



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-012

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Bedford School District**

### **Appearances:**

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Stewart Lee Karlin, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie M. Roebuck, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2007-08 and 2008-09 school years. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Winston Prep, a school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 591, 596-98; Dist. Ex. 3A; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (Tr. p. 25; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

Regarding the student's educational history, the hearing record reflects that the student began experiencing difficulties in kindergarten, the district's Committee on Special Education (CSE) determined the student eligible for special education services as a student with multiple disabilities<sup>1</sup> and the CSE developed an individualized education program (IEP) for the student's first grade school year (Tr. pp. 750-54). Throughout the next few years, various modifications were made to the student's special education program and his related services, including the provision of speech-language therapy, occupational therapy (OT), counseling, a 1:1 aide, and

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<sup>1</sup> See 34 C.F.R. § 300.8(c)(7)(i); 8 NYCRR 200.1(zz)(8).

classroom accommodations (Tr. pp. 754-63). The student attended the same district elementary school from kindergarten through grade five, and then advanced to the district middle school for sixth grade during the 2006-07 school year (Tr. pp. 36-37).

In March 2005, when the student was in the fourth grade at a district elementary school, a clinical psychologist conducted a private psychoeducational evaluation of the student to determine his educational needs, and to "rule out" attention problems, anxiety, and depression (Dist. Ex. 53 at pp. 1-2). The psychoeducational evaluation report stated that the student was initially evaluated at the same evaluation center when he was in kindergarten (id. at p. 1). Administration of various formal and informal tests in March 2005 revealed that the student exhibited a language impairment and a learning disability, and the student was diagnosed with an attention deficit disorder (ADD) (id. at pp. 5, 8, 10-11). The private psychologist indicated that the student functioned at the "cusp" of the average range of intelligence, although his overall score was a low estimate of his intellectual ability (id. at p. 10). According to the private psychologist, the student could reason effectively in the nonverbal realm because he had strong visual-spatial problem solving skills whereby he could "tackle" constructional and abstract material (id.). She further noted that the student displayed solid vocabulary knowledge and adequate reasoning skills when the demands asked of him were highly structured (id.). The private psychologist also explained that over time, the student developed the ability to use complex, grammatically correct sentences to express his ideas, and could narrate cohesive, sequential stories, although he continued to experience word retrieval weaknesses (id.). However, the private psychologist found that although the student could comfortably understand "everyday" conversation and familiar themes in stories, he had difficulty comprehending formal language (id.). In addition, the evaluation report noted significant attention and memory problems (id.). Furthermore, the private psychologist observed that the student was not able to sustain his attention for prolonged periods of time as he easily fatigued and lost his capacity to focus on the task at hand (id.). According to the private psychologist, it was extremely hard for the student to retain isolated facts, his working memory was weak, and his "fund of information [wa]s porous," as the student recalled fragments of information but could not assimilate them with what he already knows (id.).

In addition, the private psychologist found that academically, the student could fluently decode grade level passages, but displayed gaps in his ability to decipher multi-syllable words and he had difficulty with spelling (Dist. Ex. 53 at p. 10). According to the private psychologist, the student read slowly because of language processing difficulties, but even with extended time he demonstrated difficulty in making inferences, drawing conclusions, and answering questions that were phrased differently from the text (id. at pp. 10-11). The private psychologist also described the student's math skills as "quite deficient" (id. at p. 11).

Emotionally, the private psychologist described the student as "sweet natured" and cooperative, who exhibited perseverance and excellent frustration tolerance (Dist. Ex. 53 at p. 11). However, the private psychologist cautioned that the student felt overwhelmed by demands that he could not meet, and was worried about "messing up" and getting teased (id.). The psychologist further opined that when overly stressed, the student lost clarity of his thinking, might link events arbitrarily, and that he could be quite literal in the way he viewed his experiences (id.).

The private psychologist made the following recommendations: (1) the student would benefit from placement in a special education school along with other children of average

intelligence, with language/learning disabilities; (2) the student should continue to receive language therapy, resource room support, and in-class assistance; (3) the student should be evaluated by a psychiatrist to determine the potential benefits of medication to address his diagnosis of ADD; (4) the student should be reevaluated by the private psychologist in October 2005; and (5) the student should continue to receive school accommodations including extra time for tests, testing in a separate location, use of a calculator and math, permission to use a word processor for written assignments, preferential seating, ancillary visual aids, and modified assignments (Dist. Ex. 53 at p. 11).

A subcommittee on special education convened on April 8, 2005 for an annual review and to develop the student's IEP for the 2005-06 school year (fifth grade) (Dist. Ex. 52 at p. 1). Among other things, the parents advised the April 2005 CSE subcommittee that outside testing had been done, however, the parents did not provide any formal reports to the committee at that time (*id.* at p. 5). The April 2005 CSE subcommittee changed the student's special education classification from that of a student with multiple disabilities to that of a student with a learning disability (*id.* at pp. 1, 5). The April 2005 CSE subcommittee made the following recommendations: resource room daily for one hour, a 1:1 aide for six hours per day in the classroom,<sup>2</sup> counseling in a small group (5:1) one time per week for 30 minutes, 1:1 OT one time per week for 30 minutes, a monthly 30-minute OT consultation, a monthly 30-minute psychological consultation, and 1:1 speech-language therapy two times per week for 30 minutes (*id.* at pp. 1, 5). Additional recommendations included the use of a small vehicle for transportation. to and from school (*id.* at p. 1). Program modifications and accommodations included preferential seating, minimal distractions, allowing the student to work in an area with more space to complete tasks, having the student sit in a chair during instructional times, modified homework assignments, a copy of a book when the teacher was reading aloud, additional time to complete tasks, short breaks/walks for movement, warnings for transitions, prompts, redirection and refocusing, a copy of scaffolded class notes, and homework to be copied with the student into his book (*id.* at pp. 1-2). The April 2005 CSE subcommittee also recommended that the student have access to an AlphaSmart (*id.* at p. 2).<sup>3</sup> Recommended testing accommodations provided for a waiver of spelling requirements, extended time (1.5), flexible scheduling so that the student would be able to take a five-minute break for every 15 minutes of testing, a separate setting so that he could read tests aloud, directions explained, and a flexible setting (*id.*).

On June 15, 2005, the CSE convened for a continuation of the student's annual review and to develop the student's IEP for the 2005-06 school year (Dist. Ex. 51 at pp. 1, 5). The June 2005 IEP indicated that the parents submitted a copy of the private psychoeducational evaluation to the district psychologist who notified the CSE chairperson (*id.* at p. 5). The June 2005 IEP also reflected that the CSE reviewed all of the student's then-current educational performance areas, social/emotional, physical and management needs, assistive technology, program modifications, test modifications, and goals and objectives (*id.* at p. 6). All CSE members, including the student's

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<sup>2</sup> The April 2005 IEP indicated that the aide helped the student with all transitions, but the student needed to become more independent (Dist. Ex. 52 at p. 7). The IEP further reflected that "it was recommended to start reducing the aide to a shared aide 2-1" (*id.*).

<sup>3</sup> The hearing record describes an AlphaSmart device as a word processor whereby the student inputs information and later downloads the information onto a computer (Tr. pp. 56, 761).

mother, were in agreement (id.). Recommendations were the same as in the April 2005 IEP (compare Dist. Ex. 52 at pp. 1-2, with Dist Ex. 51 at pp. 1-2).

On September 19, 2005, when the student was in fifth grade, a functional behavioral assessment (FBA) was conducted and a behavioral intervention plan (BIP) was developed (Dist. Ex. 49 at p. 1). The FBA revealed that the student exhibited difficulty with sustaining attention, language processing, and minimizing movement (id. at p. 1). According to the FBA, the student needed help "filtering" when too much was presented to him, and when overwhelmed or distracted he might become tangential and perseverative (id.). The FBA also included a hypothesis statement that indicated when the student was reluctant to work on the task due to low self-confidence, a lack of attention/focus, or a lack of understanding, he tended to give up, walk around, not complete work, or state, "I can't do it" (id. at p. 2). The BIP instructed that when the student was working on a task and needed a break, he would be allowed time to walk around (id.). In addition, the BIP indicated that tasks would be broken down for the student, key vocabulary would be highlighted, and directions would be clarified by his teachers and his aide (id.). While working on a task, the student's teachers and/or aide would intervene by providing frequent check-ins and quiet praise to keep the student working (id.). The BIP further stated that when the student said that he could not do something, the teacher would intervene by helping the student with the skill of identifying his own strengths and abilities (id.). The BIP also noted that incentives would be used, such as starting his homework orally, providing time to use the computer, and earning "table stars" for cooperative work (id.).

On November 16, 2005, the student was seen for a psychoeducational evaluation update by the same private psychologist who conducted the March 2005 psychoeducational evaluation (Parent Ex. A at p. 1). The psychoeducational evaluation update report revealed that toward the end of fourth grade, the student was evaluated by a child psychiatrist and placed on medication (id.). According to the private psychologist, she suggested an updated evaluation to assess the student's functioning while medicated (id.). The private psychologist noted that at that time the student shared an aide with two other children, and a resource room teacher came into his fifth grade classroom in the district to work with him in a small group (id.). The private psychologist administered multiple formal tests (id. at pp. 1-3). According to the private psychologist, the student's attention had improved (id. at p. 3). However, she also found that the student continued to display deficiencies in language skills (id.). In addition, the private psychologist described the student's organizational capacities as "vulnerable," and further noted that the student lacked solid skills in the basics of decoding, spelling, and math (id.). The private psychologist also stated that the student had a significant language/learning disability and that he continued to exhibit marked weaknesses in cognitive and academic functioning, despite intensive remediation services received within the public school system (id.). Recommendations included a medication review by his physician so that the appropriate medication dosage could be determined to enable the student to function consistently throughout the school day; a special education placement with other learning disabled children of average intelligence who did not display behavioral problems that would address the student's deficiencies and was not curriculum driven (id.). The private psychologist further suggested that information be presented to the student in a multisensory fashion, and direct instruction be used to teach basic skill areas as well as academic course material (id.). In addition, the private psychologist recommended that the student undergo a comprehensive reevaluation in two years to review his progress as a result of special education intervention (id.).

On December 7, 2005, a subcommittee of the CSE convened for a program review to assess the student's progress during the then current school year (Dist. Ex. 50 at pp. 1, 5). Program recommendations remained the same as set forth in the April 2005 and June 2005 IEPs (compare Dist Ex. 52 at pp. 1-2, with Dist Ex. 51 at pp. 1-2, and Dist. Ex. 50 at pp. 1-2). All members of the December 2005 CSE subcommittee, including the student's mother, were in agreement (Dist. Ex. 50 at p. 6). By letter dated December 21, 2005, the district's assistant director of special education (assistant director) delivered a copy of the December 2005 IEP to the parents (Dist. Ex. 48).

The student's report card for the end of the 2005-06 school year (fifth grade) reflected that by the end of the school year the student showed academic growth in all areas (Dist. Ex. 47 at p. 1). Teacher comments included on the report card revealed that although his math skills were improving, the student needed to continue working on facility with facts, with an emphasis on multiplication and subtraction (id.). In writing, the student required consistent help with outlining and collecting information because he had difficulty finding information on his own (id.). In addition, the student needed continued support organizing notes into fluent paragraphs (id.). In content areas, the student participated more and tried to make connections as the class was discussing new ideas and concepts (id.). During group lessons, it was helpful for the student to have new information repeated and explained several times (id.). The teacher described the student as motivated and enthusiastic, and noted that he worked well when praised and encouraged (id.).

On April 4, 2006, the student's mother signed a consent form granting the district permission to conduct an OT evaluation of the student (Dist. Ex. 42 at p. 2). By letter dated April 17, 2006, the assistant director advised the parents that the CSE was scheduled to meet on May 4, 2006 for the student's annual review and to develop the student's program for the 2006-07 school year (Dist. Ex. 46).

On April 18, 2006, and April 25, 2006, a district occupational therapist conducted an OT reevaluation of the student to assess current levels of functional performance in the school setting (Dist. Ex. 45 at p. 1). Results of standardized testing showed that the student performed tasks that required visual motor integration and visual perception within and above the average range as compared to his peers (id. at p. 3). The evaluator found that the student had some difficulty with tasks that required spatial organization and overall task approach (id.). However, the evaluator stated that the student showed improvement with activities that required fine and gross motor planning, bilateral coordination, and sensory processing (id.). Lastly, the evaluator stated that recommendations would be discussed and reviewed at the student's CSE annual review meeting (id.).

On May 4, 2006, the CSE convened for the student's annual review and to develop the student's IEP for the 2006-07 school year (sixth grade) with the assistant director, who served as CSE chairperson, school psychologist, the student's regular education teacher, special education teacher, speech-language teacher, the student's mother, and an additional parent member in attendance (Dist. Exs. 43 at p. 5; 44). Another school psychologist, an occupational therapist, the learning specialist from the district middle school, and a special education teacher from the district middle school also participated in the meeting via telephone (id.). According to the May 2006 IEP, the CSE reviewed all current educational performance areas, social/emotional, physical and management needs, assistive technology, program modifications, test accommodations, and goals

(Dist. Ex. 43 at p. 6). In addition, the May 2006 IEP indicated that the CSE discussed an "appropriate program for the 2006-07 school year" (*id.*). The May 2006 IEP further reflected that the CSE chairperson discussed and described the continuum of services at the district middle school (*id.*). The May 2006 CSE's recommendations for the student at the district middle school included consultant teacher direct<sup>4</sup> services for science and social studies, each one time daily for 40 minutes in the classroom, a 40-minute co-teach<sup>5</sup> English class five times per week, a special math class (12:1+2) daily for 40 minutes in the classroom, and related services comprised of one weekly 40-minute session of small group counseling (5:1), a once quarterly 30-minute OT consultation, a monthly 30-minute psychological consultation,<sup>6</sup> and two 30-minute sessions of small group (5:1) speech-language therapy per week (*id.* at p. 1). Recommended program modifications/accommodations/supplementary aids and services were for preferential seating in the front of the classroom and near visual presentation, modified length of classwork and homework assignments, additional time to complete tasks, short breaks/walks for movement, warnings for transitions, prompts, redirection and refocus to task, a copy of scaffolded class notes, and access to an AlphaSmart (*id.* at p. 2). Recommended testing accommodations included the use of a spell check device, extended time (1.5), flexible scheduling so that the student may take a five-minute break for every 20 minutes of testing, directions explained, a flexible setting in order for the student to read tests aloud, and the use of a word processor (*id.*). Annual goals addressed the student's needs specific to study skills, reading, mathematics, speech-language, and social/emotional/behavior (*id.* at pp. 10-11). In addition, the May 2006 CSE recommended that the student ride the regular school bus to the middle school, but in an effort to address the student's difficulty with external stimuli and becoming over-stimulated, the May 2006 CSE advised that he should sit in the front of the bus (*id.* at p. 1). By letter dated May 31, 2006 to the parents, the district's assistant director sent them a copy of the student's May 2006 IEP (Dist. Ex. 40).

A district speech-language specialist conducted a speech-language reevaluation of the student over a period of three days that began on October 6, 2006 and ended on October 11, 2006 (Dist. Ex. 39 at p. 1). A variety of formal and informal speech-language testing revealed that the student demonstrated a moderate language impairment, which was further hampered by his significant weaknesses with auditory memory and attention (*id.* at p. 5). Additionally, the evaluator noted areas of growth in the student's vocabulary and overall expressive spontaneous speech, as well as continued weaknesses in his auditory memory, processing, listening comprehension and word retrieval (*id.*). The evaluator recommended modifications to minimize and/or compensate for the student's weaknesses in memory and processing such as: extended time, preferential seating, encouraging appropriate requests for clarification, repetition and reiteration of instructions, use of visualization strategy, provision of clear and concise directions to be given one step at a time, frequent check-ins to ensure comprehension; and a multi-modality approach to instruction emphasizing visual aids (*id.* at p. 7). Additional recommendations were for word

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<sup>4</sup> The May 2006 IEP stated that consultant teacher services would include the regular education teacher, consultant special education teacher, and instructional assistant (Dist. Ex. 43 at p. 2). The hearing record reflects that the special education teacher and instructional assistant would be in the classroom on alternate days (Tr. p. 228).

<sup>5</sup> The May 2006 IEP reflected that the co-teach class would consist of the regular education teacher and the special education teacher daily (Dist. Ex. 43 at p. 2).

<sup>6</sup> The May 2006 IEP stated that the first psychological consultation would occur in early September 2006 to assist in the student's transition to the middle school (Dist. Ex. 43 at p. 2).

retrieval modifications such as time to find the word, hints and clues and descriptions of forgotten words, and for language goals to include strategies to improve topic maintenance, limiting tangential comments following oral directions, listening comprehension, word retrieval and verbal reasoning (id.).

An October 12, 2006 middle school progress report included comments from the student's teachers (Dist. Ex. 38). The student's English language arts (ELA) teacher commented that the student was "inattentive in class," needed to "improve the quality of work by using class time efficiently," but that it was her pleasure to work with the student (id.). The student's math teacher indicated that the student had great math sense, could figure everything out, and was helpful with other students (id.). His science teacher stated that the student improved the quality of his work by using class time efficiently, showed an understanding of most of the basic concepts, and that it was her pleasure to work with him (id.). The student's social studies teacher described the student as cheerful and further noted that he maintained a good attitude while in class; however, he struggled with following classroom procedures and with staying focused during class (id.).

On October 17, 2006, a district school psychologist commenced a psychological reevaluation of the student that was completed on October 24, 2006 (Dist. Ex. 36 at p. 1). In regard to the October 2006 psychological testing, the school psychologist noted that the student worked diligently throughout the entire testing process (id. at p. 3). She further described the student as someone who was "determined to meet success and approached each task presented with interest and enthusiasm" (id.). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC - IV) yielded a verbal comprehension index composite score of 89 in the low average range; perceptual reasoning index composite score of 106 in the average range; working memory index composite score of 68 in the extremely low range, processing speed index score of 88 in the low average range; and a full scale IQ composite score of 87 in the low average range (id.). The school psychologist opined that results of the WISC-IV demonstrated the student's relative strength with abstract reasoning skills, his fairly consistent low average performance in verbal comprehension and processing speed abilities, and significant difficulty on tasks involving short-term memory (id. at pp. 3-5, 7-10). According to the school psychologist, due to the disparity in subtest scores, the student's full scale IQ score should be interpreted with caution because it was "an averaging together of quite disparate" scores (id. at pp. 7-10). The Conners' Rating Scale - Revised: Long Version (Parent & Teachers) was completed, with "Clinically Significant" scores revealed across home and school settings relating to the areas of hyperactivity, inattention social problems, and impulsivity (id. at pp. 5-7). In closing, the school psychologist advised that recommendations were pending team review of the student's evaluations (id. at p. 7).

A November 2, 2006 educational evaluation report indicated that the district's learning specialist conducted an education evaluation over "separate sessions" as part of the CSE reevaluation process (Dist. Ex. 37 at pp. 1, 3). Overall, the evaluator reported that the student was cooperative, friendly, and complied with all of the evaluator's requests (id. at p. 3). According to the evaluator, the student required refocusing and redirection during testing, as well as directions and prompts repeated (id.). The evaluator also reported that the student appeared to be distracted internally and externally, and that when he found that he was off-task, the student shook his head and told himself to get back to task (id.). The evaluator indicated that the student began conversations that were off-task; however, he enjoyed the idea of being timed (id.). The evaluator also noted that the student worked diligently and at a good pace, but he talked to himself while

some of the directions were being given and then wanted to begin before the directions were completed (*id.*). The evaluator opined that given the non-distracting environment of the test setting as well as the student's cooperation throughout the testing, results of the evaluation were "probably optimal" and maybe better than what he displayed on a daily basis in school (*id.* at p. 4). The evaluator further noted that the testing was considered to be a valid representation of the student's ability at that time given his motivation and minimal distractions (*id.*).

The evaluator also reported that administration of the Woodcock-Johnson III, Tests of Achievement (W-J-III) in October 2006 reflected that the student achieved an "average" range score for broad reading, characterized by average range skills in letter-word identification, reading fluency, and "below average" range skills in passage comprehension (Dist. Ex. 37 at p. 2). The student achieved a "below average" score for broad math, characterized by below average range skills in calculation, average range skills in applied problems, and "well below average" range skills in math fluency (*id.*). The student achieved an average range score for broad written language, characterized by average range scores for spelling, writing samples, and writing fluency (*id.* at p. 3). The evaluator determined that the student continued to struggle to perform in the classroom as he had difficulty working independently, organizing his materials, and understanding and following directions (*id.* at p. 4). According to the evaluator, the student required frequent reminders or refocusing and was subject to internal and external distractions (*id.*). The evaluator also reported that the student worked best when given a break or when provided an opportunity to perform a physical activity (*id.*). Additionally, the student was described as someone who enjoyed helping others and speaking in front of the class or acting out a scene (*id.*). Academically, the evaluator reported that the student was able to decode words, but he had a more difficult time obtaining meaning from the written word (*id.*). The evaluator added that the student demonstrated difficulty with word retrieval and with math facts, relying on his fingers for calculations (*id.*). Although the student demonstrated writing skills in the average range and was able to create meaningful sentences, the evaluator suggested that the student be reminded to check writing mechanics such as punctuation and capitalization (*id.*). The evaluator made the following recommendations: (1) the student should be shown models and examples to ensure that he was clear about directions, task requirements, and responsibilities; (2) that an adult work with the student on organizing his binder as a review of what he learned and as a reminder of what he needed to complete for homework; (3) that the student should receive frequent practice and review of basic math facts; and (4) re-teaching and reviewing multiplication and division of two-digit by two-digit numbers (*id.*).

On November 9, 2006, a district school psychologist prepared a social history update with the student's mother acting as the informant (Dist. Ex. 35). According to the report, the student's mother stated that initially, the student's transition to middle school was "hectic," and his performance had been erratic during the year (*id.*). The student's mother also reported that "there [had] been good times followed by slumps in both the academic and social realm" (*id.*). The report revealed that the student participated in organized activities through his church including Sunday school and community fairs, and that he also occasionally played the drums in the church's youth group (*id.*). The student's mother also reported that the student had a few play dates with other children (*id.*).

On December 11, 2006, an FBA/BIP was developed by the team of professionals working with the student in the district middle school (Dist. Ex. 32 at p. 1). The FBA noted that the student



had a great deal of energy which often interfered with his academic performance and behavior both in the classroom and the surrounding school environment (id.). In addition, according to the FBA, the student's high activity level and impulsivity could make learning very difficult for him and those around him (id.). Moreover, the FBA indicated that at times the student's poor attention interfered with his decision making ability as well as his overall ability to be successful in school (id.). With regard to pro-social behaviors, the FBA described the student as insightful and sensitive, caring, intelligent, good-natured and someone who wanted to succeed in school (id.). The FBA also included a global hypothesis that the student's difficulties in school stemmed from his difficulty maintaining focus and poor organizational skills (id.). Previous interventions employed during the first marking period of the 2006-07 school year included the use of redirection, prompting, and close proximity to the teacher, as well as holding the student responsible for an individual behavior chart to track his success in the classroom environment (id. at p. 2). Specific to the student's tendency to disrupt the class by making noise, the December 2006 FBA reflected that while at times, the student appeared unable to control his impulsivity, at other times, he appeared to enjoy the negative attention his impulsivity brought upon him (id.). According to the December 2006 BIP, the student's five teachers would receive a behavior chart to be completed for the entire week that was then provided to the school psychologist for review with the student (id. at p. 3). The FBA addressed the student's tendency to run inside the school building and on school grounds during transition times (id.). Regarding this target behavior, the FBA included a hypothesis that due to the student's high energy level, he often ran rather quickly to and from classes, and that while this might have allowed him to expel some of his energy, physical safety was a serious concern when the student was running outside the school building (id. at p. 4).<sup>7</sup> The BIP noted that to ensure the student's safety, until he proved that he was able to walk safely to all of his classes, the student would be escorted by a teacher's aide to all classes that were outside of the building (Tr. pp. 136-37; Dist. Ex. 32 at p. 4). In addition, the BIP would be monitored daily and a behavior log would be kept to record whether or not the student walked between periods each day (Dist. Ex. 32 at p. 4). On January 18, 2007, the school psychologist reviewed the FBA/BIP with the student's mother (Tr. pp.296, 901; Dist. Ex. 32 at p. 5).

According to the hearing record, the student's mother first contacted Winston Prep regarding admission for the student in winter 2007 (Tr. p. 796). On January 17, 2007, the student's mother signed a release form authorizing the district to send a copy of the student's academic records to Winston Prep (Dist. Ex. 30 at p. 1).

A Communications Art Workshop (CAW)<sup>8</sup> progress note for the first marking period of the 2006-07 school year reflected that the student made limited progress in his ability to identify and use new vocabulary words; use context clues to derive meaning in a passage; identify the main

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<sup>7</sup> The hearing record reflects that the district middle school consisted of several buildings in close proximity to each other (Tr. p. 185). Each student was assigned to a "house" located in one of the buildings (Tr. p. 125).

<sup>8</sup> The district's assistant director described CAW as a building-level service (Tr. p. 57). The CAW progress note indicated that students in CAW engage in daily reading, writing, speaking, and listening activities (Dist. Ex. 31). Students are involved in active reading and integrating questioning techniques to further enhance comprehension skills (id.). Language and vocabulary development was addressed through use of a "Quote of the Week" and "Nifty Thrifty Fifty" (id.). Decoding and spelling were addressed through the study of common prefixes, suffixes, rude words and word relationships (id.). Oral language activities focused on evaluating, developing, and improving effective listening skills (id.).

idea and details of the passage; draw logical conclusions based on prior knowledge and evidence presented orally and in written form; make relevant connections to enhance his understanding of language; monitor listening and reading comprehension and self-correct when necessary; collect, synthesize, and present information in a clear, precise manner; and recognize the relationship between reading, writing, listening and speaking across all subject areas (Dist. Ex. 31).

In a letter dated February 12, 2007 to the parents, the house director for the middle school informed the parents that the student had been absent 15 times during the school year (Dist. Ex. 27). The house director further advised that the letter was being sent due to the district's obligation to document attendance for the student's file (id.). In addition, she requested that the parents review the attendance policy with the student (id.).

The student earned the following grades for the second marking period of the 2006-07 school year: cadet wood: A; ELA: C; math: B; science: C+; social studies: C; unified arts –block I: C+ (Dist. Ex. 29). The student's ELA teacher commented that the student's frequent absences were interfering with his progress and that the student needed help with organizing (id.). Although the student's math teacher noted that the student's classroom behavior had greatly improved and that he was able to participate and learn in a positive way, she further indicated that the student's progress was hindered by not completing and/or making up missed assignments due to absences (id.). The student's science teacher commented that the student needed to continue to put more effort into his work (id.). Lastly, the student's social studies teacher stated that the student's in-class behavior had improved since the first quarter (id.). The social studies teacher also described the student as "curious" and interested in the content and someone who often added interesting details to class discussions (id.).

A March 20, 2007 middle school progress report included comments from the student's academic class teachers (Dist. Ex. 28). The student's ELA teacher commented that the student was enjoying the subject matter at the time, that he often shared his ideas and volunteered to act in class, and that his average for the class at that time was "C" (id.). The science teacher stated that the student could improve the quality of work by organizing class folders and binders (id.). The social studies teacher indicated that the student was inconsistently prepared for daily lessons by not completing daily assignments. (id.). Additional comments regarding the course entitled "Unified Arts" reflected that the student had not completed assignments (id.).

A CAW progress note for the third marking period of the 2006-07 school year revealed that the student made satisfactory progress in his ability to identify and use new vocabulary words, identify main idea and details in a passage, and draw conclusions based on evidence presented orally and/or in written form (Dist. Ex. 26 at p. 1). The progress note showed that the student made limited progress in his ability to monitor listening and reading comprehension and self-correct when necessary; and made limited progress in his ability to collect, synthesize, and present

information in a clear, precise manner (id.). In addition, the progress note indicated that the student received a "2" specific to conduct and effort in CAW (id. at p. 1).<sup>9</sup>

On April 19, 2007, a subcommittee of the CSE convened for the student's reevaluation/annual review and to develop the student's IEP for the 2007-08 school year (seventh grade), with the assistant director who acted as the CSE chairperson, a district psychologist, a district special education teacher, a speech-language specialist, a district regular education teacher, and the student's mother in attendance (Dist. Exs. 23 at pp. 1, 5; 24). The April 2007 CSE subcommittee reviewed all current educational performance areas, social/emotional, physical and management needs, assistive technology, program modifications, test accommodations, and goals (Dist. Ex. 23 at p. 6). In addition, the April 2007 CSE subcommittee reviewed the student's October 2006 social history, psychological reevaluation, educational reevaluation, speech-language evaluation, and December 2006 FBA/BIP (id. at pp. 2-6). The April 2007 CSE subcommittee recommended the following program for the student: a consultant teacher direct classroom for both science and social studies, a co-teach classroom for English and math, and related services comprised of one weekly 30-minute session of small group counseling (5:1), one quarterly 30-minute OT consultation, and one weekly 40-minute session of small group speech-language therapy (5:1) (id. at pp. 1-2). Program modifications/accommodations/supplementary aids and services included modified length of classwork and homework assignments, a copy of class notes as the student might be distracted and not have all notes written accurately, the recommendation that the BIP should be utilized as necessary to monitor whether the student's high activity and impulsivity interfered with his academic functioning, and access to a word processor (id.). Testing accommodations included the use of a spell check device due to the student's weak spelling skills, extended time (1.5) as the student may require additional time to read over test material, flexible scheduling so that the student may take a five-minute break for every 20 minutes of testing, directions explained due to the student's attention difficulties, a flexible setting for the student to read tests aloud, and the use of a word processor to increase the student's productivity (id. at pp. 2-3). In addition, the April 2007 CSE subcommittee recommended that the student ride the regular bus to the middle school and that he sit at the front of the bus to address his difficulty with external stimuli and becoming overstimulated (id.). Annual goals addressed the student's needs specific to study skills, reading, mathematics, speech-language, and social/emotional/behavioral areas (id. at pp. 7-9). The resultant IEP reflected that all committee members, including the student's mother, were in agreement (id. at p. 6).

On May 17, 2007, the student's mother signed an enrollment agreement with Winston Prep, in which she reserved a placement for the student at Winston Prep for the 2007-08 school year (Parent Ex. D). The student's mother agreed to make a non-refundable reservation deposit to the school and to pay the student's tuition for the 2007-08 school year (id.).

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<sup>9</sup> A rubric included in the CAW progress note indicates that a grade of "2" in "conduct" reflects that the student usually interacted appropriately and cooperated with peers and teachers, usually abided by classroom rules and procedures, usually made good use of class time, and usually took initiative for proper behavior when reminded to do so (Dist. Ex. 26 at p. 2). In addition, a grade of "2" in "effort" showed that the student was usually prepared for class, usually on task, usually was responsible for missed work, usually completed required assignments, usually sought extra help when needed by asking questions and/or staying after school, and that he usually strived to meet his fullest potential (id.).

A June 5, 2007 middle school progress report included comments from three of the student's academic class teachers (Dist. Ex. 21). The student's ELA teacher indicated that the student's performance was inconsistent, that the student had not handed in two assignments, and that the student was failing English class (id.). The student's ELA teacher further noted that the student lost his class text which made it hard for him to complete homework assignments (id.). The science teacher indicated that the student could improve the quality of his work by coming to class prepared with basic supplies and by completing assignments regularly (id.). The social studies teacher indicated that the student did not follow classroom procedures and that his conduct was interfering with progress (id.). She further indicated that the student's class average for social studies at the time of the report was "53" (id.).

A CAW progress note for the fourth marking period of the 2006-07 school year showed that the student made satisfactory progress in his ability to participate appropriately in class discussions, his ability to identify the main idea and details in a reading and/or listening passage, and his ability to draw conclusions based on evidence presented orally and/or in written form (Dist. Ex. 20 at p. 1). The student made limited progress in his ability to use active listening skills and not interrupt others; as well as follow oral and written directions (id.). Based on the same rubric included with the third marking period CAW progress note, the student received a grade of "2" for conduct and effort (compare Dist. Ex. 20 at pp. 1-2, with Dist. Ex. 26 at p. 2).

The student earned the following grades for the fourth marking period of the 2006-07 school year: cadet wood: A+; ELA: D; math: B; science: D; social studies: D; unified arts – block I: A (Dist. Ex. 19 at p. 1). The student's ELA teacher described the student as inattentive in class (id.). The student's math teacher commented that the student had applied himself more that marking period and further noted that she was "so proud of him when he maintain[ed] a positive attitude" (id.). The student's science teacher noted that the student chose not to complete his final project (id.). The student's social studies teacher commented that the student's conduct was interfering with progress (id.).

On August 27, 2007, the district's middle school building principal approved the "Withdrawal of Student" form signed by the student's mother (Dist. Ex. 15). According to the form, the parents planned to withdraw the student on September 5, 2007 from the district's middle school (id.). The student's mother indicated that they were withdrawing the student from the district school because he was transferring to a school outside of New York State, and she further requested that the student's records be delivered to Winston Prep (id.). On September 6, 2007, the student entered Winston Prep (Dist. Ex. 9 at p. 2).

By letter dated April 17, 2008, the district notified the parents that a subcommittee of the CSE was scheduled to convene on May 8, 2008 for the student's annual review and to develop the student's program for the upcoming school year (Dist. Ex. 12). By letter dated May 2, 2008 to the parents, the district revised its April 17, 2008 notice to invite Winston Prep staff to participate in the upcoming CSE meeting (Dist. Ex. 11).

On May 5, 2008, a subcommittee of the CSE convened for the student's annual review and to develop the student's IEP for the 2008-09 school year (eighth grade) (Dist. Ex. 7). The attendees included the district's secondary supervisor of special education who served as CSE chairperson, a district learning specialist, a district regular education teacher, the student's mother, and the

student's caregiver (Dist. Exs. 7 at pp. 1, 5; 8). In addition, the student's Focus<sup>10</sup> teacher and the Focus program director from Winston Prep participated by telephone (id.). Committee meeting minutes reflected that the student attended Winston Prep for the 2007-08 school year and planned to continue to attend for the 2008-09 school year (Dist. Ex. 7 at p. 5). Academically, although the student had been doing well in math, the May 2009 IEP reflected that his pace was "very slow" and that he required more time than his classmates (id.). Additionally, it was reported that the student's processing speed deficits affected the automaticity of his skills, but that he did not need his calculator (id.). Although the student made steady gains in math at Winston Prep, math continued to be his most difficult subject (id.).

The May 2008 IEP further indicated that at Winston Prep, the student's impulsivity led to social conflicts, therefore the student engaged in role-playing in counseling to learn how to develop his social skills (Dist. Ex. 7 at p. 6). The student's mother advised the May 2008 CSE subcommittee that improvement was noted within the first two to three months of attending Winston Prep as the student seemed more relaxed about his work and knew what he had to do with homework (id.). Committee meeting notes also revealed that with input from the student's mother and Winston Prep staff, the May 2008 CSE subcommittee reviewed all current educational performance areas, social/emotional, physical and management needs, assistive technology, program modifications, test accommodations, and goals (id.).

The May 2008 CSE subcommittee recommended a co-teach classroom for English and math, each one period daily for 43 minutes in the regular classroom and a consultant teacher direct classroom for both science and social studies, each one period daily for 43 minutes in the regular classroom (Dist. Ex. 7 at p. 1). In regard to related services recommendations, the May 2008 CSE subcommittee added one weekly 1:1 30-minute session of counseling and continued the prior April 2007 CSE subcommittee's recommendations for small group counseling (5:1) once weekly for 30 minutes, a quarterly 30-minute OT consultation, and one 40-minute session of small group speech-language therapy (5:1) per week (id. at pp. 1-2). Recommendations for program modifications/accommodations/supplementary aids and services included modified homework assignments to 50 percent, as the student required quantity, not quality (except for math); additional time to complete tasks including short break/walks for movement/warnings for transitions, and prompting and redirection and refocusing to task (id. at p. 2). Additional program modifications were for a copy of class notes as the student may be distracted and not have all notes written accurately, that the BIP should be utilized as necessary as a way to monitor the way in which the student's high activity level and impulsivity interfered with his academic functioning, modified curriculum and homework that prioritized content instruction, materials and differentiation of instruction in math and access to a word processor with spell check (id.). Testing accommodations included modified district/class assessments to differentiate prioritized content in modified curriculum for math, the use of spell check device due to the student's weak spelling skills, extended time (1.5) as the student may require additional time to read over test material, flexible scheduling so that the student may take a five-minute break for every 20 minutes of testing, directions explained, a flexible setting in order for the student to read tests aloud, the use of a word

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<sup>10</sup> The hearing record reflects that the Winston Prep Focus class is a daily 1:1 remedial class with the same instructor (Tr. pp. 601, 610). The hearing record reflects that the Focus instructor acts as a facilitator between the student, faculty, parents, and school (Tr. p. 610). The Focus instructor communicates and oversees (similar to a case manager) the student's overall academic and social/emotional experience (id.).

processor to increase his productivity (id. at pp. 2-3). In addition, the May 2008 CSE subcommittee recommended that the student ride the regular bus to middle school and that he sit at the front of the bus to address his difficulty with external stimuli and becoming overstimulated (id. at p. 1). Annual goals addressed the student's needs specific to study skills, reading, mathematics, speech-language, and social/emotional/behavioral areas (id. at pp. 7-9). Lastly, the May 2008 IEP meeting minutes indicated that all members of the May 2008 CSE subcommittee, in concert with the student's mother, were in agreement (id. at p. 6).<sup>11</sup>

In an enrollment agreement dated September 9, 2008, the student's mother reserved a placement at Winston Prep for the 2008-09 school year (Parent Ex. E). The student's mother also agreed to make a non-refundable reservation deposit to the school and to the payment of the student's tuition for the 2008-09 school year (id.).

By amended due process complaint notice dated March 3, 2009, the parents, through their attorney, requested, among other things, tuition reimbursement for Winston Prep for the 2007-08 and 2008-09 school years (Dist. Ex. 1 at p. 3).<sup>12</sup> Without differentiating between the challenged IEPs, the parents alleged, among other things, that the April 2007 and May 2008 IEPs did not offer the student a FAPE for the following reasons: (1) the IEPs did not provide a sufficient level of integrated support in a full-time day special education school dedicated to meeting the needs of students with similar learning disabilities with a "small pupil ratio" and where social development would be enhanced by fostering interaction with peers of similar learning needs; (2) the recommended middle school environment would be "toxic" for the student, as he would be overstimulated and environment was too large and noisy; (3) the student required a multisensory approach; however, there was nothing in the IEPs requiring the district to use that approach; (4) the CSEs were invalidly composed; (5) the CSEs did not consider a more restrictive alternative setting for the student; and (6) the annual goals and objectives were insufficient, lacked specificity, and were not measurable (id. at p. 2). Without further elaborating, the parents contended that "there were other procedural and substantive defects to the IEPs" (id. at p. 3). In closing, the parents maintained that the IEPs did not offer the student a FAPE and would not confer meaningful educational benefits to the student, "but would actually cause him to regress or at least not educationally progress" (id.).

An impartial hearing convened on April 20, 2009 and concluded on June 10, 2009 after five days of testimony (IHO Decision at p. 1; Tr. pp. 1-991). In an undated 82-page decision, the impartial hearing officer denied the parents' request for tuition reimbursement for Winston Prep for the 2007-08 and 2008-09 school years (IHO Decision at p. 79).<sup>13</sup> First, the impartial hearing

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<sup>11</sup> Although the May 2008 IEP indicates otherwise, the student's mother testified that she advised the May 2008 CSE subcommittee that the student would not be returning to the district for the 2008-09 school year and that he would be attending Winston Prep (Tr. p. 830). The student's mother further testified that she advised the May 2008 CSE subcommittee that she had objections to the proposed IEP and that she needed to consult legal counsel to find out what she was going to and learn more about her rights (Tr. pp. 830-31).

<sup>12</sup> The hearing record also contains a January 14, 2009 "corrected impartial hearing request," which contained claims that pertained only to the May 2008 IEP (Dist. Ex. 2).

<sup>13</sup> According to parents' attorney, although the impartial hearing officer's decision itself is undated, the date of the decision was December 30, 2009 (Parent Mem. of Law at p. 2).

officer addressed the parents' claim that the May 2008 CSE subcommittee was not properly constituted because a school psychologist and a speech-language pathologist did not participate in the meeting (*id.* at p. 59). Regarding this claim, the impartial hearing officer concluded that the parents did not show that there was a denial of a FAPE due to the absence of a school psychologist at the May 2008 CSE subcommittee meeting, given that the student's Focus teacher and the Focus program director from Winston Prep took part in the meeting by telephone and were able to present information regarding the student's evaluation results during the meeting (*id.*). However, the impartial hearing officer did not make any findings with regard to whether the lack of a speech-language pathologist at the May 2008 meeting resulted in a denial of a FAPE to the student (*id.* at pp. 59-60). Turning next to the parents' assertion that the CSE did not consider a more restrictive environment for the student, the impartial hearing officer noted that the parents did not present any evidence that the district did not have available a continuum of alternative placements and services (*id.* at p. 60). He further noted that there was no requirement that the district consider a more restrictive environment, finding that with respect to the May 2006, April 2007, and May 2008 IEPs, the CSEs considered and rejected a general education setting with support and related services (*id.*). The impartial hearing officer next rejected the parents' contention that a BIP was not developed (*id.*). With respect to the goals listed in the disputed IEPs, the impartial hearing officer found that the April 2007 and May 2008 IEPs contained measurable goals designed to meet the student's needs and that they were appropriate (*id.* at pp. 60, 77).

Next, the impartial hearing officer considered the parents' claim that the May 2006 IEP was not properly implemented by the district because the student was not seated at the front of the bus pursuant to his IEP (IHO Decision at pp. 60-61). The impartial hearing officer rejected the parents' implementation claim for the following reasons: (1) the parents provided the only evidence that the student was not seated at the front of the bus, which the impartial hearing officer determined was hearsay; (2) the parents never advised the district that the student was not sitting at the front of the bus; and (3) there was no evidence that the bus driver or the bus company refused to provide the accommodations (*id.* at p. 61).

Substantively, the impartial hearing officer found that the district presented credible evidence that the programs developed by the CSEs for the 2007-08 and 2008-09 school years were appropriate and would have provided the student with a "meaningful education" and were likely to produce progress (IHO Decision at pp. 78, 79). He further found that during the prior 2006-07 school year, the student made progress; however, the impartial hearing officer determined that during the second half of the school year, except in math, the student stopped progressing (*id.* at p. 77). According to the impartial hearing officer, the "school records [were] quite clear" that the student received satisfactory grades for the first half of the 2006-07 school year and that his grades dropped in the second half (*id.* at p. 78). In light of his finding that the program offered to the student during the 2006-07 school year was appropriate, the impartial hearing officer found that the student was provided with appropriate classes, was redirected in his classes by his special education teacher or by another adult, and was receiving counseling from the school psychologist (*id.*). Noting that the program did not change from what was recommended in the prior 2006-07 school year, the impartial hearing officer concluded that the recommended classes and services were reasonably calculated to produce educational progress for the 2007-08 and 2008-09 school years (*id.*).

On appeal, the parents seek annulment of the impartial hearing officer's decision and request an award of tuition reimbursement for Winston Prep for the 2007-08 and 2008-09 school years. The parents maintain that by failing to afford the accommodation in the student's IEP providing the student a seat at the front of the school bus during the 2006-07 school year, the district failed to implement the IEP. In addition, the parents allege that the May 2008 CSE was not properly composed because a school psychologist and speech-language pathologist did not participate in the meeting. Next without specifying which CSE which they are referring to, the parents contend that the CSE did not consider a more restrictive placement for the student and that it never fully implemented a BIP regarding the student's classroom behavior, which rendered the IEP invalid.

The parents also raise the following allegations regarding the annual goals listed in the IEPs: (1) the IEPs did not have goals that were consistent with the student's needs; (2) the IEPs had only one pragmatic goal; (3) the IEPs failed to include spelling goals; (4) the IEPs failed to include goals pertaining to executive functioning; (5) the IEPs failed to include goals pertaining to the student's lack of organizational skills; (6) the IEPs failed to include goals pertaining to his inability to do his homework; (7) the IEPs failed to include any writing goals; (8) the IEPs failed to include a goal to slow down the student's reading speed; (9) the IEPs failed to address the student's most significant deficit, his working memory; and (10) many of the goals were cut and pasted from the May 2006 IEP to the May 2007 IEP.

Next, the parents contend that the district's recommended placement was not reasonably calculated for the student to make educational progress. First, the parents maintain that the student needed greater educational support than what the district offered. Although the district had previously provided the student with a 1:1 aide, the parents allege that for the school years at issue, the district should not have removed the aide because the student was transitioning into a bigger school with more transitions. The parents also allege that the recommended school was too large and the classroom size was too big with too many distractions and transitions. Next, the parents argue that in light of the student's diagnosis of an attention deficit hyperactivity disorder (ADHD)<sup>14</sup> and severe language deficits, the district's program that was offered in a general education classroom would not have addressed the student's needs. Furthermore, the parents assert that it was unclear how special education instruction would have been delivered to the student. In addition, the parents argue that the program offered by the district was not sufficient to address the student's learning disability because the curriculum was getting more difficult and student lacked the language skills to keep up. The parents maintain that the student required a small, supportive class setting with individualized instruction and a peer group similar to the student because of the social impact upon the student.

The parents further allege that the same program was offered to the student for the 2007-08 and 2008-09 school years that had been offered in the prior 2006-07 school year, with the exception of no longer offering a self-contained math class. According to the parents, during 2006-

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<sup>14</sup> Although review of the hearing record referenced completion of the Conners' Rating Scale - Revised: Long Version (Parent & Teachers) as part of the November 2006 psychological re-evaluation as follows: "[c]linically [s]ignificant" scores revealed across home and school settings relating to the areas of hyperactivity, inattention, social problems, and impulsivity, and the hearing record reflects a formal diagnosis of ADD in a 2005 psychoeducational evaluation report; it does not reflect a formal diagnosis of ADHD (see Dist. Exs. 53 at p. 10; 36 at pp. 5-7).



07 school year, the student made no social progress. Moreover, during the 2006-07 school year, the parents argue that "math was a disaster," and that the student missed a lot of homework.

Next, the parents argue that Winston Prep was appropriate because the class sizes were smaller and the school employed a language immersion program. The parents contend that the student benefits from the structured environment and that the focus upon instruction and small classes provided the student with less distraction. The parents assert that academically and socially, the student made substantial progress at Winston Prep. In light of the academic and therapeutic gains made by the student, the parents argue that the hearing record demonstrates that Winston Prep was appropriate. Lastly with regard to equitable considerations, the parents argue that the equities favor an award of tuition reimbursement for the 2007-08 and 2008-09 school years because the parents cooperated with the CSE and worked with the district. The parents argue that the hearing record shows that they were rejecting the IEP<sup>15</sup> and that they complied with the Individuals with Disabilities Education Act's (IDEA's) notice provisions.

The district submitted an answer, in which it argues that the impartial hearing officer's decision was supported by substantial evidence and should not be overturned on appeal. Specifically, the district contends that the impartial hearing officer correctly determined that for both school years in question, it offered the student a FAPE because the programs were appropriate for the student and designed to confer educational benefits to the student in the least restrictive environment (LRE).

In response to the parents' claim that the May 2008 CSE subcommittee was improperly constituted, the district argues that the requisite members participated in the May 2008 meeting. Next, the district asserts that for both school years at issue, for English and math, the student was recommended for a co-teach class, taught by a regular and special education teacher that would have provided the student with small group instruction through a multisensory approach. In addition, the district argues that the student would have been provided with appropriate accommodations and that the instructional material would have been modified on the student's instructional level. The district maintains that through the co-teach model, the student would have received the support of a special education teacher on a daily basis, while still having access to his regular education peers during instruction. Next, the district argues that the recommendation for a consultant teacher direct model for social studies and science was also supported by the information provided to the CSEs. With respect to the consultant teacher direct model, the district asserts that a special education teacher collaborates with the regular education teacher to ensure that all curriculum and instructional materials are modified to the students' needs, and that all assignments and assessments are also modified given the unique needs of the students in those classes. Additionally, for both school years at issue, the district asserts that the student would also have been scheduled for a building-level support class called the "CORE" class, which would have provided the student with further support in his content area classes.<sup>16</sup> Moreover, the district contends that the student was scheduled to participate in "CAW," a class that focused on reading, writing, speaking, and listening strategies for students. Next, the district contends that the CSEs

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<sup>15</sup> The parents do not specify which IEP they are referring to.

<sup>16</sup> The hearing record does not indicate if "CORE" is an acronym.

recommended a program that addressed the student's attentional difficulties with appropriate modifications, such as refocusing and preferential seating designed to address those needs.

Next, the district argues that for both school years, it offered the student appropriate related services. First, the district contends that given the student's weaknesses in word retrieval and auditory processing, the CSEs recommended weekly speech-language therapy to help the student organize his thoughts and assist him with his pragmatic language skills. Moreover, the district alleges that in light of the social difficulties that the student had previously exhibited, the April 2007 CSE recommended weekly group counseling. The district further alleges that the May 2008 CSE added an individual weekly counseling session to the student's program based on reports from Winston Prep that the student continued to exhibit difficulties in social skills, impulsivity, and deregulation.

Regarding the parents' contention that the lack of a 1:1 aide rendered the programs offered in April 2007 and May 2008 inappropriate, the district submits that the student did not require an aide when he attended the district middle school. Moreover, the district asserts that the fact that the student needed an aide while in elementary school does not provide sufficient evidence regarding his needs in seventh and eighth grades. For the school years in dispute, the district submits that the programs offered by the CSEs would have provided the student with the requisite support and structure without the need for a 1:1 aide. Next, contrary to the parents' argument that the district's middle school would have been too large for the student, the district asserts that in light of the accommodations made for the student and the structure of the middle school, the setting was appropriate.

Turning next to goals enumerated in the challenged IEPs, the district first argues that the goals contained in the April 2007 IEP were developed based on discussions that occurred during the CSE meeting, where the student's district teachers were present. The district further submits that the student's mother participated in the development of the goals, and did not ask any questions. With respect to the goals listed in the May 2008 IEP, the district alleges that they were developed with input from the student's teacher at Winston Prep. Contrary to the parents' allegations, the district contends that the goals enumerated in both IEPs were not vague and they were measurable. The district also claims that both IEPs provided the student's special education teachers with information about the student's writing needs; however, the district maintains that goals for writing were not required in order to develop an appropriate program for the student. Lastly, although the parents claim that the goals in each IEP were carried over from year to year, the district submits that the goals changed to the extent that the expectations for the student were different.

With regard to the appropriateness of Winston Prep, the district asserts that the parents did not demonstrate the school's appropriateness for the following reasons: (1) the student requires special education instruction; (2) the hearing record does not indicate that the instruction offered to the student at Winston Prep was as individualized as it would have been had he enrolled in the district's program; (3) the student did not participate in the Focus program at Winston Prep during the first two months of the 2008-09 school year; (4) the reports from Winston Prep did not show that the student had made progress towards his core difficulties; impulsivity and self-regulation; (5) the hearing record contains limited information regarding the textbooks or other instructional materials used to educate the student; (6) the student was not receiving speech-language therapy

during the 2008-09 school year; (7) although the student received assistance with his social skills, he did not receive such assistance from a school psychologist; and (8) the student did not interact with any mainstream classmates, which precluded him from learning how to associate with typical peers. Lastly, the district argues that equitable considerations preclude an award of relief to the parents for the following reasons: (1) the parents had no intention of enrolling their son in a district program; and (2) the parents failed to provide the requisite notice to the district of their intention to place the student at Winston Prep and their desire to seek tuition reimbursement for both school years at issue.

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).

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

A student's recommended program must be provided in the least restrictive environment (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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of

supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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

At the outset, I will address the parents' claims relating to the implementation of the April 2006 IEP, specifically that the district failed to provide a seat for the student in the front of the school bus (see Dist. Ex. 43 at p. 1). First, however, I will consider whether such a claim was outside the scope of the impartial hearing. The impartial hearing officer did not find that the April 2006 IEP should be ruled invalid as a result of any failure to implement the IEP or a portion thereof (IHO Decision at p. 61). Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (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]; see Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]).

Here, a review of the parents' due process complaint notice reveals that the parents are only disputing the appropriateness of the April 2007 and May 2008 IEPs and have not challenged the appropriateness of the May 2006 IEP (Dist. Ex. 1 at pp. 2-3). Moreover, the parents did not raise any allegations in the due process complaint notice regarding the implementation of the April 2006 IEP (see id.). More specifically, the parents did not include any allegations in the due process complaint notice with respect to the district's failure to afford the student the accommodation of a

seat at the front of the bus which resulted in a failure to implement the April 2006 IEP (*id.*). Nor does the hearing record suggest that the parents amended their due process complaint notice to include such claims. Although the student's mother testified that she did not "think" that the student was seated at the front of the school bus, counsel for the parents did not further develop their claim that the failure to insure the student's seat at the front of the bus resulted in a failure to implement the April 2006 IEP during the impartial hearing (Tr. pp. 781-82).<sup>17</sup> Here, the parents first raised the implementation issue in their post-hearing brief, which was submitted after the final day of testimony.<sup>18</sup> Additionally, a reading of the impartial hearing officer's determination does not show that he admitted the parties' post-hearing brief into evidence (IHO Decision at pp. 80-81). Under the circumstances, the impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (*see* 20 U.S.C. § 1415[c][1],[c][2][E],[f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5[i][1][iv],[i][7],[j][1][ii]; 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). Accordingly, I find that the impartial hearing officer exceeded his jurisdiction making a determination on an issue that that was not identified in the parents' due process complaint notice.

Next, before reviewing the appropriateness of the challenged IEPs that were properly raised on appeal, some discussion of the student's progress during the 2006-07 school year is warranted, particularly in light of the parents' claims that in reaching his decision, the impartial hearing officer failed to acknowledge the academic and social difficulties that the student encountered during the 2006-07 school year. Although the parents contend that during the school years in question, the district offered the same program that was offered to the student during the 2006-07 school year, a program under which they claim the student made no progress, a thorough and independent review of the hearing record shows that the hearing record does not support their assertion. Despite the student's "D" grades in ELA, science, and social studies and the student's ELA teacher's description of the student as "inattentive in class," the student's science 6 teacher's comment that the student "chose not to complete his final project," and the student's social studies 6 teacher's comment that the student's "conduct [was] interfering with progress," the report card for the fourth marking period of the 2006-07 school year indicated that the student earned a grade of "A+" in cadet wood, a grade of "A" in unified arts – block I, and a grade of "B" in math 6 (Dist. Ex. 19 at p. 1). I note in particular, the student's grade in math demonstrated that he achieved meaningful progress in the subject, because as indicated in the May 2006 IEP, consistent with evaluative information for math, the student had difficulty with computation, fractional parts, geometric formulas, and multiplication of two-digit numbers, and application of operations and

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<sup>17</sup> The hearing record further indicates that counsel for the district was preparing to object to the student's mother's testimony regarding whether the student was seated at the front of the bus during the 2006-07 school year (Tr. p. 782). Although the impartial hearing officer stated that he was going to make a ruling on the objection, there is no indication in the hearing record that he did so (*id.*).

<sup>18</sup> I also note that the impartial hearing officer did not reference the record close date in his decision as required by state regulations (*see* 8 NYCRR 200.5[j][5][v]).

understanding of concepts (Tr. pp. 55, 281; Dist. Exs. 14 at p. 2, 19 at p. 1; 43 at p. 3; 37 at pp. 2-4; Parent Ex. A at pp. 2-3). Furthermore, accompanying comments from the math teacher reflected progress as the teacher indicated that the student had applied himself more that marking period and that she was "so proud of him when he maintain[ed] a positive attitude" and that, "when [the student] tells himself he can do it – he does!" (Dist. Exs. 19 at p. 1).

Next, a review of the CAW progress reports for the 2006-07 school year as discussed above reflected that the student made progress in his conduct and effort. For the first marking period, the student received a rating of "3," whereby he "rarely" demonstrated the descriptors in any given category; however, by the third and fourth marking periods of the same school year the student received a rating of "2," whereby he "usually" demonstrated the descriptors in any given category regarding conduct and effort (Dist. Exs. 20 at pp. 1-2; 26 at pp. 1-2; 31). Furthermore, at the time of the CAW progress report for the first marking period, also as discussed above, the student made limited progress in all areas addressed (Dist. Ex. 31). By the third and fourth marking periods, the CAW progress reports showed that the student demonstrated satisfactory progress in several of the areas addressed (Dist. Exs. 20 at p. 1; 26 at p. 1).

In addition, the hearing record reflects that in regard to the student's annual goals for the 2006-07 year, the student achieved annual goals relating to following morning classroom routines (Dist. Ex. 18 at pp. 1-3), Regarding academics, the student achieved goals relating to using the correct order of numerical operations and verbally expressing the main idea and then supporting details when presented with a reading selection (*id.*). In the social/emotional domain, the student achieved his goal relating to verbally identifying feelings of frustration and identifying and implementing strategies to deal with each frustration" (*id.*). The student was progressing satisfactorily for all other annual goals in study skills, speech-language, social/emotional, and mathematics, except for solving two-digit by two-digit multiplication problems in which he made some progress (*id.*).

Testimony by the student's special education teacher for the 2006-07 school year revealed that by the end of that school year the student was "progressing very nicely" (Tr. p. 423). She noted that his score at level 3 on the ELA exam in January 2007 was a "passing score," and indicative of his progress (Tr. p. 423; Dist. Ex. 14 at p. 2). The special education teacher also indicated that the student was a full participating member of the classroom and she opined that he enjoyed English class (Tr. p. 423).

In addition, the speech-language specialist who performed the October 2006 speech-language re-evaluation and knew the student from homeroom, speech-language related service sessions, and an afternoon running club testified that the student demonstrated a pattern of inconsistency from day to day (Tr. pp. 482-83, 488-89). She also opined that the student's program was correctly designed to meet his needs because he received "a lot of services in the literacy and language areas" (Tr. p. 499).

The hearing record also includes testimony by the school psychologist who participated in the May 2006 CSE, who worked with the student during the 2006-07 school year, was primarily responsible for his social/emotional/behavioral goals included in the May 2006 IEP for that year, and supervised the development of and drafted his FBA/BIP, indicated that during the 2006-07 school year, she observed the student's social progress as he appeared to become more comfortable

and confident through the sixth grade year (Tr. pp. 277, 281, 289, 291-92, 313; Dist. Exs. 32; 43; 44). She indicated that the student achieved some social goals and was negotiating social interactions better (Tr. p. 313; Dist. Ex. 18 at p. 3). In addition, the school psychologist described the student as "more easily" advocating for himself and able to seek out help when necessary (Tr. p. 289). The school psychologist testified that the student was more willing to come and discuss concerns he might be facing, either in the classroom or in an unstructured environment in the school (*id.*). In addition, the student was able to speak about and process his thoughts regarding frustration and strategies to deal with those frustrations (Tr. pp. 289, 315).

Consistent with testimony by the assistant director, the district secondary supervisor of special education described the physical layout of the school grounds that consisted of five different buildings (central administration, south, east, west, and gymnasium buildings) which could be accessed building-to-building, either indoors or outdoors (Tr. pp. 125, 185). The hearing record reflects the student's core academic classes were located very close together physical proximity to the learning specialist in "south" house and classes such as music, art and gym were in one of the other buildings (Tr. p. 185). The secondary supervisor of special education indicated that in December 2006 the student was assigned an aide to assist him with transitions between buildings because at that time, when outside, he tended to run between buildings and there was concern for his safety and the possibility of falling on the concrete surface (Tr. pp. 185-86). After conducting an FBA/BIP that in part targeted the student's running behavior, the student was assigned a building level aide for transitioning between buildings and to assist him in keeping his body in control and in walking from class to class when outside of the south house (Tr. pp. 183, 191-92). The secondary supervisor of special education indicated that towards springtime of the 2006-07 school year, the student's conduct during transitions between school buildings was "much improved" and he no longer needed the assistance of the aide for those transitions (Tr. p. 192).

Furthermore, staff comments included in the May 2006 IEP reflected that during the 2006-07 school year, with modifications, accommodations and supports the student made good academic progress in writing, and with reading comprehension questions (Dist. Ex. 43 at p. 5). The student was able to understand concepts and participate in class discussions, was willing to accept help from adults, was able to sustain his attention during class activities, participate in group activities, and appropriately ask for breaks when needed (*id.*). The May 2006 IEP also reflected that the student was able to return to a text to find critical information and met all of his writing goals worked on with the learning specialist (*id.*). Additionally, at the time of the May 2006 CSE meeting the occupational therapist indicated the student's graphomotor abilities "significantly improved" (*id.* at p. 6). The student's sensory processing skills improved as the student developed self-compensatory strategies to address sensory seeking needs (*id.*). Additional improvement was also noted in the student's fine and gross motor planning, bilateral coordination, and sensory processing (*id.*). Based on the above, the hearing record illustrates that the student made academic and social and emotional progress during the 2006-07 school year.

Turning next to the challenged IEPs, the impartial hearing officer found that the district presented credible evidence that the programs offered to the student for the 2007-08 and 2008-09 school years were appropriate and would have conferred meaningful educational benefits on him (*see* IHO Decision at p. 79). As set forth in greater detail herein, although for different reasons, I concur with the impartial hearing officer's ultimate conclusion that the student was offered a FAPE in the LRE during the 2007-08 and 2008-09 school years.



I begin by reviewing the April 2007 IEP. The assistant director who chaired the April 2007 CSE subcommittee meeting testified that the program recommended for the student for the 2007-08 school year addressed the student's academic strengths and weaknesses, provided the student with the appropriate level of support and remediation, and helped him to increasingly access the general education curriculum (Tr. pp. 33, 77; Dist. Ex. 23 at p. 1). A review of the April 2007 IEP shows that it accurately depicted the student's present levels of academic performance gleaned from current evaluative data before the CSE subcommittee. The assistant director testified that as it was the student's "re-evaluation year," the April 2007 CSE subcommittee reviewed the November 2006 psychological, educational, speech-language evaluations, and social history, as well as the student's report card, and the December 2006 FBA/BIP (Tr. pp. 60-61; Dist. Exs. 23 at pp. 4, 7; 29; 35; 36; 39). The resultant IEP reflected current evaluative data and descriptions of the student consistent with the educational, psychological and speech-language evaluation reports as previously discussed, and described the student's present level of performance (Dist. Ex. 23 at pp. 3-5, 7). The April 2007 IEP indicated that cognitively, the student performed in the low average range on the WISC- IV with significant strengths and weaknesses noted (*id.* at p. 3). According to the April 2007 IEP, the student demonstrated relative strength in his abstract reasoning skills and significant weakness on tasks tapping his short-term memory (*id.*). The April 2007 IEP also revealed that the student's overall score on the WISC – IV should be interpreted with caution since it was averaging together disparate scores (*id.*). In regard to the student's speech-language abilities, the April 2007 IEP reflected that the student continued to have difficulty following multi-step directions, remembering, listening, comprehending and processing information (*id.*). Additionally, the April 2007 IEP noted that the student experienced auditory "overload" with concomitant difficulties attending, focusing and being distracted by himself and others and that the student's word finding behaviors interfered with his expressive language skills, which were more developed than his receptive language skills (*id.*). In reading, the April 2007 IEP stated that the student demonstrated appropriate decoding skills sounding out words phonetically; however, at times, he tended to read fast, "blurring" words and rushing through punctuation (*id.*). The April 2007 IEP also indicated that the student read all material at the same rate (*id.*). In regard to reading comprehension, the April 2007 IEP reflected that although the student demonstrated the appropriate ability to read short passages for meaning, he might not recognize cause and effect relationships and had difficulty stating the main idea (*id.*). According to the April 2007 IEP, the student did not recognize when comprehension was not taking place and he frequently became distracted while reading, something that further affected his comprehension ability (*id.* at pp. 3-4). In regard to the student's math abilities, the April 2007 IEP described the student as more confident in his math facts, but that he confused multiplication and division (*id.* at p. 4). Although the student was able to evaluate answers for reasonableness and he understood and carried out individual math skills, the student had difficulty when more advanced math concepts required multiple skills to be applied at once (*id.*). Additionally, the April 2007 IEP noted that lack of homework completion affected repetition and practice of these skills so that the student tended to get overwhelmed and would lose confidence (*id.*). Without adult support, the resultant IEP reflected that the student had difficulty comprehending the required operation in word problems and that the student was easily confused with multi-step problems (*id.*). In regard to written language, the April 2007 IEP reflected that the student demonstrated the ability to write simple sentences that satisfied the demands of a task; however, his writing mechanics, spelling and punctuation were weak (*id.*). The April 2007 IEP further indicated that the student had good

background knowledge, and was able to put more details into his writing when using a word processor (id.).

Moreover, the hearing record reflects that the April 2007 CSE subcommittee identified the student's needs in accordance with his aforementioned present levels of performance. The April 2007 IEP indicated that cognitively, the student required information broken down for him, especially if such information was presented only verbally, and repetition of information (Dist. Ex. 23 at p. 4). It further noted that given that the student's working memory was weak, too much information would be overwhelming to him (id.). Speech-language needs included on the April 2007 IEP were for the student to improve his ability to attend, listen, process and comprehend information, including following multi-step directions or instructions (id.). The April 2007 CSE subcommittee determined that the student required listening tasks repeated, rephrased or broken down, and that he benefited from clear and concise expectations and instructions (id.). Academically, for reading, the April 2007 IEP revealed that the student needed to increase inferential skills and content area reading (id.). For math, the student needed to decide which operation was required to solve a problem, apply that operation and evaluate if the answer was reasonable, as well as to increase his ability to solve multi-step word problems (id.). For written language, the April 2007 IEP directed that the student needed to increase his writing skills by adding detail and using correct punctuation (id.). In regard to the student's social development, the April 2007 IEP reflected that the student continued to require structure and support from adults to model appropriate social situations (id.). In addition, the April 2007 IEP noted that the student required assistance navigating social interactions and understanding social nuances, and that he continued to benefit from group counseling sessions where he could rehearse and practice appropriate interactions with peers (id. at pp. 4-5). According to the April 2007 IEP, the student had management needs, because he was distractible externally and internally, and that he benefited from implementing techniques such as walking around the room, taking breaks, or getting a drink of water to help deal with sensory overload or the need to expend extra energy (id. at p. 5). In addition, the student continued to require reminders and refocusing during academic tasks that were more frustrating for him (id.). The April 2007 IEP further prescribed that all of the student's assignments and tasks must be broken into small, sequential chunks which must be repeated for clarity and that a separate workspace could be available for the student to successfully participate and complete assignments (id.).

Next, contrary to the parents' assertion that the goals listed in the April 2007 IEP were consistent with the student's needs, a review of the April 2007 IEP shows that it included annual goals that were measurable and aligned with his needs. 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, the annual goal addressing the student's needs with respect to study skills directed that the student would follow a classroom morning routine of independently working on seat-time activity (Dist. Ex. 23 at p. 7). Annual goals for reading included that when given a reading passage, the student would read it, paraphrase it and orally state the main idea and answer four "who, what, where, when or why questions" regarding the passage (id. at p. 8). An additional reading goal specified that the student would answer three comprehension questions from factual materials (e.g., newspapers, maps, brochures)

and content area textbooks (e.g., social studies, science) that demonstrated understanding of what has been read which included distinguishing between relevant and non-relevant material (id.). Annual goals for mathematics addressed the student's need to solve problems of three-digit dividends and two-digit divisors and that when presented with different types of graphs, the student would discuss appropriate conclusions and make predictions from each type of graph (id.). An additional goal addressed the student's need to improve his ability to solve multi-step word problems (Dist. Ex. 23 at p. 8). Turning to the annual goals which address the student's speech-language deficits, one goal focused on the student's need to express conclusions, discuss main ideas, convey expectations, and provide descriptions to answer questions accurately about his story or event, when questioned by the therapist (id. at pp. 8-9). An additional speech-language goal focused on the expectation that the student would follow three-step directions presented orally with no more than one teacher prompt (id. at p. 9). Another goal addressed the student's need to sequence and relate information presented orally in a logical manner when telling a story from visually presented stimuli or when telling narratives (id.). Lastly, the April 2007 IEP contained a goal that the student would verbally express the main idea and then supporting details, when presented with a reading selection (id.). Annual goals for social/emotional/behavioral concerns addressed the student's need to verbally identify three feelings of frustration, and identify and implement strategies to deal with each frustration (id.). The April 2007 IEP also contained a goal addressing the student's need to communicate and interact in a socially acceptable manner with peers (e.g., appropriate eye contact, listening without speaking, engaging in reciprocal conversation) (id.). Furthermore, the April 2007 IEP specified which type of service provider would be primarily responsible for implementing each goal with the student (id. at pp. 7-9). For example, although the special and regular education teachers were primarily responsible for the implementation of most of the goals, the April 2007 IEP indicated that the special and regular education teachers and aide were primarily responsible for one of the mathematics goals (id. at p. 8). The speech-language related service provider was primarily responsible for implementing the speech-language goals, but she also shared primary responsibility for some annual goals with the special education teacher (id. at pp. 8-9). Next, the special education teacher and/or psychologist/social worker were primarily responsible for the annual goals addressing the student's social/emotional/behavioral needs (id. at p. 9). In addition, testimony by the assistant director and school psychologist indicated that although some of the goals were carried over from the previous school year's IEP (2006-07 school year), the evaluation criteria for the some goals changed so that in order to be successful and achieve criteria during the 2007-08 school year, the student would need to exert greater independence with less assistance from an adult (Tr. pp. 93-95, 314; compare Dist. Exs. 23 at pp. 7-9, and 43 at pp. 10-11). I further note that the hearing record supports the district's contention that the goals enumerated in the April 2007 IEP were developed with feedback from each of the CSE subcommittee members, including the student's mother, who did not have any questions regarding the goals (Tr. p. 74; Dist. Ex. 23 at p. 5). Based on the above, the hearing record reflects that the April 2007 IEP contained annual goals that were appropriate to meet the student's needs and that they provided sufficient specificity to enable the student's teachers and related service providers to understand the CSE subcommittee's expectations with respect to each goal and what the student would be working on over the course of the school year (see Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*9 [S.D.N.Y. July 3, 2008]); Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096; Application of a Student with a Disability,

Appeal No. 08-086; Application of a Child with a Disability, Appeal No. 07-117; see also M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]).

The hearing record also substantiates the district's argument that the April 2007 CSE subcommittee added program modifications/accommodations/supplementary aids and services, assistive technology, and testing accommodations to the April 2007 IEP that were consistent with the aforementioned evaluations and addressed the student's array of attention and learning needs that encompassed his learning disability (Dist. Ex. 23 at pp. 2-3). In addition, the hearing record reflects that had the student attended the recommended program for the 2007-08 school year, he would have received building level support services open to regular and special education students in the CAW class taught by the student's speech-language specialist as well as in the "CORE" class, a daily academic building level support class taught by the student's special education teacher (Tr. pp. 57, 247-49, 396). The hearing record further reveals that during "CORE" class, the special education teacher reviewed, previewed and re-taught information, and that she addressed skill remediation and worked on reading, writing and math (Tr. pp. 248-50).

Moreover, the April 2007 CSE subcommittee's program recommendations, as noted above, combined with its related services recommendations, reflected its intent to provide the student with individualized support as he accessed the general education curriculum (Dist. Ex. 23 at pp. 1-2). The assistant director opined that the recommended program and related services were appropriate for the student at the time of the April 2007 CSE subcommittee meeting (Tr. p. 77). She further indicated that the recommended program addressed student's academic strengths and weaknesses, while providing him with the appropriate level of support and remediation as he increasingly accessed the general education curriculum (*id.*). The school psychologist opined during testimony that had the student attended seventh grade in the district middle school, the continued recommendation for weekly psychological counseling would have been appropriate for the student in that it would have continued addressing the student's ongoing need to work on frustration tolerance, impulsivity, and social skills training (Tr. p. 316; Dist. Ex. 43 at p. 1). The school psychologist also stated that in its entirety, the program developed for the student for the 2007-08 school year was appropriate because "it would [have] served his needs as a learner, including his social and emotional needs as well as his learning needs, in a supportive environment" (Tr. p. 317). The student's speech-language specialist opined that given what she observed of the student during the 2006-07 school year, the program recommended for him for the 2007-08 school year would have "absolutely" been appropriate for him because, the student became a valued member of the middle school community and had a lot to offer, particularly when he was interested in a topic (Tr. p. 516). The district speech-language specialist also noted that continued speech-language services would be of value for the student because his strengths needed to be built on within the language domain and that some of his specific weaknesses went hand-in-hand with attention difficulties and distractibility (Tr. pp. 516-17). She further explained that the student had some "definite weaknesses" that should be remediated (Tr. p. 517). In light of the foregoing, the hearing record reflects that through the proposed program modifications and accommodations, the April 2007 IEP addressed the student's primary areas of concern, particularly in the academic and social-emotional domains.

Turning next to the parents' claim that the district never fully implemented a BIP regarding the student's classroom behavior, the hearing record demonstrates otherwise. When a student's behavior impedes his or her learning or that of others, the CSE must consider positive behavioral

interventions and supports, and other strategies, to address such 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, 2008 WL 2736027, at \*8; 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).<sup>19</sup> In addition to the federal requirement, State regulations require that an evaluation 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]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at \*4 [S.D.N.Y. 2009]). 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]).<sup>20</sup>

In the instant case, according to the school psychologist, when the student was in sixth grade during the 2006-07 school year, he demonstrated an inconsistent ability to remain focused and attentive in class both internally and externally (Tr. pp. 290-91). During that school year, the student's instructional team appropriately developed an informal behavior chart to "look at targeted areas of behavior, to focus on them and rate [the student's] behavior so that he would become more aware of his own behavior within the classroom setting" (Tr. pp. 291; see also Tr. pp. 292-96). Testimony by the school psychologist indicated that the student was initially responsible for the informal behavior chart; however, that arrangement did not prove to be as successful for the student as anticipated (Tr. p. 291). Consequently, as discussed in detail above, on December 11, 2006 when the student was in sixth grade, the team of professionals working with him in the district middle school formally developed an FBA and BIP (Tr. pp. 291-92; Dist. Ex. 32 at p. 1). The FBA/BIP indicated in part:

Due to the fact that it proved very difficult for [the student] to be responsible for his own behavior plan, a new behavioral intervention plan was created. (Dist. Ex. 32 at p. 3).

The December 2006 FBA/BIP also indicated in part that the then-current behavior chart would examine the same three behaviors as set forth in the previous (informal) plan (id.). However, and to the district's credit, the FBA/BIP reflected that the student's team recognized his difficulty as noted in the referenced documentary evidence, and rather than the student being

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<sup>19</sup> 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.

<sup>20</sup> 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]).

responsible for the behavior monitoring documents, "the teachers [would be] responsible for the piece of paper" (id.).

The district school psychologist indicated that she consulted and reviewed the FBA with the student's mother after the FBA was completed, and she did not recall that the student's mother had any questions regarding the administration of the resultant BIP (Tr. pp. 296-97). She also indicated that she provided the student's teachers with a weekly behavior monitoring document to monitor the student's targeted behaviors, collect information provided by the teachers on the behavior monitoring document, and subsequently review the information with the student during counseling sessions or at a separate time (Tr. p. 297; Dist. Ex. 33 at pp. 1-41). The school psychologist also noted that she shared the student's progress with his parents and that she was in frequent contact with the student's mother (Tr. pp. 297, 300). According to the school psychologist, the student actively participated in discussions about the information on the behavior monitoring document and that he was "oftentimes interested in the feedback" submitted by his teachers (Tr. p. 298). Although the school psychologist described the student's progress as "inconsistent," and she further opined that his progress appeared to correlate with whether the student took his medication, she stated that by March 13, 2008, the student's math teacher decided the behavior monitoring document was no longer necessary for him in her class because the student accomplished his goals in that class on a continual basis (id.). The hearing record also reflects that that December 2006 FBA/BIP was reviewed during the April 2007 CSE subcommittee meeting (Tr. p. 66). Although the April 2007 IEP did not specifically indicate as such, the assistant director testified that the behavior plan was added to the student's program and that the April 2007 CSE subcommittee recommended that the FBA/BIP be continued for the 2007-08 school year (Tr. pp. 76, 118). Based on the above, the parents' claim that the district did not develop an FBA/BIP is not persuasive, given that the hearing record reflects that an FBA/BIP was created by the district with parental input and with the expectation that it would be carried over into the 2007-08 school year (Tr. pp. 118, 293, 296).

Next, the parents assert that the district's failure to include a 1:1 aide with the student's program, rendered the April 2007 IEP inadequate. Conversely, the district maintains that the student did not require a (classroom) aide during his time in the district middle school and the fact that he had a (classroom) aide in elementary school does not provide sufficient evidence as to his needs during seventh and eighth grades. Initially, I note that while in elementary school, the student attended a mainstream classroom without the support of a special education teacher and in that setting, the CSE determined that the student required an aide to help with refocusing (Tr. pp. 45, 55, 86-87; Dist. Ex. 50). However, as discussed below, the hearing record demonstrates that the program the CSE subcommittee recommended for the 2007-08 school year offered the student the support of a special education teacher and a structure that would have accommodated him without the need for a 1:1 aide in the classroom.

The hearing record reflects that had the student attended the district middle school, he would have been offered special education services in a supportive environment that constituted

the student's LRE.<sup>21</sup> As noted above, the district middle school consisted of five buildings (Tr. p. 185). Testimony by the assistant director explained that the district middle school had a total of approximately 900 students and used a "house system" in order to help students transition from the elementary school to the middle school (Tr. pp. 125-26). The assistant director testified that the middle school consisted of three houses that were each divided by separate grade six, grade seven, and grade eight level teams (*id.*). The assistant director indicated that each grade level team in the middle school consisted of approximately 100 students who were then divided into five classes (*id.*).<sup>22</sup> Each grade had its own team of teachers and its own psychologist, as well as its own learning specialist and "an oral clinician,"<sup>23</sup> [who was] attached to it" (Tr. p. 125). According to the assistant director, the team of teachers met with every student on their team in one of the classes (*id.*). In addition, the team met on at least a weekly basis with its learning specialist, psychologist, guidance counselor, and house director to monitor students' progress (*id.*).

Testimony by the assistant director revealed that at the time of the May 2006 CSE meeting, the student's fifth grade teacher participated in that meeting and discussed how at that time, when the student was still in elementary school, they "began to pull the aide back to collect their data on whether [the student] would need that aide's support to transition to middle school" (Tr. p. 128). Based on that collected data and the process the elementary school team followed, the student's fifth grade teacher reportedly indicated that the student did not need the aide's support to make the transition from elementary school to middle school, particularly in light of the program the April 2007 CSE subcommittee recommended for the student for the 2007-08 school year (*id.*). However, as detailed below, the hearing record reflects that the April 2007 CSE subcommittee maintained individualized supports for the student that addressed his needs.

The April 2007 IEP reflected that for the 2007-08 school year, the student was offered a co-teach class for both English and math, consultant teacher direct services for science and social studies, counseling in a small group, an OT consultation, and speech-language therapy (Dist. Ex. 23 at pp. 1-2). The assistant director noted that the April 2007 CSE subcommittee recommended a less restrictive co-teach math class for the student for the 2007-08 school year rather than the 12:1+1 special class for math the student attended during the previous school year (Tr. p. 75; Dist. Exs. 23 at p. 1; 43 at p. 1). As noted above, the hearing record establishes that a co-teach class would have consisted of a regular and a special education teacher on a daily basis (Dist. Ex. 43 at p. 2). The assistant director explained that the April 2007 CSE subcommittee knew that the co-teach program was very supportive program with a learning specialist and the regular education teacher in the classroom every day (Tr. pp. 75-76). She indicated that the learning specialist would support a small cohort of four (special education) students (Tr. p. 75). The assistant director noted that the CSE subcommittee further determined that the learning specialist would provide the adult

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<sup>21</sup> Although the hearing record reflects that the April 2007 CSE subcommittee did not consider a more restrictive setting as a program option for the student, the impartial hearing officer correctly determined that neither federal or State regulation impose any requirement to do so (IHO Decision at p. 60; Tr. pp. 106-07; *see* 34 C.F.R. § 300.115; 8 NYCRR 200.6).

<sup>22</sup> The assistant director also testified that there were more than 300 students in the elementary school that the student attended prior to coming to the middle school (Tr. p. 127).

<sup>23</sup> The hearing record does not define "oral clinician." Testimony by the district speech-language specialist indicated that she sits on many teams within the middle school (Tr. pp. 125, 481).

support that the student needed to preview and review math concepts and processes and could provide the practice that he required as well as prioritize the curriculum and assessments when needed (*id.*). In addition, the assistant director indicated that the student had the daily "CORE" class as a support for him, and that his math skills could be reinforced and practiced there (*id.*).

The hearing record also reflects that the April 2007 CSE subcommittee's related services recommendations offered the student the necessary support for him to make meaningful progress. The assistant director indicated that during the 2007-08 school year, the student would have continued to receive counseling to address his social interactions as well as coping strategies for his impulsivity, in addition to a quarterly OT consultation as a support for teachers in terms of classroom accommodations, and speech-language therapy, as well as continued program modifications and accommodations (Tr. pp. 76-77; Dist. Ex. 23 at p. 2). The assistant director opined that the program recommended by the April 2007 CSE subcommittee addressed the student's academic strengths and weaknesses, gave the student the appropriate level of support and remediation, and helped him to increasingly access the general education curriculum (Tr. p. 77).

In regard to the April 2007 CSE subcommittee's recommendation for a co-teach math class, testimony by the school psychologist indicated that the May 2006 CSE determined that the co-teach program recommended for the student for the 2006-07 school year would have provided the student with the necessary support and structure without an individual aide (Tr. pp. 283-84). Testimony by the student's special education learning specialist indicated that the co-teach math program was a "very supportive" program (Tr. pp. 425-26). Regarding the student's placement in a co-teach math program for the 2007-08 school year, the learning specialist opined that with a certified math teacher and a certified special education teacher in the classroom, the teachers were better able to make accommodations because they were "in the moment" and would gauge what was needed to be done for each student so that they could "reach success" (Tr. p. 425). The learning specialist explained that the teachers were present while students' learning was happening in class and that students' learning could be supported in the CORE class later on in the day (Tr. p. 426). She further explained that the two teachers provided students with a "very strong influence" in math (*id.*). When asked for her opinion specific to her experience in the middle school as to how special education students tended to function in a co-teach math class, the learning specialist indicated that the co-teach math class offered students with skills similar to the student in the instant case the opportunity to learn from the math teacher (*id.*). According to the learning specialist, the co-teach math class gave students opportunity to work with and learn from other students in a different way than hearing a teacher (Tr. pp. 426-27). She further explained that by having a special educator "there in the moment" who could implement changes for a student and make that student feel successful, she consequently saw "so much more progress" (Tr. p. 427). The learning specialist opined that the student would have made "some nice progress" because, "...given the fact that we saw so much progress in sixth grade, and the fact that [the student] would have had so much support in seventh grade again, now knowing the building and routine and the teachers, he was over that learning experience" (Tr. pp. 427-28). According to the learning specialist, the middle school was a "more comfortable environment for him" (Tr. p. 428).

Moreover, contrary to the parents argument that the during the 2006-07 school year, the student made no social progress and experienced many difficulties, the school psychologist testified that the April 2007 CSE subcommittee came to a consensus that by the end of the 2006-07 school year (sixth grade), the student grew and matured socially and emotionally, had achieved



some goals, was more confident and improved his ability to negotiate social interactions better (Tr. p. 313). In regard to the student's social and emotional goals for the 2007-08 school year, the school psychologist indicated that the April 2007 CSE subcommittee raised the criteria for success in his existing goals so that the student would move from moderate adult assistance in order to achieve to independently achieving goals (Tr. p. 314).

In light of the foregoing, the hearing record amply supports the district's assertion that the program recommended by the April 2007 CSE subcommittee was appropriate for the student's educational needs and was reasonably calculated to confer a meaningful educational benefit on him in the LRE. I will next turn my attention to an analysis of the appropriateness of the May 2008 IEP. For many of the reasons listed above, I also find that the May 2008 IEP offered the student a FAPE, such that it was designed to confer a meaningful educational benefit on the student in the LRE.

Initially, I will address the parties' claims regarding the composition of the May 2008 CSE subcommittee. The parents assert that the lack of a speech-language specialist, in addition to a school psychologist, rose to the level of depriving the student of a FAPE. In contrast, the district maintains that the May 2008 CSE subcommittee was properly constituted.

First, although the hearing record establishes that a speech-language specialist did not attend the May 2008 CSE subcommittee meeting, it does not suggest that the lack of a speech-language specialist resulted in a denial of a FAPE to the student (Dist. Ex. 7 at p. 5). What the hearing record does reveal is that the student's Focus teacher from Winston Prep as well as the director of the Focus program participated in the May 2008 CSE meeting by telephone and they were able to report on the student's present levels of performance regarding speech and language (*id.* at pp. 4-5). The hearing record also demonstrates that the May 2008 CSE subcommittee had before it formal and informal assessments conducted by the district's speech-language specialist during the October 2006 reevaluation (Dist. Ex. 7 at p. 4; *see* Dist. Ex. 39). Under the circumstances, the hearing record does not show that the lack of a speech-language specialist at the May 2008 CSE subcommittee meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. I therefore find that the absence of a speech-language specialist at the May 2008 CSE subcommittee meeting did not rise to the level of a denial of a FAPE (*see* 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; *see also* Application of the Bd. of Educ., Appeal No. 09-124; Application of the Bd. of Educ., Appeal No. 09-101; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student with a Disability, Appeal No. 08-064).

Regarding the lack of a school psychologist at the May 2008 CSE subcommittee meeting, the hearing record reflects that a school psychologist did not participate in the meeting (Dist. Exs. 7 at pp. 5; 8). Under New York State law, subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). The subcommittees are required to evaluate each student with a disability at least annually and report to the CSE (Educ. Law §

4402[1][b][1][d]; 8 NYCRR 200.3[c][6]). In addition, the subcommittee must immediately refer to the CSE, upon written request of the parent, any matter in which the parent disagrees with the subcommittee's recommendation concerning a modification or change in the identification, evaluation, educational placement, or provision of a FAPE to the student (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][5]). Each subcommittee is required to include as members: the parents; one regular education teacher of the student (if the student is or may be participating in the regular education environment); one special education teacher of the student, or, if appropriate, a special education provider of the student; a representative of the school district involved in special education; an individual who can interpret evaluation results; such other persons having knowledge or special expertise regarding the student as the school district or parents shall designate; if appropriate, the student; and a school psychologist whenever a new psychological evaluation is being reviewed or a change to a more restrictive program is being considered; and such other persons having knowledge or special expertise regarding the student (Educ. Law § 4402[1][b][1][d]; see Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[c][2]).

In the instant matter, the hearing record reflects that the May 2008 CSE subcommittee neither reviewed a new psychological evaluation, nor changed the student's recommendation to a more restrictive program than what was set forth in the previous April 2007 IEP (compare Dist. Ex. 7 at pp. 1-2, 5-6, with Dist. Ex. 23 at pp. 1-2, 5-6).<sup>24</sup> Therefore, the attendance of a school psychologist was not required by State regulation at the May 2008 subcommittee meeting. Moreover, as noted above, the hearing record reflects that the student's Focus teacher and the director of the Focus program at Winston Prep participated in the May 2008 CSE subcommittee meeting by telephone and were able to report on the student's academic and social/emotional progress during the meeting (Dist. Ex. 7 at pp. 5-6). The student's mother also offered input regarding the student's academic and social/emotional status, which the May 2008 CSE subcommittee took into consideration in developing the student's program.

Furthermore, I find that under the circumstances of this case, the hearing record does not demonstrate that the lack of a school psychologist at the May 2008 CSE subcommittee meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. I therefore find that the hearing record supports the impartial hearing officer's conclusion that the lack of a school psychologist at the May 2008 CSE subcommittee meeting did not rise to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Bd. of Educ., Appeal No. 09-124; Application of the Bd. of Educ., Appeal No. 09-101; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student with a Disability, Appeal No. 08-064).

The hearing record further reflects that the May 2008 IEP was developed with active participation by district personnel and via telephone, staff from Winston Prep for the entire meeting, as well as by the student's mother (Tr. pp. 206-08; Dist. Ex. 7 at p. 5). Testimony by the secondary supervisor of special education who chaired the May 2008 CSE subcommittee meeting indicated that prior to the meeting and upon request by the district, Winston Prep staff submitted

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<sup>24</sup> The hearing record does not suggest that the student's mother objected to proceeding without a school psychologist at the May 2008 CSE subcommittee meeting (see Dist. Ex. 7 at pp. 5-6).

a school report for the student's 2007-08 school year for the CSE subcommittee's review (Tr. pp. 207-09; Dist. Ex. 9). As a result, the hearing record shows that the May 2008 IEP reflected an accurate depiction of the student's present levels of academic and social/emotional present levels of performance. According to the secondary supervisor of special education, the May 2008 CSE reviewed reports from Winston Prep that described the student's strong decoding and encoding skills (Tr. p. 210). The reports from Winston Prep also discussed the student's significant attention weaknesses and how such weaknesses affected the student's behavioral regulation, self-monitoring, and his ability to sustain his attention, which affected the student's social and academic development, and the student's struggle with social skills (*id.*). In addition the May 2008 CSE subcommittee discussed the student's skills, and how Winston Prep staff worked with him on abstract reading comprehension, inferential thinking, mathematical problem solving, and multi-step problems (Tr. pp. 210-11). The secondary supervisor of special education also noted that at the May 2008 CSE subcommittee meeting, she invited the teachers from Winston Prep to share the student's progress for the 2007-08 school year (Tr. p. 211). Consistent with comments included in the May 2008 IEP, the secondary supervisor of special education indicated that the teachers from Winston Prep discussed the student's abilities and needs (Tr. pp. 211-13; Dist Ex. 7 at pp. 5-6). According to the May 2008 IEP, the teachers from Winston Prep reported that the student responded to the small class environment and how their pacing addressed the student's low processing and working memory difficulties (Dist. Ex. 7 at p. 5). Winston Prep staff also reported to the May 2008 CSE subcommittee that although the student was offered frequent breaks, he could become "disregulated," and that the student might need to be redirected on class topics (*id.*). As reflected on the May 2008 IEP, the student's teachers from Winston Prep also advised the May 2008 CSE subcommittee that the student continued to have difficulty transitioning after the weekend as well as in between classes, and that he continued to struggle with focusing, being fidgety, and paying attention to teachers (*id.*). Winston Prep staff also noted that the student "laugh[ed] excessively" at times and demonstrated inappropriate verbalization and random sounds in class (*id.*). Socially, the May 2008 IEP reflected that the teachers from Winston Prep reported to the May 2008 CSE subcommittee how the student's impulsivity and communication skills continued to lead to social conflicts and that the student could become frustrated when "things [didn't] go his way" (*id.* at p. 6). The resultant IEP further reflected that the student did not yet have the necessary coping skills to manage conflicts that arose through social difficulties he encountered (Tr. p. 216; Dist. Ex. 7 at p. 5).

The secondary supervisor of special education testified that based upon her knowledge of the student from the 2006-07 school year when he attended the district middle school, she was not surprised by the Winston Prep teachers' aforementioned description of the student (Tr. p. 213). Testimony by the secondary supervisor of special education and the May 2008 IEP reflected that the student's decoding and encoding skills were age appropriate and within normal limits, but that he struggled with the comprehension of expository non-fiction text (Tr. p. 215; Dist. Ex. 7 at p. 5). However, as noted by the secondary supervisor of special education and as further indicated in committee meeting notes contained in the resultant IEP, the student was making progress with multiplication and division facts, in developing paragraph skills, and in understanding the rules of grammar (Tr. p. 215; Dist. Ex. 7 at pp. 5-6). In addition, the hearing record demonstrates that despite having made steady gains in math, the student needed continued work with respect to word problems, calculation, and computation skills (Tr. p. 215; Dist. Ex. 7 at p. 6). The hearing record further reflects that the student struggled with the mechanics of writing, and that he needed to work on pre-writing skills including, brainstorming techniques, using outlines and graphic organizers to

further develop his writing (*id.*). Socially, the May 2008 IEP reflected information consistent with what was reported by Winston Prep staff (Dist. Ex. 7 at p. 6). For example, the May 2008 IEP noted that the student needed support to navigate and manage social conflict as well as help and support in being aware of, monitoring, and regulating his behaviors, especially when he did not get his way and became frustrated (Tr. p. 216; Dist. Ex. 7 at p. 6).

Next, a review of the May 2008 IEP demonstrates that the May 2008 CSE subcommittee developed annual goals that targeted the student's primary areas of need based on information presented by Winston Prep staff and the student's mother (Tr. pp. 216-217; Dist. Ex. 7 at pp. 7-9). In regard to the development of the student's goals listed in the May 2008 IEP, the secondary supervisor special education testified as follows:

In collaboration with the Winston Prep teachers and [the student's mother], we went through line-by-line of all of the present levels of performance in terms of -- in the academic areas, in the social areas, in the physical development areas, in the management areas. And after, with feedback from Winston Prep, the Winston Prep teachers, and [the student's mother], and from what I knew about [the student] when he was here in sixth grade, we collaboratively reviewed every single goal and developed every single goal

(Tr. p. 217).

In light of the foregoing, the hearing record illustrates that the goals listed in the May 2008 IEP were developed with meaningful parent participation (see Cerra 427 F. 3d at 194-95).

Similar to the April 2007 IEP, the May 2008 IEP offered the student a program that was reasonably calculated to meet his special education needs, while offering him access to the general education curriculum. Consistent with reports from Winston Prep, which reflected that despite his progress in reading and writing, the student exhibited continued deficits in comprehending non-fiction texts and required support in writing, the May 2008 CSE subcommittee recommended a co-teach English class for the student's 2008-09 school year (Dist. Ex. 7 at pp. 1, 5-6). More specifically, the secondary supervisor of special education testified that the May 2008 CSE subcommittee recommended the co-teach English class for the student for the 2008-09 school year because he had "real strengths" in the language arts area, but the May 2008 CSE subcommittee determined that the student needed the presence of a special educator for special instruction, so that he could "see it, hear it, do it," and so that his attention and impulsive behaviors could be addressed (Tr. pp. 217-18). The secondary supervisor of special education also testified that the May 2008 CSE subcommittee recommended the co-teach math class for the student because his greatest difficulty was in math, and the May 2008 CSE subcommittee opined that he needed access to a teacher certified in math "with the special education teacher present every single day to offer that specialized instruction" (Tr. p. 218). She also testified that there would be fewer students with IEPs in the recommended math class as compared to his prior year's sixth grade class, which the hearing record reflects had four students that required the support of the special education specialist (Tr. pp. 75, 218). In addition, the secondary supervisor of special education indicated that the May 2008 CSE subcommittee recommended consultant teacher direct model services for science and social studies because the student needed a level of intervention whereby the special education

specialist played a key role in providing specialized instruction "everywhere," encompassing the student's needs through lesson planning, delivery of instruction, assessment, and homework, as well as in addressing the student's needs in relation to attention, behavior, and impulsivity (Tr. pp. 218-19). The hearing record also shows that the May 2008 CSE subcommittee made its related services recommendations based on information offered by the student's teachers from Winston Prep (see Tr. p. 219). In order to address the student's continued struggle with social skills, how his impulsivity and "disregulated" behavior affected him socially, and that he needed to role play in order to develop coping skills and strategies to engage in socially appropriate ways with peers, the May 2008 CSE subcommittee recommended continuing small group (5:1) counseling one time per week for 30 minutes with the school psychologist, and added a weekly 1:1 30-minute counseling session with the school psychologist (Tr. pp. 219-20; compare Dist. Ex. 7 at p. 2, with Dist. Ex. 23 at p. 2). The May 2008 CSE subcommittee recommended continuing speech-language therapy for the student, because upon a review of his present levels of performance, the CSE subcommittee noted that difficulties with speech and language remained (Tr. p. 220; Dist. Ex. 7 at pp. 5-6). The May 2008 CSE subcommittee also recommended an OT consultation on a quarterly basis to provide the student's teachers with strategies to address the student's OT needs in the classroom (Tr. pp. 221-22; Dist. Ex. 7 at p. 2). The hearing record reflects that the secondary supervisor of special education thoroughly explained at the May 2008 CSE subcommittee meeting that the program modifications recommended by the May 2008 CSE subcommittee that, like the April 2007 IEP, addressed the student's difficulties with attention (Tr. pp. 220-21). For example, had the student attended the recommended program for the 2008-09 school year, he would have received a modified curriculum specifically in math (his most difficult subject),<sup>25</sup> whereby the team would have prioritized essential concepts, skills, and understandings for which the student would be held accountable and then assessed (Tr. p. 221; Dist. Ex. 7 at p. 2). In addition, the May 2008 CSE subcommittee offered the student additional time to complete tasks and breaks to move around (Dist. Ex. 7 at p. 2). The May 2008 IEP also mandated that the student receive prompts, redirection, and refocusing and that as a result of the student's distractibility, he be provided with a copy of class notes (id.). Lastly, the May 2008 IEP required that the student be provided with a BIP as a way to monitor the way in which his activity level and impulsivity interfered with his academic functioning (Tr. p. 221; Dist. Ex. 7 at pp. 2-3). Furthermore, I note that according to the secondary supervisor of special education, had the student attended the district's middle school for the 2008-09 school year, similar to the program offered in the April 2007 IEP, he would have continued to receive academic support through the CORE class (Tr. pp. 248-49).

The secondary supervisor of special education opined that the student's program recommended by the May 2008 CSE subcommittee for the 2008-09 school year was comprehensive and appropriate for the student because the recommended program was highly supportive, such that it had a special educator present in all of the student's academic subjects and offered the student "intense" modifications, accommodations, and related services (Tr. pp. 223-24). Moreover, based on what she knew about the student from when she worked with him at the middle school when he was in sixth grade during the 2006-07 school year, the secondary supervisor of special education opined that the recommended program for the student by the May 2008 CSE

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<sup>25</sup> The hearing record reflects that the student's homework assignments in English, social studies, and science would have been reduced in quantity by 50 percent (Tr. p. 221). Math homework would have been modified in content (id.).

subcommittee supported the student's needs in all areas and "show[ed] him working toward his goals in a more sophisticated manner" (Tr. p. 428; Dist Ex. 7). Under the circumstances presented above, the hearing record reflects that the student was offered a program that was reasonably calculated to provide educational benefits to the student and was designed to enable him to make progress in the LRE.

Based on the above, I find that the district's recommended programs for the 2007-08 and 2008-09 school years offered the student a FAPE in that they offered individualized educational program designed to meet the unique needs of the student and were reasonably calculated to confer educational benefits in the LRE. Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether Winston Prep was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

**THE APPEAL IS DISMISSED.**

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

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**PAUL F. KELLY  
STATE REVIEW OFFICER**