attend a CTT class would have nurtured the student's academic strengths and would have offered the student frequent interaction with typically developing peers. Second, the district claims that the student would have received related services comprised of counseling and speech-language therapy, which would have addressed the student's social/emotional and language deficits. Third, the district asserts that it made a timely offer to the

¹² Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

student of a seat in a school that would have been able to implement the student's IEP during the 2008-09 school year.

Next, the district alleges that the impartial hearing officer erred to the extent that she made findings unrelated to any specific allegations contained in the parents' due process complaint notice. In particular, the district argues that the impartial hearing officer exceeded the scope of the issues raised by the parents in the due process complaint notice by finding that the lack of special education teachers in every class at the proposed placement rose to the level of a denial of a FAPE to the student. Alternatively, the district argues that regardless of whether the issue was properly raised by the parents in their due process complaint notice, a FAPE was offered to the student. The district contends that the regular education teachers for the few non-CTT classes in which the student would have been enrolled worked closely with the special education teachers to implement their students' IEPs. The district also asserts that the student's principal areas of deficit would have been addressed by both a regular and a special education teacher in his English and social studies CTT classes had he been enrolled in the recommended placement. In light of the foregoing, the district alleges that the student's June 2008 IEP would have been substantively implemented at the recommended placement for the 2008-09 school year.

Next, the district asserts that Winston Prep was not an appropriate placement for the student and was overly restrictive given the student's needs. First, the district alleges that although the student had significant deficits in the areas of speech-language and social/emotional functioning, the student did not receive any related services at Winston Prep. In addition, the district contends that although the hearing record reflects that the student would have benefited from exposure to typically developing peers, Winston Prep did not offer any mainstreaming opportunities. Lastly, the district asserts that the student made little academic progress in numerous areas at Winston Prep during the 2008-09 school year.

Regarding equitable considerations, the district maintains that the equities do not favor an award of relief to the parents. First, the district alleges that the parents' 10-day notice letter failed to afford the district appropriate notice that the parents were rejecting the proposed program. Moreover, the district argues that the parents had no intention of enrolling their son in a district school for the following reasons: (1) pursuant to their April 2008 enrollment agreement with Winston Prep, the parents had committed themselves to payment of the student's tuition for the 2008-09 school year well before the CSE had convened to develop the student's program for that year; and (2) there is no indication in the hearing record that the parents advised the June 2008 CSE that they were considering Winston Prep and/or were obligated to pay the full tuition there per the enrollment agreement.

The parents submitted an answer in which they maintain that the impartial hearing officer's decision should be upheld. First, the parents allege that the district failed to offer the student an appropriate program for the following reasons: (1) the June 2008 IEP did not adequately describe the student's present levels of cognitive, social/emotional, and academic functioning needs; (2) the June 2008 IEP did not describe the student's present levels of academic performance; (3) the June 2008 CSE failed to develop appropriate and specific goals and objectives for the student; (4) the goals listed in the June 2008 IEP were vague and overbroad; (5) the June 2008 CSE did not provide any valid, individualized reasons for making a significant change in the student's program; and (6)

the district would not have been able to properly implement the proposed IEP. Second, the parents assert that they established that Winston Prep was an appropriate placement to meet the student's special education needs and that the school sufficiently addressed the student's related services needs within its academic program. Third, the parents argue that equitable considerations favor their request for relief for the following reasons: (1) they complied with the Individuals with Disabilities Education Act's (IDEA's) 10-day notice requirement; (2) the parents disagreed with the program recommendation at the June 2008 CSE meeting and provided the district with sufficient notice of their intent to enroll the student at Winston Prep for the 2008-09 school year at the district's expense; and (3) the district did not suffer any prejudice as a result of the parents' failure to state their concerns in the August 15, 2008 letter, as the district failed to take any steps to revisit the appropriateness of the recommended program.

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

A 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).

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).

Turning to the instant matter, the impartial hearing officer concluded that the June 2008 CSE's recommendation that the student be placed in a full-time CTT program for the 2008-09 school year was not reasonably calculated to enable the student to make "meaningful educational progress" and therefore, the student was denied a FAPE (IHO Decision at p. 5). Conversely, the district argues on appeal that the June 2008 CSE's recommendation of a CTT classroom in conjunction with the related services of counseling and speech-language therapy would have offered the student a FAPE in the LRE. For the reasons expressed below, after a careful review of the hearing record, I find that the hearing record supports a finding that the June 2008 CSE's recommendation was reasonably calculated to confer educational benefits on the student.

Initially, a review of the challenged IEP reveals that it accurately depicted the student's needs at the time that the IEP was developed. Testimony by the district's witness who participated

in the June 2008 CSE and acted as both the district representative and the special education teacher (district representative) indicated that the CSE reviewed the April 2006 private neurodevelopmental evaluation report, Winston Prep Focus teacher reports, and the student's entire educational file and history (Tr. pp. 177-78). The June 2008 IEP reflected the student's present levels of academic performance and learning characteristics consistent with results reported in his last evaluation (the April 2006 neurodevelopmental evaluation report) and current teacher estimates (compare Dist. Ex. 7 at pp. 4-8, 11-16, with Dist. Ex. 3 at p. 3). Consistent with testimony by the district representative, the June 2008 IEP indicated that at that time, the student functioned in the average range of intelligence, with variability among skill areas (Tr. pp. 183, 186; Dist. Ex. 3 at p. 3). The June 2008 IEP noted that the student's perceptual reasoning skills were in the above average range and verbal comprehension and working memory skills were in the average range, while by comparison processing speed skills were "extremely weak" in the impaired range (Dist. Ex. 3 at p. 3). The June 2008 IEP further reflected that the student's visuomotor integration skills, memory skills within the verbal and visual domains, and receptive and expressive language skills were intact (id.). Additionally, the June 2008 IEP indicated that the student's academic fluency was poor, commensurate with his weak processing speed skills (id.). The June 2008 IEP further described the student's reading as "slow but accurate" (id.). According to teacher estimates at the time of the June 2008 CSE meeting, the student was at a "grade level" instructional level in decoding, an eighth grade instructional level in reading comprehension, a ninth grade instructional level in written language, and at or above a grade level instructional level in math (id.). The June 2008 IEP noted the student's difficulty with inferential thinking and that fact based writing was easier for the student (id.). Testimony by the district representative regarding the student's then present levels of academic performance and learning characteristics was consistent with the information included in the June 2008 IEP (Tr. pp. 186-91).

The June 2008 IEP also reflected that the student had been offered a diagnosis of ADHD, for which he took medication, and had controlled asthma for which he took medication as needed (Dist. Ex. 3 at pp. 4-5). Regarding the student's social and emotional needs, the June 2008 IEP indicated that the student reportedly struggled with reading social cues and that his social skills were weak (Tr. pp. 187-88; Dist. Ex. 3 at p. 4). The June 2008 IEP also noted that the student tended to be reserved, inattentive and distractible, but he reportedly was becoming more self-reflective and open to discussing his feelings (Dist. Ex. 3 at p. 4). In addition, the June 2008 IEP reflected that the student's organization and time management skills remained problematic for him (id. at p. 3). Lastly, the June 2008 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by a regular and/or special education classroom teacher; therefore, a behavioral intervention plan (BIP) was not developed (id. at p. 4).

The June 2008 CSE also incorporated strategies, supports and testing modifications into the student's IEP that were designed to meet the student's identified needs. For example, to address the student's academic management needs, the June 2008 CSE recommended that the student receive supports such as graphic organizers, prompts and reminders to structure and organize his writing, to address his organization and time management difficulties, and to address his attention difficulties (Tr. pp. 190-91; Dist. Ex. 3 at p. 3). The June 2008 IEP reflected the CSE's recommendation to change the student's testing modifications by adding directions read and reread (Tr. p. 204; Dist. Ex. 3 at p. 2). Testimony by the district representative indicated that this change was made because the purpose of having directions read and reread during a test was "generally to

focus the student," and make sure that the student understood the directions, and had an opportunity to ask questions about the test directions (Tr. pp. 204-05).

Turning next to the annual goals enumerated in the challenged IEP, a review of the annual goals and short-term objectives shows that they were aligned with the student's present levels of performance and needs, and the short-term objectives delineated multiple sub-skills that when combined, would likely result in the student achieving the broader skills stated in the annual goals (see Dist. Ex. 3 at pp. 6-9). An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). For example, one annual goal addressed the student's need to read texts written on his instructional reading level and comprehend what he read on a critical inferential reasoning level (*id.* at p. 7). The goal's corresponding short-term objectives focused on the student describing two main characters in each of two texts including character traits and motives; explaining the main idea of five short teacher selected texts; predicting a possible next event occurring after reading five texts; predicting the effect given a cause in five texts, drawing to conclusions in each of five texts, and underlining the pertinent information in the text that led to these conclusions; correctly stating the moral of four fables, and justifying the moral with evidence from each fable; comparing two characters or events in two different texts and using evidence from the text as support; summarizing two texts, both in writing and then verbally, including only the most essential details (*id.*). Another goal addressed the student's need to improve his informational writing (*id.* at p. 8). The goal's corresponding short-term objectives focused on the student taking notes on a given topic from an informational source, jotting down pertinent words, short phrases relevant to topic; complete a graphic organizer (i.e., semantic map, and outline) for a written piece, organizing the information into correct sections; removing unessential points of information from the outline; writing a rough draft of two essays and two reports using the graphic organizers developed by the student, including appropriate topic sentences and concluding statements; editing two essays and two reports being written for variety of sentence constructions; taking ten sentences chosen by the teacher from a rough draft of a narrative being written, and re-writing for greater clarity and elaboration; editing a rough draft of two essays and two reports for spelling errors; editing a rough draft of two essays and two reports for grammar errors; editing a rough draft of two essays and two reports for punctuation and capitalization errors, and writing a final draft of two essays and two reports using student/teacher corrections on previous rough drafts (*id.*). Furthermore, another annual goal addressed the student's need to maintain and continue to develop appropriate peer interactions as demonstrated by the ability to recognize social cues and discuss social interactions (*id.* at pp. 6, 9). The goal's corresponding short-term objectives focused on the student using socially appropriate language during social interactions with peers; initiating a positive interaction with another student; using appropriate body language and facial expressions; recognizing various facial expressions suggesting different emotions, in order to facilitate social interactions; and developing and implementing three social reasoning and problem solving skills (*id.* at p. 6). Additional annual goals and their corresponding short-term objectives addressed the student's needs to improve task attention, completion and independence in various school related assignments, and to continue to improve pragmatic language skills (*id.* at pp. 6, 9).

The district representative testified that she had reviewed the recommended goals and short-term objectives included in the June 2008 IEP, and indicated that the short-term objectives were very focused to assist the student in being able to "tackle more sophisticated books and material on age and grade level," skills that he would need to move on in high school (Tr. pp. 194-95). She also noted that some goals could be used by classroom teachers as well as related service providers (Tr. p. 196). Furthermore, the district representative testified that the student's Focus teacher from Winston Prep participated by telephone for the entire CSE meeting (Tr. p. 205). She added that information regarding the student's academic present levels of performance and learning characteristics provided by the Focus teacher was included in the IEP (Tr. p. 206; Dist. Ex. 3 at p. 3). The district representative testified that in addition, the June 2008 CSE discussed and developed goals for the student based on the specifics that the student's Focus teacher provided during the CSE meeting (Tr. p. 207). The district representative opined that the goals and short-term objectives were appropriate for the student and stated that none of the CSE participants indicated during the meeting that there were other areas that needed to be addressed (Tr. pp. 194, 196-99).¹³ In view of the foregoing, the hearing record reflects that at the time that it was created, the June 2008 IEP accurately portrayed the student's needs and contained annual goals and short-term objectives designed to address those needs, which were developed with meaningful parental participation (Tr. pp. 16, 207, 239-44).

Moreover, the hearing record also supports the district's contention that the June 2008 CSE recommended related services that would have appropriately addressed the student's speech-language needs and social/emotional functioning. Testimony by the district representative indicated that in order to address the student's academic and social/emotional difficulties, the CSE recommended related services of counseling,¹⁴ as well as speech-language therapy to address some of the more abstract language processing skills that the student needed to work on in reading and writing (Tr. p. 188).¹⁵ First, regarding counseling, the district representative testified that the June 2008 IEP included counseling goals (Tr. p. 191). She opined that in a small group of students (3:1), the student would be able to work out some of his social difficulties with a guidance counselor, a psychologist, or a social worker (Tr. p. 192). The district representative further indicated that the behavioral concerns regarding the student's maturity as well as his need to develop good peer relationships as discussed by student's Focus teacher who participated in the CSE meeting, would be best addressed in a small group facilitated by someone who specialized in behavioral and social difficulties (such as one of the aforementioned professionals available at the proposed placement) with students that had those kinds of needs (id.).

Additionally, the June 2008 CSE recommended individual speech-language therapy two times per week for the student because according to the district representative, "he was so close on some of the academic areas in terms of being able to reach his grade level that we wanted to give

¹³ As noted above, the student's mother testified that she did not object to the recommended goals (Tr. pp. 242-43).

¹⁴ The witness's testimony indicated that counseling had also been recommended in a previous IEP (Tr. p. 188).

¹⁵ Testimony by the student's mother indicated that she did not object to the recommended related services and thought that the June 2008 CSE's recommendations for counseling and speech-language therapy were appropriate for the student (Tr. pp. 242-44).

him very focused help in some of the language processing, more abstract language processing, issues that might be affecting his reading and writing" (Tr. pp. 192-93).

Furthermore, a review of the hearing record reflects the student's long standing need for related services. The April 2006 private neurodevelopmental evaluation report revealed that one of the evaluators was of the opinion that the student's private school at the time was a "poor fit" for him as it lacked a number of resources including a psychologist, and that the private school did not meet the student's needs (Dist. Ex. 7 at pp. 1, 8). At the time of the impartial hearing, testimony by the dean from Winston Prep indicated that the student did not receive any related services at the private school (Tr. p. 104).¹⁶ Moreover, the student's Focus teacher for the 2008-09 school year opined that the student had social/emotional and pragmatic language deficits that needed to be addressed (Tr. pp. 156-57).

Next, I will address the district's contention that the student's IEP would have been substantively implemented at the recommended placement.

Before reaching the merits of this claim, I must first address a threshold matter. Notwithstanding its assertion that the proposed placement would have appropriately implemented the student's June 2008 IEP, the district first alleges that the impartial hearing officer erred by finding that the lack of a special education teacher in every class at the recommended placement would have resulted in a denial of a FAPE to the student, an issue which was not identified in the due process complaint notice. An impartial hearing officer must confine her determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Here, although the parents did not raise this issue in the due process complaint notice, a review of the hearing record reveals that it was addressed during the impartial hearing and the district did not raise any objection as a result thereof (see Tr. pp. 20, 31, 33-34, 68-69; Parent Ex. A). Further review of the hearing record reflects that the district also raised this issue during the impartial hearing (see Tr. pp. 20, 31, 33-34, 68-69). Therefore, the district's claim that the impartial hearing officer exceeded the scope of her review is not persuasive. Accordingly, I will review the matter. Having considered this issue, as set forth in greater detail below, I disagree with the impartial hearing officer and find that the student's special education needs would have been addressed in his CTT core academic classes

¹⁶ See Werner, 363 F. Supp. 2d at 660 (holding that the parents failed to sustain their burden of demonstrating the appropriateness of a private placement where the hearing record did not demonstrate that the placement provided special education services designed to address the student's area of need).

and in his general education elective classes,¹⁷ and that the lack of a special education teacher in the student's elective classes did not rise to a denial of FAPE in this case.

Here, the district asserts that the few regular education teachers that the student would have had at the recommended placement worked closely together to implement their students' IEPs. In her description of a tenth grade CTT class at the recommended placement, the assistant principal testified that a regular education teacher and a special education teacher collaboratively planned and co-taught the class (Tr. p. 30). She also noted that she was familiar with the tenth grade CTT teachers for the 2008-09 school year (*id.*). The assistant principal testified that the CTT setting was provided for the subjects of math, science, English, and social studies (Tr. pp. 31, 33). The students in the tenth grade CTT class were together for all classes taught in the CTT setting, and usually were together if they were scheduled for the same electives (Tr. pp. 36-37). She also explained that for other required or elective classes such as Spanish, there would be a general education tenth grade class in which the student would be provided with support (Tr. p. 34). For example, the assistant principal testified that the regular education teacher for Spanish would have a copy of every special education student's IEP and would meet regularly with the special education department to structure lessons and to assist special education students in meeting their IEP goals (*id.*). In regard to this student's elective classes such as Spanish, physical education and music, the compliance coordinator testified that the student would be in general education classes (Tr. pp. 69-70). The compliance coordinator also indicated that the regular education teachers communicated with the special education teacher about the special education students in their classes on a regular basis (Tr. p. 76). All of the regular education teachers had copies of the special education students' IEPs and discussed with the special education teacher accommodations or any other management needs to which a student was entitled (Tr. p. 77). Based on the foregoing, the hearing record supports the district's assertion that the student would have been provided with personalized instruction with sufficient support to permit him to benefit educationally from instruction by ensuring the substantial implementation of the June 2008 CSE's recommendations in the few non-CTT classes that the student would have attended.

Moreover, the hearing record supports the district's claim that the June 2008 CSE's recommendation that the student attend a CTT class would have nurtured the student's academic strengths and offered him frequent interaction with typically developing peers, thereby conveying educational benefits to him. Testimony by the district representative who participated in the June 2008 CSE indicated that the CSE believed that a CTT class with related services was appropriate for the student (Tr. p. 183).¹⁸ According to the district representative, the June 2008 CSE wanted the student to be exposed to a general education curriculum because it saw a profile of a student with "average, if not in some areas even higher, superior intelligence in certain areas of academics," as well as some "IQ breakdowns" that were in the very high performing range (*id.*). The district representative further explained that if he were in a CTT class, the student would have

¹⁷ According to the hearing record, elective subjects such as art, music, law and technology are required for graduation (Tr. p. 33).

¹⁸ Additional testimony by the district representative indicated that by the conclusion of the June 2008 CSE meeting, the CSE team was aware that the parents and their educational advocate did not agree with the CSE's program recommendation for the student (Tr. pp. 203-04, 212).

had access to general education students, something that she opined would be beneficial for him because he had areas that needed to be developed with other students who were on his level and who had the same interests, abilities and potential to understand material that was both grade appropriate and age appropriate (Tr. pp. 184-85). The district representative also noted that the student would not benefit from a program where everyone else was on a lower level than he was, as he would not be stimulated in an environment where everyone else was working on much lower levels (Tr. p. 185). The district representative further testified that the student's social/emotional development would benefit from a CTT class because he would have role models to interact with and learn from socially (*id.*). In addition, the district representative opined that the student's needs would be met in a CTT environment because there was a certified special education teacher who would travel with and work with a group of up to 14 students (Tr. p. 200). The special education teacher would modify any instruction to support the students in the CTT class, in conjunction with the regular education teacher, whom the hearing record described as "a second person to provide the stimulation in the curriculum on level" (*id.*). In light of the foregoing, the hearing record reflects that the June 2008 CSE had a sufficient basis upon which to make their recommendation that the student be placed in a CTT classroom for the 2008-09 school year.

Furthermore, the assistant principal testified that the school had "a lot of special education students," and that all of the teachers at the school were trained in reading IEPs, in differentiating instruction, and in classroom management (Tr. p. 27). The assistant principal noted that she supervised teachers individually and in groups, observed classrooms and instruction, and monitored curriculum and the implementation of curriculum (*id.*). She reported that all teachers received at least two formal observations that were preceded by multiple informal instructional observations, and that she met with teachers "almost every day" (*id.*). The assistant principal testified that the proposed high school also had related service providers and offered speech-language therapy and counseling services (Tr. p. 28). In the event that the student had attended the proposed high school in September 2008, speech-language therapy and counseling services would have been available to him (Tr. p. 29). The assistant principal testified that related service providers and classroom teachers communicated about students informally, "almost every day" because the related service providers instructed students within the classroom as well as outside of the classroom (*id.*). She stated that the related service providers assisted the teachers in how to modify instruction for students and may work with the teacher within the classroom and model lessons specifically geared toward helping a student (Tr. p. 30). The assistant principal also reported that the proposed high school used a reading program that included both a reading and a writing workshop and taught skills as opposed to content (Tr. p. 32). The writing process used in the school focused on revision in order to help students overcome areas of weakness (*id.*). For tenth grade math, the school used regular tenth grade State standards (*id.*).

Additionally, testimony by the compliance coordinator of special education at the proposed high school who "ha[s] a license in special ed[ucation], a "[c]ommon [b]ranch license," and has taught special education students for approximately 11 years; testified that her responsibility at the time of the impartial hearing was in part to review all of the IEPs developed in the school, to make sure they were in compliance, and to make sure all mandates on all special education students' IEPs were implemented by the related service providers (Tr. pp. 49, 51). She testified that she was also the transition coordinator for the special education department to prepare students with disabilities in moving from school to adult living within the community (Tr. p. 50). Prior to her

current responsibilities, she testified that she was in charge of mainstreaming special education students into the general education population (Tr. pp. 49-50). The compliance coordinator stated that she had received training related to CTT classes, how the CTT process worked, and various ways to implement differentiated instruction and the accommodations included on all IEPs (Tr. p. 52).

In consideration of what she knew about the student from reviewing his June 2008 IEP, the compliance coordinator opined that the student would have been appropriately placed in the proposed high school's CTT class based upon his levels of functioning and his specific needs (Tr. p. 68). In reference to the student's proposed tenth grade CTT class, the compliance coordinator testified that at the beginning of the 2008-09 school year, the class was comprised of 22 students (Tr. p. 52).¹⁹ Nineteen of the students were general education students and the remaining three students had IEPs and were eligible for special education as students with a learning disability (Tr. pp. 52-53). The compliance coordinator opined that upon her review of the student's June 2008 IEP, the student would have fit into the proposed CTT class and would have received a meaningful educational benefits in the proposed program because his reading and math functioning levels were similar to the classroom group to which he would have been assigned (Tr. pp. 58-59, 67).²⁰ The compliance coordinator testified that students were functionally grouped in the CTT class and opined that they individually benefited from such groupings because lessons were differentiated according to the abilities and interests in the classroom and the teacher was able to respond to students' needs more readily (Tr. pp. 54-55). She stated that the classroom curriculum addressed State standards and it was "adapted and modified" according to each student's IEP (Tr. p. 55).

The compliance coordinator further testified that teachers formally and informally assessed students at the beginning of the school year using a baseline assessment tool, interest inventories, and modality styles, as well as district assessments, observations, journal entries, portfolios, and conferences (Tr. pp. 56-57). She also testified that it was important for the teacher to assess the student at the beginning of the school year so that the teacher would know where the student was at the time, as well as what the teacher needed to teach the student, and to determine groupings of students in order to move students to the next level (Tr. p. 58). Weekly informal assessments were conducted on an ongoing basis to determine if students had reached their goals (Tr. pp. 57, 62). The compliance coordinator's testimony was consistent with the district representative's testimony regarding the CTT classes offered during the 2008-09 school year at the proposed placement in English, math, social studies, and science (Tr. p. 58). Her testimony was also consistent with the

¹⁹ The hearing record reflects that at the time of the impartial hearing, there were 25 students in total in the proposed CTT class (Tr. pp. 71, 73). Seven students had IEPs (Tr. pp. 71-72). The hearing record reflects that the proposed CTT class could contain up to 14 special education students (Tr. pp. 75, 182), but actually had 50 percent fewer special education students than prescribed by the IEP. According to the district representative, fewer special education students in the CTT class offered greater possibility for more individualized instruction to be provided to the students (Tr. p. 183).

²⁰ Testimony by the compliance coordinator indicated that at the beginning of the 2008-09 school year, two of the special education students in the CTT class were at the 7.5 reading level and the third special education student in the class was at the 10.9 reading level (Tr. p. 53). In regard to math instruction, two of the special education students in the CTT class were at the 7.5 level and one was at the 8.5 level (*id.*). The general education students in the CTT class were on grade level (*id.*). The June 2008 IEP reflected the student's instructional levels in reading and math to be within the range of the instructional levels in the proposed CTT class (Tr. pp. 53, 59; Dist. Ex. 3 at p. 3).

testimony by the district representative in regard to her understanding of the student's deficit areas, her opinion of the appropriateness of the annual goals and short-term objectives included in the student's June 2008 IEP, and implementation of classroom modifications and related services to address the student's needs (Tr. pp. 59-68). In light of the foregoing, the hearing record supports the district's assertion that the student's principal areas of deficit would have been addressed by a general and special education teacher and in turn, that the student's IEP would have been substantively implemented in the recommended placement (see Application of the Dep't of Educ., Appeal No. 08-105).

Having decided that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE, I need not address the parties' remaining contentions, including the issue of whether Winston Prep was appropriate, and accordingly the necessary inquiry is at an end (see M.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 considered the parties' remaining contentions and need not address them in light of my decisions herein.

THE APPEAL IS SUSTAINED.

**Dated: Albany, New York
March 12, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**