



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-053

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

Appearances:

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

DECISION

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

At the time of the impartial hearing, the student was enrolled in the tenth grade at York Prep (Tr. pp. 165, 206). The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). In addition, the student was receiving privately obtained speech-language therapy (Tr. pp. 235-36). The student reportedly exhibits severe dysfluency; however, the hearing record indicates that the student's speech-language difficulties do not interfere with his functioning in the classroom (Tr. p. 197; Dist. Ex. 8 at pp. 3-4).¹ Cognitively, the student reportedly functions in the average range of intelligence across domains; however, his performance in the areas of social comprehension and processing speed are noted to be "slightly lower" (Dist. Ex. 8 at p. 4). The student has also been reported to exhibit a history of sensory integration difficulties, attentional variability, and language and motor delays (id.). Although the student's expressive and pragmatic language skills are reportedly within normal limits, his receptive language skills fall in the mildly deficient range (id.). Academically, the student reportedly exhibits grade level skills with regard to reading and writing, and his math skills appear close to grade level for math concepts and

¹ The hearing record describes dysfluency as "a stuttering difficulty" in terms of speech (Tr. p. 26).

applications; however, the student's computational skills have been characterized as "slightly weaker" (*id.* at p. 3). Although the student has been described as a "very social child with no emotional difficulties," he has also been characterized as "very impulsive" and as someone who tends to get over-involved in other people's business and who "rushes through things" (*id.* at p. 5). The student's reported attentional difficulties appear to impede his enjoyment of learning (*id.*). The student's eligibility for special education services as a student with a speech or language impairment is not a matter in dispute in this appeal (*see* 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1 [zz][11]).

According to the student's mother, she noticed the student's stuttering at a very young age, and following a series of evaluations, the student began receiving speech-language therapy and occupational therapy (OT) (Tr. p. 201; Dist. Ex. 3 at p. 1).² The student continued to receive speech-language therapy until he enrolled in a private preschool (Tr. p. 201). From kindergarten through eighth grade, the student continued to attend private schools (Tr. pp. 206, 223).

On April 4, 2007, the student underwent a private speech-language evaluation (Dist. Ex. 3). The speech-language pathologist conducted the evaluation through a "conversational and oral reading sample," and noted that she asked the student questions that required single-word answers in order to determine fluency on single-word responses (*id.* at p. 1). The speech-language pathologist characterized the student as a bright young man, who related well and was very mature (*id.*). According to the speech-language pathologist, the student recalled that he became dysfluent at age six, and that the student knew when he was about to "block" on a word, because the student felt tension in his throat (*id.*). The student described himself to the speech-language pathologist as "a perfectionist, who has a very bad temper" (*id.*). The speech-language pathologist concluded that the student was "severely dysfluent" in more than 95 percent of utterances, which included single-word and sentences (*id.*). She further found that the student was equally dysfluent in oral reading and that his dysfluency manifested itself in the following ways: severe tension in articulators and laryngeal region; blocking of sounds and straining to push the sound out; tensing and locking of lips; bodily movements; shaking and trembling of his upper body; tongue clicking and locking his tongue on his palate (*id.* at pp. 1-2). The speech-language pathologist further described the student's speech as "choppy [...] lacking prosody, because of the extreme dysfluency" (*id.* at p. 2). In summary, the speech-language pathologist noted that the student had a severe speech disorder characterized by stuttering on almost every utterance, which was accompanied by numerous secondary symptoms (*id.*). The speech-language therapist recommended that the student undergo speech-language therapy two to three times per week and her report set forth long-term and short-term goals for the student's treatment (*id.*).

Beginning on July 16, 2007 and ending on September 6, 2007, over a four-day period, a private psychologist conducted a psychological evaluation of the student (Dist. Ex. 2 at p. 1). According to the psychologist, the student presented as a mature, engaging boy, who was highly motivated to put forth his best effort (*id.* at p. 8). The report further indicated that the student's teachers described him as "an enthusiastic learner and active participant in class activities and discussions" (*id.*). The private psychologist noted that the student had "obviously benefitted" from

² The hearing record does not indicate the frequency or duration of the student's speech-language therapy sessions or the duration or frequency of his OT sessions at that time (Tr. p. 201).

a small classroom environment and the instructional supports offered at the private school he was attending at the time (id.). The private psychologist determined that the student performed within the average range on a test of general intellectual ability (id.). Although the student's perceptual reasoning abilities and nonverbal problem solving skills were "for the most part, solidly above average," and therefore somewhat better developed than the student's linguistic functioning, the private psychologist did not identify any significant difference between the verbal comprehension and perceptual reasoning subtest scores (id.). The private psychologist concluded that, verbally, the student's practical social judgment, word definition skills, and fund of information were average, but that the student demonstrated above average abstract thinking capacities (id.). The private psychologist also found that the student's working memory and processing speed skills both met age expectations (id.). Regarding academic achievement, the private psychologist determined that the student's word reading and written expression were both at grade level, and that the student performed above grade level in numerical operations (id.). According to the private psychologist, the student exhibited weakness when required to read relatively lengthy passages (id.). The private psychologist further opined that with less information to process, the student's ability to make inferences improved, and accordingly, the student's reading comprehension skills improved (id.). When the information presented to the student was meaningful and thematically linked, the private psychologist reported that the student exhibited average memory skills, but he exhibited below average memory skills when the verbal and visual stimuli were discrete and not part of a narrative (id.). Additionally, the private psychologist determined that the student's performance was particularly compromised when the tasks were less structured and the student was unable to comprehend how disparate pieces fit together, and further observed that without explicit guidelines, the student had difficulty organizing the task, planning the approach, making use of feedback and flexibly adjusting his strategies in order to analyze and work effectively with the information presented to him (id.).

As a result of the student's difficulties with executive functions, the private psychologist offered the following recommendations: placement for the student in an academic environment with small classes; remedial-based instruction with lengthy reading assignments; provision of strategies for enhancing recall skills; and help working effectively with less structured assignments and lessons (Dist. Ex. 2 at pp. 8-9). The private psychologist further explained that the student required individualized assistance to understand task expectations and how to develop a range of successful work strategies that the student could flexibly apply (id. at p. 9). In addition, the private psychologist recommended that the student receive extended time on tests to compensate for his weaknesses in executive functions (id.).

On February 26, 2008, the parent signed a student enrollment contract with York Prep, selecting a tuition payment option requiring a non-refundable deposit to be paid to the school by March 13, 2008 (Parent Ex. G at p. 1). For an additional fee, the parent further elected to enroll the student in York Prep's Jump Start program, which the hearing record describes as a supplemental program designed for students with special learning needs, including specific learning disabilities or "more executive functioning deficits" (Tr. p. 164). According to the hearing record, the Jump Start teacher supported the student by providing whatever supportive help was needed for the student to function in the classroom (Tr. pp. 164-65).

In a March 4, 2008 speech-language progress report, the student's private speech-language pathologist described the student's progress as "minimal;" however, she also indicated that the

student had made some progress in structured activities (Dist. Ex. 4 at p. 1). The private speech-language pathologist stated that the student had a severe stuttering disorder with numerous secondary characteristics (id.). According to the private speech-language pathologist, the student was able to use "easy onset" and the "air flow technique" for single-word utterances and oral reading; however, she further reported that there was no carryover into conversation (id.). The private speech-language pathologist also reported that the student required constant prompting and cueing to produce fluent verbalizations (id.). In addition, the private speech-language pathologist described the student's breathing as "clavicular and shallow" (id.). She noted that the student stopped the air and held his breath before phonation, and that he exhibited extreme struggle behavior (id.). The private speech-language pathologist indicated that as a result of severe dysfluency, the student's speech was choppy and she recommended the provision of three weekly sessions of speech-language therapy (id.).

On March 12, 2008, the parent paid a non-refundable deposit of \$4000 to York Prep (Parent Ex. F).

On March 20, 2008, a district social worker conducted a classroom observation of the student in his class at the private school he was attending at the time (Dist. Ex. 5). According to the social worker, the class was comprised of 12 students, all of whom were male and seated in a horseshoe shaped arrangement of desks (id.). The student had his binder out and appeared ready to work (id.). During the lesson, the social worker noted that the student indicated that he was up to the point of formulating his opinion argument for presentation (id.). She further observed that as the teacher walked around the room, looking at each student's notebook, the student had his binder out and he wrote notes (id.). The social worker reported that the student appeared to be focused and was writing his opinion piece, though at one point, the student looked up, sat with his arms folded and appeared to be staring off somewhere (id.). According to the social worker, there was a great deal of ambient noise in the room and the student minimally involved himself with the cross conversations (id.). The social worker also noted that at one point the student became angry with the student seated next to him, who was engaging in loud, distracting and off task behavior (id.). Additionally, the social worker reported that the observation took place the day before a holiday, and there was a lot of cross-conversation in the class; however, most students alternated between talking and working behaviors (id.). The social worker further noted that the student remained on task while he was completing the assignment (id.). Per a conversation with the student's teacher, the social worker stated that the student was ahead of most of the students in his class with his assignments, and the student's teacher also advised the social worker that the student seemed "ready and eager" to change schools in the near future (id.).

By Notice of Committee on Special Education (CSE) Review Meeting dated April 9, 2008, the CSE chairperson informed the parent of the date and time of an upcoming CSE meeting (Dist. Ex. 6).³ The parent was advised of her right to fully participate in the decision making process regarding the development of her son's individualized education program (IEP) as well as her right to bring another individual to the meeting (id.).

³ The student's IEP indicates that a notice of the CSE meeting was sent to the parent on February 12, 2008 and April 9, 2008 (Dist. Ex. 8 at p. 2).

On April 28, 2008, the CSE met for an annual review and to develop the student's IEP for the 2008-09 school year (ninth grade) (Tr. p. 72; Dist. Exs. 7; 8). The parent, the student's teacher from his private school, a district school psychologist, a district special education teacher, who also served as a district representative, and a district regular education teacher participated in the April 2008 meeting (Tr. pp. 17-18; Dist. Exs. 7; 8 at p. 2).⁴ For the 2008-09 school year, the April 2008 CSE proposed placement of the student in a collaborative team teaching (CTT) classroom with a staffing ratio of 14:1 and related services comprised of one weekly 40-minute session of counseling in a group of three and two weekly 40-minute sessions of speech-language therapy in a group of three (Dist. Ex. 8 at pp. 1-2, 12, 14).⁵ The April 2008 IEP further revealed that the CSE opted to discontinue once weekly individual 30-minute sessions of speech-language therapy (id. at p. 14). The April 2008 CSE also developed annual goals and short-term objectives to address the student's needs in math, study and test taking skills, focusing, organization and speech and language (id. at pp. 7-11).

The April 2008 IEP also reflected that for the student's 2008-09 school year, the CSE also considered placement in a general education classroom with special education teacher support services (SETSS) in conjunction with related services; however, rejected this option, because the CSE determined that it would be inadequate to meet the student's academic and attentional needs (Dist. Ex. 8 at p. 13). As another program option for the student, the April 2008 CSE considered placement in a special class in a community school, but determined that this alternative was too restrictive for the student, because the student was "high functioning and social" and the CSE believed he could benefit from interaction with general education students (id.).

CSE meeting notes reflected that testing results and the recommended placement were explained to the parent (Dist. Ex. 7). Meeting notes also indicated that the parent's primary areas of concern were the student's stuttering, his impulsivity, and his impatience (id.). In addition, the CSE meeting notes revealed that the April 2008 CSE discussed the student's speech "issues," such as tensing and locking of lips, tongue clicking, and blocking sounds, but that these difficulties did not significantly affect his academic performance (id.). According to the April 2008 CSE meeting notes, at times, the student was fluent, but sometimes he was not (id.). The meeting notes described the student as impulsive, and indicated that he needed to slow down; however, the student was capable of controlling himself when motivated (id.). The student's academic work was described as "good," but it was noted that the student's comprehension would be better if he slowed down (id.). Regarding writing, the student's independent work was also described as "good" (id.).

By Notice of Recommended Deferred Placement dated April 28, 2008, the CSE chairperson summarized the April 2008 CSE's placement recommendation for the student and

⁴ The student's private school teacher participated in the April 2008 CSE meeting by telephone (Tr. p. 17).

⁵ "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

advised the parent that it was in the best interest of the student to defer placement in the recommended program until September 2008, because the IEP created for the student was for the 2008-09 school year (Dist. Ex. 9). The parent was also advised that although the CSE could not recommend a specific school location for the student at that time, the CSE chairperson gave the parent the contact information of the district employee who could assist her in arranging a visit to a "sample" of the type of program recommended for the student (id.). The CSE chairperson also informed the parent that she would receive the Final Notice of Recommendation (FNR) on or prior to August 18, 2008 (id.).

By FNR dated July 22, 2008, the CSE chairperson summarized the CSE's program recommendation for the student and advised the parent of the specific school location where the proposed program would be implemented (Parent Ex. C). The FNR also furnished the parent with the contact information of a district employee with whom she could further discuss the CSE's recommendation (id.). The parent was also advised of her right to arrange for another CSE meeting as well as her due process rights to an impartial hearing (id.). Subsequent to her receipt of the July 2008 FNR, the parent visited the recommended placement and upon determining that it was not appropriate for the student, she rejected it (Tr. p. 211). On August 5, 2008, a second FNR was sent to the parent that also advised her of her due process rights and provided her with the contact information of a district employee with whom she could further discuss the CSE's program recommendation (Parent Ex. D). The August 2008 FNR advised the parent of a different specific school location where the student's April 2008 IEP would be implemented (id.). In the beginning of August 2008, the parent visited the second recommended school and also determined that it was not appropriate for her son (Tr. pp. 210-12).

By letter dated August 18, 2008, the parent advised the CSE chairperson of her intention to place the student at York Prep for the 2008-09 school year, and to seek funding from the district for the unilateral placement (Parent Ex. B). In addition, the parent requested that the district provide transportation (id.). The parent rejected the April IEP and proposed placement (id.). According to the parent, the April 2008 IEP and placement denied the student a free appropriate public education (FAPE) on procedural and substantive grounds (id.).⁶ The parent further specified that no valid IEP had been created for the student, and that she had been denied meaningful participation in the development of the IEP (id.). Moreover, the parent indicated that the CSE did not recommend an appropriate placement for the student that would provide him with a suitable and functional grouping (id.). The parent stated that she would provide further details regarding her objections to the IEP and placement in a due process complaint notice under separate cover (id.).

⁶ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

For the 2008-09 school year (ninth grade), the parent enrolled the student in York Prep (Tr. pp. 165, 206).

By due process complaint notice, dated April 30, 2009, through her attorney, the parent requested an impartial hearing, seeking tuition reimbursement for York Prep for the 2008-09 school year (Parent Ex. A). Specifically, the parent raised the following allegations regarding the April 2008 CSE meeting and the resultant IEP: (1) an additional parent member did not participate in the CSE meeting; (2) the student's IEP was developed without current and/or necessary evaluative data; (3) the goals contained in the IEP were not measurable; and (4) the CSE failed to conduct a vocational assessment of the student (*id.* at pp. 2-3). The parent also contended that the proposed placement was not appropriate for her son, maintaining that the school was "too big and too hectic" for him (*id.* at p. 3). The parent also argued that the class size was too large for her son, and would be intimidating for him, in light of his severe stuttering and speech dysfunction (*id.*). The parent maintained that in order for the student to continue to make progress, he required a small, structured and supportive program and she "felt compelled to continue [the student's] placement at York Preparatory School" (*id.*).

On May 7, 2009, the district responded to the parent's due process complaint notice (Dist. Ex. 10). The district denied many of the allegations raised in the parent's due process complaint notice and maintained that the placement offered to the student was reasonably calculated to enable the student to obtain meaningful educational benefits (*id.* at pp.1, 3).

An impartial hearing convened on October 15, 2009 and after two days of testimony, concluded on November 10, 2009 (IHO Decision at p. 2). By decision dated May 4, 2010, the impartial hearing officer ordered the district to reimburse the parent for the student's tuition for York Prep for the 2008-09 school year (*id.* at p. 10).⁷ In particular, the impartial hearing officer found that the district failed to offer the student a FAPE in light of the following: (1) an additional parent member did not attend the April 2008 CSE meeting, which deprived the parent of an opportunity to participate in the development of the student's IEP; (2) the student's recommended program was predetermined; and (3) the recommended CTT classroom was inappropriate, because the student required a small class, and there was no "effort to have the student retested to determine if there was any significant change in his learning issues that would allow him to perform well in a large class" (*id.* at pp. 5-7). The impartial hearing officer went on to conclude that York Prep was an appropriate placement for the student (*id.* at p. 10). Specifically, he determined that the Jump Start program "[met] the requirement that the educational instruction be specially designed

⁷ Federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (*see* 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, the impartial hearing officer failed to document in the hearing record or include in his decision information about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing, and the date of the decision suggests that one or more extensions were granted. I note that the impartial hearing officer was previously cautioned on this issue in Application of the Dep't of Educ., Appeal No. 08-025 and in Application of the Dep't of Educ., Appeal No. 10-014, and I again remind the impartial hearing officer to comply with federal and State regulations.

to meet the unique needs of the handicapped child" (*id.* at p. 9). The impartial hearing officer further found that the individual sessions and regular support for each student insured that the student would benefit from the instruction (*id.*). In addition, the impartial hearing officer also noted that the small classes offered at York Prep met the student's needs as recommended by the psychological evaluation (*id.* at pp. 9-10). With regard to equitable considerations, the impartial hearing officer stated that he "respectfully disagree[ed] with the presumption that an early enrollment automatically means the parent was unwilling to consider a [district] program" (*id.* at p. 10). Ultimately, the impartial hearing officer found that the parent cooperated with the district in the evaluation process, and accordingly, equitable considerations favored her claim for relief (*id.*).

On appeal, as a preliminary matter, the district argues that the impartial hearing officer's decision was procedurally flawed for two reasons: (1) the impartial hearing officer rendered his decision in excess of the 45-day rule prescribed by federal and State regulations; and (2) although the parent abandoned her claim for tuition reimbursement for the York Prep portion of the tuition, the impartial hearing officer awarded tuition reimbursement to the parent for York Prep and Jump Start. Additionally, the district contends that the impartial hearing officer improperly exceeded the scope of the due process complaint notice. In particular, the district asserts that the impartial hearing officer should not have considered the following issues in reaching his determination: (1) that the April 2008 CSE predetermined the student's program, because it was not raised by the parent in her due process complaint notice; and (2) that the lack of an additional parent member deprived the student of a FAPE, because the parent abandoned this claim at the impartial hearing.

With regard to the IEP in dispute, the district maintains that it offered the student a FAPE for the 2008-09 school year. The district further specifies that the April 2008 CSE meeting and resultant IEP were not procedurally and substantively flawed for reasons including that: (1) regardless of whether the parent abandoned her claim that the lack of an additional parent member deprived the student of a FAPE, the challenged IEP was developed by a subcommittee of the CSE, and therefore, an additional parent member was not a required member; (2) in developing the student's IEP, the April 2008 CSE relied upon appropriate evaluative data; (3) the goals listed in the April 2008 IEP were measurable; (4) had the student attended the recommended placement, he would have received a vocational assessment and transition services; and (5) the recommended program was not too large for the student and would have been appropriate. The district also argues that the parent attempted to expand the scope of her due process complaint notice, by interjecting a claim at the impartial hearing that the recommended program was inappropriate, because a special education teacher would not have accompanied the student to three of his classes. Regardless of whether the parent properly raised this claim, the district maintains that the lack of a special education teacher in an elective course would not have resulted in a denial of a FAPE to the student.

The district next asserts that the parent failed to establish at the impartial hearing that Jump Start was appropriate to meet the student's special education needs. The district maintains that York Prep and Jump Start are inappropriate for the student, because they failed to provide the student with any related services, namely, speech-language therapy or counseling as prescribed by the student's IEP. Moreover, the district alleges that York Prep and Jump Start are inappropriate because neither program provides the student with education specifically designed to meet the student's unique educational needs. The district further contends that Jump Start comprises the

only special education services offered at York Prep, and that it primarily addresses organization and homework help. Lastly, the district argues that equitable considerations weigh against the parent because she failed to provide the district with proper notice of her intention to enroll the student in a private program at public expense and she never intended to place the student in a public school.

The parent submitted an answer denying each of the district's claims. The parent further maintained that the impartial hearing officer's decision was correct. She argued that the district did not offer her son a FAPE and that her unilateral placement was reasonably calculated to confer an educational benefit on him. In addition, the parent asserted that she was entitled to tuition reimbursement for equitable reasons.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley,

458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

At the outset, a procedural matter surrounding the impartial hearing officer's decision must be considered. In the instant appeal, the impartial hearing officer determined that "it [wa]s clear ... that there was a predetermination of the program to be offered," which he concluded resulted in a denial of a FAPE to the student (IHO Decision at pp. 5-6). The district submits that the impartial hearing officer erred in reaching a determination that the student's proposed program was predetermined, because it was not an issue raised in the parent's due process complaint notice. As explained below, the hearing record supports the district's allegation that the impartial hearing officer improperly exceeded the scope of the due process complaint notice by concluding that the student's program was the result of predetermination.

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 due process complaint notice reveals that the parent did not allege that the student's April 2008 IEP was predetermined (Parent Ex. A). Moreover, the hearing record does not reflect that predetermination was an issue raised during the impartial hearing, nor does it suggest that the parent amended her due process complaint notice to include such a claim. Under the circumstances, the impartial hearing officer should have confined his determination to issues raised in the parent's 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 Student with a Disability, Appeal No. 10-012; 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 was not identified in the parent's due process complaint notice.

Turning next to an analysis of the challenged IEP, the impartial hearing officer found that the district failed to meet its obligation to offer the student a FAPE for the 2008-09 school year (IHO Decision at p. 7). Conversely, the district maintains that it offered the student a FAPE for the 2008-09 school year. As detailed below, a review of the hearing record reflects that the district offered the student a program for the 2008-09 school year that was formulated with adequate

procedural compliance with the IDEA and which offered the student a substantive program reasonably calculated to enable him to obtain educational benefits. Accordingly, contrary to the impartial hearing officer's conclusion, the student was offered a FAPE in the LRE.

Regarding the procedural claims surrounding the development of the April 2008 IEP, the district asserts that during the impartial hearing, the parent abandoned her claim that an additional parent member did not participate in the April 2008 CSE meeting, which compromised the development of the IEP. Contrary to the district's claim, a review of the hearing record shows that this issue was raised during the impartial hearing (Tr. pp. 19-21, 40-41, 241-42). Accordingly, I will consider whether the lack of an additional parent member on the April 2008 CSE impeded the student's right to a FAPE. As detailed below, although the absence of an additional parent member from the April 2008 CSE and the district's failure to execute a valid waiver of an additional parent member's participation in the relevant meeting constituted a procedural violation with respect to the development of the student's IEP, the hearing record does not reflect that such an error rose to the level of substantive harm, resulting in a denial of a FAPE to the student.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). In addition, State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]).

Here, the district submits that a subcommittee of the CSE developed the disputed IEP, and therefore, an additional parent member was not a required member of the committee. However, a review of the April 2008 IEP reflects that it was a CSE review (Dist. Ex. 8 at p. 1). As noted herein, irrespective of whether a full committee or a subcommittee of the CSE developed the April 2008 IEP, the hearing record does not demonstrate that the lack of an additional parent member or failure to obtain a valid waiver thereof resulted in a denial of a FAPE to the student. In the instant matter, the hearing record demonstrates that the parent was afforded an opportunity to participate in the development of the student's IEP. First, the hearing record suggests that the parent was familiar with the IEP development process in light of her testimony that she had previously participated in a number of CSE meetings for her son (Tr. p. 228). Furthermore, CSE meeting notes reflected that testing results and the recommended placement were explained to the parent (Dist. Ex. 7). Additional testimony from the district representative reflected that all attendees were provided an opportunity to ask questions or voice concerns during the April 2008 CSE meeting

(Tr. p. 39). According to the CSE meeting notes, the parent expressed concerns regarding the student's stuttering, impulsivity, and impatience (Dist. Ex. 7). I also note that the student's teacher from the private school he was attending at that time, shared strategies that the teacher found worked effectively with the student that were incorporated into the April 2008 IEP (Tr. pp. 35-36; Dist. Exs. 7; 8 at pp. 2-3). Furthermore, goals listed on the April 2008 IEP were also discussed with the student's teacher, and they were developed based on the teacher's input (Tr. p. 34). In addition, the district representative testified that the student's speech-language pathologist provided his fluency goals, which was the area of need that she was addressing (Tr. p. 37). Lastly, testimony from the district representative shows that the CSE would have reconvened if there was more material or new information was presented that necessitated a more restrictive setting for the student (Tr. pp. 45-46). Based on the foregoing, given the opportunities for parental input reflected in the development of the April 2008 IEP, the hearing record does not show that the absence of an additional parent member or the district's failure to obtain a valid waiver of the additional parent member's participation constituted a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Mills, 2005 WL 1618765, at *5; see also E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Next, for the reasons described below, the hearing record substantiates the district's assertion that in developing the student's program, the April 2008 CSE relied upon appropriate data that accurately reflected the student's primary needs and functioning levels particularly with regards to academics and speech and language. An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clark, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

In the instant case, testimony by the district representative, who was dually certified in special and regular education, revealed that the April 2008 CSE reviewed a private psychological evaluation obtained by the parent, a private speech therapy evaluation and progress reports, as well

as progress reports and testing results from the student's previous private school (Tr. pp. 23-24, 66-67; see Dist. Exs. 1-5). The district representative also noted that the CSE always reviewed whatever had been previously done with a student and the CSE attempted to obtain a "whole view" of the student that included background information and information from his last IEP (Tr. p. 23). In developing the student's April 2008 IEP, the district representative indicated that she reviewed everything before the meeting in order to have "perspective on the case" (Tr. pp. 24, 66-67). Furthermore, detailed testimony by the district representative reflected that based on the information available to the April 2008 CSE, the committee was able to identify the student's present levels of performance regarding academic, speech-language, social/emotional, behavioral and physical areas (Tr. pp. 25-29). The district representative further testified that there were no clinically significant discrepancies in the student's levels of performance, when comparing formal testing results to materials provided from the student's school and consequently, the April 2008 CSE determined no additional formal testing was needed prior to the CSE making its recommendations (Tr. pp. 76-77). She added that in the event there were significant discrepancies in the materials that they had reviewed, the CSE would have asked for additional testing, and if necessary, the CSE would have reconvened when the appropriate material was available and reconsidered other program possibilities (Tr. p. 77). In addition, the hearing record does not suggest that the parent or the student's teacher requested any additional testing at the time of the April 2008 CSE meeting.

Consistent with the aforementioned evaluation and progress reports available to the April 2008 CSE as well as the information provided by the student's "Focus"⁸ teacher from his previous private school, the April 2008 IEP included details regarding the student's academic performance and learning characteristics (Dist. Ex. 8 at pp. 3-6). Cognitively, the April 2008 IEP indicated that the student functioned in the average range of intelligence across domains with slightly lower performance noted in the areas of social comprehension and processing speed (id. at p. 4). According to the April 2008 IEP, the student also had a history of sensory integration difficulties, attention variability, and language and motor delays (id.). His last speech-language evaluation, dated November 2005, indicated that although the student's pragmatic and expressive language skills were within normal limits at that time, his receptive language skills fell in the mildly deficient range and his speech was significant for stuttering (id.).

Academically, the April 2008 IEP reflected that teacher reports revealed that despite the student's severe dysfluency of speech, he spoke up in class (Dist. Ex. 8 at p. 3). In addition, the speech dysfluency "d[id] not seem to impact on his school performance" (id.). According to the April 2008 IEP, the student was described to read at least on grade level but he tended to rush through tasks (id.).⁹ The April 2008 IEP also indicated the student's writing was on grade level although he required reminders to proofread and edit his work (id.). Math skills appeared close to

⁸ Testimony by the district representative indicates that the "Focus" teacher from the student's previous private school met with the student individually on a daily basis, was a liaison to the student's different teachers, and provided remedial work based on [the student's] needs in the different classes (Tr. pp. 24-25).

⁹ Meeting notes from the April 2008 CSE contained a list of topics consistent with the IEP that was discussed during the CSE meeting (Dist. Exs. 7, 8 at pp. 3-6). The CSE review minutes indicated that for writing, the student's independent work was good and although the student's academic work was good, his comprehension would be better if he slowed down; the student was capable of controlling himself when motivated (Dist. Ex. 7).

grade level for math concepts and applications, and were slightly weaker for computational skills (*id.*). The disputed IEP also included formal and informal test results from spring 2007 and spring 2008 (*id.*). In regard to social/emotional present levels of performance, the April 2008 IEP described the student as a very social child with no emotional difficulties (Tr. p. 27; Dist. Ex. 8 at p. 5). However, the April 2008 IEP further characterized the student as "very impulsive," someone who tended to get over-involved in "other people's business" and someone who rushed through things (*id.*). Additionally, the April 2008 CSE noted that although the student enjoyed learning, his significant attentional difficulties impeded his ability to do so (Dist. Ex. 8 at p. 5). The April 2008 CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by his regular education teacher and/or the special education classroom teacher (Tr. p. 28; Dist. Ex. 8 at p. 5). In regard to the student's present health status and physical development, the IEP reflected as follows: (1) the student had allergies and asthma, which was more problematic when he had a cold; (2) he wore glasses; (3) his hearing was within normal limits; (4) he did not require medication, medical treatment or health as a related service during the school day; and (5) he did not have physical mobility limitations (Tr. pp. 27-28; Dist. Ex. 8 at pp. 1, 6).

Consistent with the student's present levels of performance and learning characteristics, academic management needs listed in the April 2008 IEP included the provision of checklists to which the student could refer when proofreading and editing written work, a reminder to slow down rather than rush through tasks, encouragement to take notes while reading and that the student reread for clarification when necessary (Dist. Ex. 8 at p. 3). Testing accommodations included extended time (double) as well as tests to be administered in a separate location (*id.* at p. 14). Testimony by the district representative reflected that the CSE identified the student's management needs consistent with specific information regarding strategies and methods of working with the student suggested by the student's private school teacher (Tr. pp. 35-36, 64-65).

In light of the foregoing, the hearing record reflects the April 2008 IEP was based on appropriate evaluative data, including teacher reports, that accurately depicted and addressed the student's primary areas of educational need.

Next, a review of the hearing record reveals that the goals contained in the student's April 2008 IEP were aligned with his present levels of performance and were measurable. 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]). The April 2008 IEP included goals and short-term objectives that addressed the student's academic, speech-language, organization, and attending needs and that could be addressed by the classroom teacher as well as a related service provider (Tr. pp. 31-32, 34; Dist. Ex. 8 at pp. 7-12). Testimony by the district representative indicated that at the April 2008 CSE meeting, the committee discussed specific areas of concern for the student's private school teacher and parent and developed goals based on those concerns (Tr. p. 29). The April 2008 CSE used the information provided in the private speech therapy reports to develop the goals that addressed the student's fluency (Tr. pp. 29-30; Dist. Ex. 8 at p. 9). Given that the private speech therapy progress report only addressed the student's stuttering behaviors, the April 2008 CSE developed additional goals to address the

student's oral expressive language skill needs in the classroom (Tr. p. 37). The district representative indicated that although math was a strong the area for the student, he tested "somewhat lower" on assessments conducted by the private school the previous year, and the April 2008 CSE provided math goals to "just get some of the computational skills up to level, since his conceptual knowledge of math was pretty good" (Tr. pp. 34-35). Furthermore, the district representative further testified that despite the student's "very strong academics," the CSE developed a for study and test taking skills because the student's impulsivity and attention difficulties seemed to interfere with his classroom performance (Tr. p. 35).

In regard to the parent's assertion that the CSE did not determine the methods of measurement to assess the student's progress regarding his goals and objectives, a careful review of the April 2008 IEP shows that although the annual goals were not measurable, the 34 corresponding short-term objectives clarify the annual goals and include sufficient specificity to allow for measurement of progress in the student's areas of need. (Tr. pp. 38-39; see Dist. Ex. 8 at pp. 7-9). Moreover, according to the district representative, the special education teacher in the recommended program would decide what methods of measurement to use to assess development in the student's skills per the IEP (Tr. pp. 70-71). The district representative noted that it was up to the teacher to decide during the school year on what method would be appropriate to measure progress in the classroom (Tr. p. 71). In light of the foregoing, although the annual goals listed on the April 2008 were not measurable, the short-term objectives comprehensively addressed the student's needs, were both detailed and measureable, and cured any deficiencies in the annual goals (see Tarlowe, 2008 WL 2736027, at *9; 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 claim that had the student attended the district's recommended program, he would have received a vocational assessment and transition services. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]). It must also include the transition services needed to assist the student in reaching those goals (id.). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education,

vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]). Students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests (8 NYCRR 200.4[b][6][vii]).

In regard to transition services at the proposed school during the 2008-09 school year, the recommended placement's assistant principal for pupil personnel services (assistant principal) testified that the school had a transition linkage coordinator (Tr. p. 95). The transition linkage coordinator provided transition services for the school's special education students to address (post high school) educational and vocational services that began when students entered ninth grade and continued consistently from that point forward (Tr. pp. 95-97). According to the assistant principal, the transition linkage coordinator came into the school building, interviewed the special education students and learned what their life goals were at the time, completed folders for the students, contacted teachers to notify them about the students' projected transition goals and requested feedback from the teachers (Tr. pp. 95-96). The transition linkage coordinator collaborated with teachers regarding students' strengths and weaknesses, met with students about the information gleaned and refined with students what needed to be achieved (Tr. p. 96). If and when necessary, the transition linkage coordinator assisted students in connecting with VESID¹⁰ (*id.*). Based on the foregoing, the absence of a vocational assessment prior to the CSE meeting did not result in a denial of a FAPE to the student.

Turning next to an analysis of the recommended placement, a careful review of the hearing record shows that placement in the recommended CTT was appropriate to meet the student's special education needs, and notwithstanding the lack of a special education teacher in the elective courses, the placement was reasonably calculated to confer meaningful educational benefits on the student. The assistant principal indicated that the ninth grade CTT program during the 2008-09 school year consisted of CTT classes in English, history, math and science, with one core group of freshmen students that traveled together in the CTT program (Tr. pp. 99-100, 144). The ratio of general education students to special education students was 60:40 (Tr. pp. 100-01). Each CTT class contained a certified special education teacher and a regular education teacher certified in a content area (Tr. pp. 101-02).

First, notwithstanding the district's assertion that the parent improperly attempted to add the allegation that the recommended placement was inappropriate because a special education teacher would not have traveled with the student to his non-academic classes, a review of the

¹⁰ "VESID" is the acronym for the State Office of Vocational and Educational Services for Individuals with Disabilities.

hearing record reveals that the issue was raised during the impartial hearing, and no objection was raised by the district at the time (Tr. pp. 126-28). Accordingly, the matter will be considered. However, as explained in greater detail below, the lack of a special education teacher in the aforementioned non-academic classes did not render the proposed placement inappropriate. According to the assistant principal, the purpose of the collaboration between the regular education teacher and the special education teacher in a CTT class was to develop the best lesson plan to help both general and special education students with content area (Tr. p. 132). The assistant principal explained that "side by side with the gen[eral] ed[ucation] teacher," the special education teacher helped "fine tune" the lesson (Tr. p. 125). He further testified that if there was a stigma for students due to their enrollment in special education, rather than isolating special education students for instruction, the CTT class attempted to create a "seamless environment," whereby the special education teacher interjected at certain parts of the lesson and specifically tailored the lesson and provided techniques and accommodations for the special education students, according to each student's strengths and needs (Tr. pp. 133-34). The assistant principal recalled that special education students in the CTT classrooms during the 2008-09 school year were eligible for special education services as students with a learning disability, an emotional disturbance, and a speech or language impairment, and were either at or slightly below grade level (Tr. pp. 115, 120, 122, 143). All freshmen students were also required to take a freshman focus class which the assistant principal described as a high school "skills" class that addressed study and organization skills (Tr. pp. 101, 105). Students in the CTT class were also required to take a physical education course, a business course (computers) and electives, either art, health, music or a foreign language, all general education classes (Tr. pp. 101, 118, 129). According to the assistant principal, the student would have been in one of the elective classes once a day, as well as in freshman focus (Tr. p. 119). During half of the day the student would have been in the CTT academic classes (with a special education teacher and a regular education teacher) and during the other half of the day he would have been in non-academic elective classes taught by a regular education teacher only (Tr. pp. 101-02, 119). The student would also have participated in gym and a lunch period (Tr. p. 131). Testimony by the assistant principal further revealed that "pure academics" were taught in the four CTT classes and that academics were not taught during lunch or gym and the business class addressed computer skills or depending on the course, accounting (Tr. pp. 131-32). Based on his recall of the student's IEP, the assistant principal explained that the CTT courses offered for ninth graders would have "hit [the student's] major components," i.e., history, math, English and science (Tr. pp. 108-09). The assistant principal further noted that all of the regular education teachers of the elective and required classes had access to students' IEPs and access to the students' special education teachers to discuss techniques they might use with the students (Tr. p. 104). In light of the foregoing, the lack of a special education teacher in the student's elective courses would not have resulted in a denial of a FAPE to him (Application of the Dep't of Educ., Appeal No. 10-001).

The parent also claims that the recommended placement would have been too large for the student; however, the hearing record indicates otherwise. Initially, the hearing record shows that during the April 2008 CSE meeting, the student's private school teacher did not request that the student be placed in a more restrictive setting than the proposed placement, and she did not voice her opinion when the CSE asked her for a specific placement recommendation for the student (Tr. p. 67). When asked how students in the CTT classroom received individualized attention in their content areas, the assistant principal explained that the special education teacher in the CTT classroom collaborated in the lesson with the regular education teacher so that, the CTT special education teacher would break in at some point in the lesson and review content with students as

necessary (Tr. p. 106). The special education teacher and the regular education teacher collaborated prior to the lesson to plan and fine tune it (Tr. p. 107). The special education teacher helped keep the entire class on track in tandem with the regular education teacher, and offered the special education students in the class individual help as needed (Tr. pp. 107, 125-26). The assistant principal opined that based on his knowledge of the CTT program for ninth graders during the 2008-09 school year, the recommended program would have been appropriate for the student because the CSE recommendation called for a 14:1 CTT program and related services (Tr. p. 108). According to the assistant principal, the recommended program also had a "speech teacher," a nurse, and a "special education counselor" on staff (Tr. pp. 94, 108-09). Under the circumstances, all of the student's related services needs would have been met in school (Tr. p. 95). Testimony by the assistant principal also reveals that staff was familiar with attention deficit disorders and the provision of test accommodations (Tr. pp. 109-10). Furthermore, special education and general education students had access to peer tutoring; tutoring provided by teachers on a walk-in basis; "P.M. School," where counselors provided courses in the early evening for students who had fallen behind in credits; and clubs (Tr. pp. 111, 115).

The assistant principal indicated that instruction in the CTT classes during the 2008-09 school year consisted of both large and small group instruction (Tr. p. 113). In his description of how a CTT class functions, the assistant principal stated, "...we try to discourage isolating the CTT kids" (Tr. p. 114; see Tr. pp. 132, 134). Special education and general education students were grouped according to the level in which they were working, the regular and special education teachers circulated around the room and focused on particular groups, with the special education teacher focusing on the groups containing the CTT students (Tr. pp. 114-15). The hearing record also reflects the assistant principal's description of the types of supports available to students in preparation for the Regents examinations and the Regents Competency Tests (RCT), including Saturday morning classes in January and June and tutoring (Tr. pp. 115-16).

According to the district representative, the CSE's mandate was to keep a student in as natural and normal a setting as the student could handle, or in a student's LRE, based on the student's needs (Tr. p. 69). In consideration of all of the above, especially in consideration of information about the student available to and considered by the April 2008 CSE, the resultant IEP, the student's high level of academic and social abilities despite his difficulties with fluency, impulsivity and attention, as well as the testimony by the district representative and the assistant principal of the recommended high school, the hearing record demonstrates that the proposed CTT placement with related services offered the student a FAPE in the LRE.

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

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

THE APPEAL IS SUSTAINED.

Dated: **Albany, New York**
 August 26, 2010

PAUL F. KELLY
STATE REVIEW OFFICER