The University of the State of New York

The State Education Department
State Review Officer
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No. 10-070

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, attorneys for petitioner, Tracy Siligmueller, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Lawrence D. Weinberg, 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 Winston Preparatory School (Winston Prep) for the 2009-10 school year. The parent cross-appeals, asserting that the impartial hearing officer did not address all of the parties' issues in her decision. The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Winston Prep, where he was unilaterally placed by his parent in September 2009. The hearing record describes Winston Prep as an independent school that provides education to students who exhibit learning disabilities (Tr. p. 76). The Commissioner of Education has not approved Winston Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The hearing record indicates that the student began receiving remedial services in early elementary school (Parent Ex. C at p. 1). The district initially evaluated the student around his second grade school year, at which time it determined the student eligible for special education services and developed an individualized education program (IEP) for the student (id.). The student reportedly exhibits difficulties with attention, decoding, encoding, reading comprehension, written expression, math computation, and problem solving (Tr. pp. 19, 65, 123). He has diagnoses of an attention deficit hyperactivity disorder (ADHD) and "dyslexia" (Tr. p. 65; Parent Ex. C at p.

5). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

On March 20, 2008, the Committee on Special Education (CSE) convened for the student's triennial review (Parent Ex. J).[1] According to the resultant IEP, the student exhibited academic skills in the average range of functioning; however, the IEP also noted that the student's academic skills were "scattered" (id. at p. 4). The IEP indicated, among other things, that the student displayed weaknesses in spelling, including deficits in applying phonics and structural analysis skills in encoding words, that his reading comprehension abilities were below grade level, and that he had some difficulty with math fluency (id.). The student's math calculation skills were described as a strength (id.). The IEP further noted that the student responded well to teacher guided work and positive reinforcement and that he benefited from repetition and practice, primarily in spelling (id. at p. 3). The student's interests and goals were described as age appropriate, and the IEP noted that the student made age appropriate eye contact and appeared to be functioning well in the social/emotional realm (id. at p. 5). The March 2008 CSE determined that the student was eligible for special education services as a student with an OHI, and recommended placement in a general education program with special education teacher support services (SETSS) in a community school (id. at p. 1). The CSE developed annual goals and short-term objectives to address the student's needs with respect to reading, math, and writing (id. at p. 7). Proposed testing accommodations included tests to be administered in a separate location, directions read and reread aloud, questions read and reread, and extended time (2x) (id. at p. 10). The student attended the district's proposed placement for the 2008-09 school year (see Tr. pp. 19, 91).

On March 27, 2009, when the student was in seventh grade, a subcommittee of the CSE convened for an annual review of the student's program (Parent Ex. B). Meeting participants included the parent, the student's special education teacher who also served as the district representative, and a regular education teacher (id. at p. 2). The resultant IEP indicated that the student was reading at a sixth grade level, as measured by the Teachers College Reading Assessment (id. at p. 3).[2] The IEP noted that when the student read aloud, he read very slowly and that his fluency was "very choppy" (id.). According to the IEP, the student had difficulty decoding many words, which affected his fluency (id.). The IEP stated that the student was not very familiar with the rules that governed the pronunciation of vowels or with the strategies that would help him decode multisyllabic words (id.). With respect to reading comprehension, the IEP indicated that the student was able to follow the general plot or main idea of a text and retell the information accurately; however, the student sometimes had trouble understanding some of the vocabulary in the text (id.). The IEP described the student as capable of verbalizing the ideas that he wanted to include in his written pieces, and the student's ideas were described as creative and thoughtful (id. at p. 4). However, the IEP indicated that the student needed to work on the organization and structure of his written pieces as well as on sentence structure, grammar, and mechanics (id.). The

[1] The March 20, 2008 IEP was developed while the student was in sixth grade and covered part of both his sixth and seventh grade school years (Parent Ex. J).

[2] The March 27, 2009 IEP was developed while the student was in seventh grade and covered part of both his seventh and eighth grade school years (Parent Ex. B at pp. 1, 2).

IEP identified spelling as a major weakness for the student (id.). The IEP stated that although the student spelled phonetically, he was not familiar with the various spelling patterns of words that sound alike but have multiple spellings (id.). With regard to mathematics, the IEP stated that the student had not yet mastered his multiplication facts, which affected his ability to solve more complex problems without a calculator (id.). The IEP further reflected that the student had difficulty solving multi-step math problems; however, he was more successful with those types of problems after repeated opportunities for practice (id.). As indicated in the IEP, based on teacher assessment, the student's decoding and writing skills were judged to be at a fifth grade level, reading comprehension skills at a beginning sixth grade level, and listening comprehension skills at a sixth grade level (id. at p. 3). The student's computation skills were assessed to be at a fourth grade level and his problem solving skills were judged to be between a fifth and sixth grade level (id.).

Regarding the student's present levels of social/emotional performance, the IEP characterized the student as "friendly" and "energetic" (Parent Ex. B at p. 5). According to the IEP, although the student enjoyed participating in his classes, he sometimes needed reminders to remain focused on the lesson and to stop fidgeting with objects around him (id.). The student also required reminders to stay engaged with his classroom assignments (id.). The IEP noted that while the student sometimes became discouraged when he encountered a topic that was at first difficult for him to understand, he responded well to encouragement and reinforcement from adults (id.). The March 2009 CSE subcommittee determined that the student's behavior did not seriously interfere with instruction and therefore a behavior intervention plan (BIP) was not warranted (id.). The CSE subcommittee further advised that the student's SETSS teacher and regular education teachers would be responsible for providing the student with behavioral support (id.). The March 2009 IEP reflected annual goals and short-term objectives to address the student's needs with regard to reading, math, and writing (id. at pp. 7-9). Recommended testing modifications included: tests administered in a separate location, extended time (2x), directions read and reread aloud, and questions read and reread (id. at p. 12).

The March 2009 CSE subcommittee recommended that the student continue to be eligible for special education services as a student with an OHI and attend a general education classroom in a community school with SETSS five times a week for 45 minutes (Parent Ex. B at pp. 1, 9). The CSE subcommittee considered a general education program without SETSS, but rejected such a placement because it would not have sufficiently addressed the student's academic needs (id. at p. 11). In addition, the CSE subcommittee considered a collaborative team teaching (CTT) class as an alternative for the student, but determined that such a placement would be too restrictive for the student's needs (id. at p. 10).[3]

Upon the student's completion of seventh grade (the 2008-09 school year), the parent referred her son for a private neuropsychological evaluation where he was evaluated over three days in July 2009 (Parent Ex. C). Based on the results of standardized testing, the private psychologist opined that the student had difficulty with cognitive flexibility and exhibited variability in working memory skills (id. at p. 5). He further found that the student exhibited some

[3] "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]).

degree of difficulty with learning and retrieval, as well as with auditory processing (id.). The psychologist noted that the student did not demonstrate any difficulties with respect to visuoperceptual or spatial abilities, and at the time of the examination, the student was not experiencing any primary behavioral, emotional, or adjustment difficulties (id.). Academically, the psychologist determined that the student had "very poor basic reading skills with regard to decoding and fluency" (id.). According to the psychologist, the student's difficulty with reading comprehension appeared to be secondary to his actual reading ability and not related to his comprehension (id.). The psychologist also described the student's spelling and writing mechanics as "markedly poor" (id.). In addition, the psychologist reported that the student's memory seemed to affect his math skills with regard to computational ability and that the student exhibited difficulty with problem solving (id.). The psychologist also provided the student with a diagnosis of an ADHD (id.). However, the psychologist opined that the student's difficulty with attention was not a primary consideration with regard to the student's school performance (id.). Rather, the psychologist determined that the student's primary difficulty with regard to academics was his dyslexia (id.).

Based on his findings, the psychologist opined that the student should be classified as a student with a learning disability instead of a student with an OHI (Parent Ex. C at p. 5). According to the psychologist, the student required an intensive, individualized, scientifically-based, multisensory reading program on a daily basis that emphasized decoding and fluency and was taught by an appropriately trained special education or reading teacher (id. at pp. 5-6). The psychologist further opined that placement in a specialized program would be a more appropriate setting for the student than the district's recommended placement of a general education classroom in a community school with SETSS (id. at p. 6). Among other recommendations, the psychologist also suggested that the student's program include a low student-to-teacher ratio and preferably be geared toward dyslexic students who did not exhibit behavioral or social difficulties, or intellectual limitations (id.). Additionally, the psychologist suggested that the student needed a spelling program that was linked to the aforementioned decoding program and that the student required a remedial program for math (id.). He recommended that the student receive extended time for both classroom tasks and during testing (id.). The psychologist further recommended that the student's SETSS teacher assist the student with test preparation and with reinforcing didactic material, using multiple modalities to make it more efficient for the student to learn material and later retrieve it (id.).

In a final notice of recommendation (FNR) dated August 31, 2009, the district notified the parent of the specific location of the student's proposed program (see Dist. Ex. 2 at p. 3). On September 3, 2009, the parent submitted a nonrefundable deposit to Winston Prep (Parent Ex. G; see Parent Exs. E; F at p. 1). The student began attending Winston Prep on or around September 11, 2009 (Tr. pp. 80, 86).

By letter dated September 16, 2009 to the CSE chairperson, the parent submitted a copy of the July 2009 private neuropsychological evaluation of the student to the district and further advised that she did not consider the district's recommended program and placement appropriate (Parent Ex. I). According to the parent, the district's proposed program was inappropriate because the student had previously attended the program and did not make progress, the regular education teachers were unfamiliar with working with students with her son's disability, the class size was too large, the student-to-teacher ratio was not appropriate, and the program was not sufficiently

language-based (id.). In her September 16, 2009 letter, the parent stated that she had informed the recommended school, prior to the start of the school year, that her son would not be attending the public school and that she had instead enrolled the student at Winston Prep (id.). The parent further advised the district that she intended to seek reimbursement from the district for the student's tuition at Winston Prep for the 2009-10 school year (id.).

On September 18, 2009, the parent entered into an agreement with Winston Prep for the student's enrollment for the 2009-10 school year (Parent Ex. F).

By due process complaint notice dated September 22, 2009, the parent commenced an impartial hearing and sought, among other things, tuition reimbursement for Winston Prep for the 2009-10 school year and the cost of evaluations and transportation (Parent Ex. A at p. 5). The parent alleged that the district failed to offer the student a free appropriate public education (FAPE) and asserted numerous procedural and substantive allegations (id. at pp. 2-5). Specifically, the parent alleged that the March 2009 IEP was inappropriate because the CSE was not duly constituted as there was no school psychologist or additional parent member in attendance, that the March 2009 IEP was predetermined, that the March 2009 IEP contained insufficient goals and objectives that were developed outside of the CSE meeting, that the CSE failed to provide a copy of the IEP to the parent at the CSE meeting, that the level of related services on the IEP were inappropriate, that the CSE did not recommend a specific placement for the student at the CSE meeting, and that the parent was denied the opportunity to meaningfully participate in the formulation of the student's IEP (id. at pp. 2-3). The parent further alleged that the district's program and placement were inappropriate because the district recommended the same school that the student had previously attended, the students in the recommended class did not have similar needs to the student, the student-to-teacher ratio was too large, the teachers were not Orton-Gillingham certified, the school building was too large, and the student previously attended the program and did not make adequate progress (id. at p. 3). Lastly, the parent alleged that the district failed to ensure that there was a valid IEP and appropriate placement for the student prior to the start of the school year (id.).

On October 2, 2009, the district submitted an answer to the parent's due process complaint notice (Dist. Ex. 2). The district maintained that the placement was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at p. 3). Furthermore, the district alleged that the March 2009 IEP contained annual goals for academics, and that the meeting participants, including the parent, had an opportunity to participate in the formulation of the student's program (id.). The district also asserted that the program recommendation was discussed at the meeting (id.).

A 2009 fall report, written by the student's Winston Prep teachers, identified the student's academic and social/emotional needs and detailed the strategies that would be used to address the student's weaknesses (Parent Ex. D). The report indicated that the bulk of the student's "Focus" curriculum would center on improving the student's decoding, encoding, comprehension, fluency, and written expression skills (id. at p. 1).[4] The teachers commented on the student's difficulty maintaining attention and his occasional need for repeated redirection (id. at pp. 5, 7, 9, 10). A

[4] According to the hearing record, "Focus" refers to the 42-minute period of individual instruction that each student at Winston Prep receives on a daily basis (Tr. p. 122).

fall 2009 progress update from Winston Prep reflected that the student had earned the following grades: literature, B; writing, B; math (beginning algebra), A-; history (American history 1950-present), B-; science (earth science), B; art, A; physical education, A; Focus, A- (Parent Ex. K).

On December 18, 2009, the parties proceeded to an impartial hearing that occurred over the course of three, nonconsecutive days and concluded on May 14, 2010 (Tr. pp. 1, 49, 107). By decision dated June 25, 2010, the impartial hearing officer ordered the district to reimburse the parent for the student's tuition costs at Winston Prep for the 2009-10 school year (IHO Decision at p. 8). First, the impartial hearing officer found, absent any explanation, that the district "did not make a valid placement offer for [the student] for the 2009-10 school year" (id. at p. 7). Regarding the appropriateness of Winston Prep, the impartial hearing officer noted that the parent presented testimony regarding the student's academic and social advancement at Winston Prep and determined that the parent met her burden of proof to show that Winston Prep was an appropriate placement for the student (id.).[5] Turning next to an analysis of equitable considerations, the impartial hearing officer found that the parent fully cooperated with the district as the evidence showed that the parent provided the district with evaluations and reports, attended meetings, and was in "constant contact" with the district (id. at pp. 7-8). Accordingly, the impartial hearing officer determined that equitable considerations favored an award of relief to the parent (id. at p. 8).

The district appeals and requests that the impartial hearing officer's decision be vacated in its entirety. The district argues that there are no procedural violations that rose to the level of a denial of a FAPE. The district maintains that it appointed a CSE subcommittee consistent with State regulations and further alleges that such CSE subcommittee was properly composed. According to the district, the parent was provided the opportunity to meaningfully participate in the formulation of the student's program and the student's program was not predetermined. The district alleges that the parent had the opportunity to voice concerns during the March 2009 CSE subcommittee meeting and failed to raise any objection regarding the goals, program recommendation, or the student's classification of disability. The district further asserts that the March 2009 IEP contained goals and objectives targeting the student's primary areas of need and the goals were discussed with the parent at the CSE meeting. According to the district, the parent's claim relating to insufficient related services must fail because the parent does not offer any suggestion of what level or type of related services the student needs and the student does not receive any related services at Winston Prep. Further, the district argues that its failure to furnish the parent with a copy of the IEP at the time of the CSE meeting did not cause a denial of a FAPE. The district also maintains that its failure to identify a specific school while formulating the student's IEP at the March 2009 CSE meeting did not deny the student a FAPE. Substantively, the district argues that its placement recommendation of a general education classroom with SETSS would have provided the student with meaningful educational benefits. The district further requests that a determination on the appropriateness of the student's program be based on the information that was before the CSE at the time that the March 2009 IEP was developed. In addition, the district contends that the parent's claim that the proposed program was inappropriate

[5] In determining that Winston Prep was appropriate, the impartial hearing officer referenced a different student and private school than the student and school at issue in the case before her (IHO Decision at p. 7).

because it was not "language-based" and the teachers were not certified in Orton-Gillingham lacks merit because a parent cannot dictate the type of teaching methodology to be implemented.

The district further asserts in its petition that the parent has not met her burden of establishing the appropriateness of Winston Prep. According to the district, Winston Prep is not an appropriate placement for the student because it is overly restrictive and does not provide all of the recommendations offered in the July 2009 private neuropsychological evaluation, which the district argues the parent relied upon in rejecting the recommended placement and selecting Winston Prep. Finally, the district asserts that equitable considerations preclude an award of relief because the parent failed to afford the district with requisite notice of her intention to enroll her son in Winston Prep. Additionally, the district contends that the parent failed to cooperate with the district because when the parent received the private neuropsychological evaluation, she decided to unilaterally enroll the student at Winston Prep instead of timely sharing the private evaluation with the CSE or requesting a new CSE meeting to review the results of the evaluation. Lastly, the district argues that the impartial hearing officer properly did not award the parent the cost of the private neuropsychological evaluation when the parent testified that the psychologist accepted her insurance and there was no evidence in the hearing record that she requested an independent educational evaluation or any evidence relating to the cost of the evaluation (see 34 C.F.R. § 300.502; 8 NYCRR 200.5[g]).[6]

In her answer, the parent asserts that the impartial hearing officer properly awarded the parent reimbursement for the student's tuition at Winston Prep. As an affirmative defense, the parent sets forth that she did not waive any issues at the impartial hearing or on appeal. According to the parent, the district did not meet its burden of proof to show that it offered the student a FAPE for the 2009-10 school year. The parent asserts that the district failed to present any objective evidence that the student would make meaningful educational progress and that the student failed to make progress during the 2008-09 school year. In addition to the allegations that were asserted in the due process complaint notice, the parent alleges that the district failed to diagnose the student's dyslexia and failed to evaluate the student before the March 2009 IEP meeting. The parent further alleges that the district "failed to ensure that federal and state mandated procedural requirements guaranteeing parental participation and due process were used or provided" (Answer at p. 17). Regarding Winston Prep, the parent argues that she met her burden to show that Winston Prep was an appropriate placement and that the hearing record shows that the student made progress at Winston Prep. In response to the district's claim that Winston Prep is not an appropriate placement for the student, the parent asserts, among other defenses, that it is irrelevant whether the Winston Prep teachers are certified, that a parent is not held to the same mainstreaming requirements as a school district, and that a parent need not show that a private placement furnishes every special service necessary, instead courts look to the totality of the circumstances in determining the appropriateness of the private placement.

The parent further argues that equities favor awarding her tuition reimbursement because she cooperated with the CSE. The parent argues that she should not be denied tuition reimbursement on the basis that she did not immediately provide the CSE with the private

[6] While the parent requested reimbursement for the private neuropsychological evaluation in her due process complaint notice, the impartial hearing officer did not make a ruling on whether the parent was entitled to reimbursement.

evaluation when the evaluation was completed after the March 2009 CSE subcommittee meeting and the CSE had failed to evaluate the student. According to the parent, the district failed to inform the parent that she was required to provide notice of the unilateral placement, thereby excusing her failure to provide timely notice to the district. In her cross-appeal, the parent appeals "any adverse rulings made by the impartial hearing officer" and asserts that the impartial hearing officer failed to address all of the issues that the parties presented (Answer at p. 18).

The district filed a reply in response to the parent's procedural defense that the district failed to inform her that she was required to provide notice of the unilateral placement of her son at Winston Prep. The district alleges in its reply that the parent is precluded from raising such a defense for the first time on appeal when it was not asserted in her due process complaint notice and there is no indication in the hearing record that the parties agreed to expand the scope of the impartial hearing. The district did not file an answer to the parent's cross-appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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]).

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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]).

Upon review and due consideration of the entire hearing record in this matter, I find that the district's recommended program and services were designed to confer the student with educational benefits during the 2009-10 school year. At the onset, I note that the impartial hearing officer determined, without any explanation, that the district failed to offer the student a FAPE

because it did not offer a "valid placement" (IHO Decision at p. 7). In its petition seeking reversal of the impartial hearing officer's decision, the district addresses each of the issues that the parent raised in her September 2009 due process complaint notice to argue that it offered the student a FAPE. The parent asserted in her answer and cross-appeal that she has not waived any issue and that the impartial hearing officer failed to consider all of the parties' issues. In reviewing the hearing record in this case, I note that both parties had the opportunity to question witnesses, enter exhibits into evidence, and present their respective cases over the course of a three-day impartial hearing and there is an adequate hearing record to render a determination on the contentions raised by the parent in her due process complaint notice. Given that the impartial hearing officer failed to resolve all of the parties' contentions and failed to set forth in her decision the reasons and factual basis for her determination that the district failed to offer the student a FAPE, I will briefly consider each of the issues raised by the parent in her due process complaint notice.[7]

Before addressing the merits of this case, I must address a procedural matter. The parent alleges for the first time in her answer that the district failed to diagnose the student's dyslexia, failed to evaluate the student before the March 2009 IEP meeting, and failed to provide the parent with notice of the parent's due process rights. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C.§ 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). Here, I find that the hearing record demonstrates that the parent failed to assert in her due process complaint notice any claim relating to the district's failure to evaluate or diagnose the student (see Parent Ex. A). There is also no assertion that the district failed to provide notice of the parent's due process rights (id.). Moreover, the hearing record does not indicate that the parent amended the due process complaint notice or that the district agreed to expand the scope of the impartial hearing to include these issues. Accordingly, these issues raised for the first time in the parent's answer must be dismissed.

Turning to the first prong of the Burlington/Carter test, I must determine whether the district complied with the procedural protections of the IDEA (see Cerra, 427 F.3d at 192). I will begin by reviewing the parties' dispute over the composition of the March 2009 CSE. The parent argues that the March 2009 CSE was invalid because it did not include the participation of an additional parent member or a school psychologist. The district argues that it properly appointed a CSE subcommittee consistent with State regulations to review the student's program. According to the district, the March 2009 CSE subcommittee was properly composed because an additional parent member is not a required participant at a CSE subcommittee meeting and the presence of a

[7] I caution the impartial hearing officer that her decision must comport with State regulations at 8 NYCRR 200.5(j)(5)(v) requiring the decision to set forth the reasons and the factual basis for the determination. Here, the impartial hearing officer's failure to cite with specificity to the facts in the hearing record and the law upon which the decision is based, and failure to provide the reasons for her determinations, is not helpful to the parties in understanding the decision (see Application of a Student with a Disability, Appeal No. 10-035).

school psychologist was not required under State regulations. The impartial hearing officer did not render a decision with respect to the composition of the March 2009 CSE.

Under New York State law, CSE 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 child 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 (Educ. Law § 4402[1][b][1][d]; see Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[c][2]).

Regarding the parent's assertion that there was no additional parent member or school psychologist at the March 2009 CSE subcommittee meeting, the hearing record reflects that neither an additional parent member nor a school psychologist participated in the meeting (Tr. pp. 21, 36; Parent Ex. B at p. 2).[8] With respect to the additional parent member, State law does not require the participation of an additional parent member at a CSE subcommittee meeting (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]). With respect to the school psychologist, a review of the hearing record reveals that the March 2009 CSE subcommittee neither reviewed a new psychological evaluation report nor changed the student's program recommendation to a more restrictive setting than what was set forth in the student's previous IEP (Tr. pp. 21, 36, 44; compare Parent Ex. B at p. 1, with Parent Ex. J at p. 1). Therefore, a school psychologist was not a required participant at the March 2009 CSE subcommittee meeting (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]). Furthermore, the parent does not allege that the lack of an additional parent member and/or school psychologist at the March 2009 CSE subcommittee meeting impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (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]). Accordingly, I find that the CSE subcommittee was properly composed and decline to find that the lack of an additional parent member or school psychologist at the March 2009 CSE

[8] There is no indication in the hearing record that the parent objected to proceeding with the March 2009 CSE subcommittee meeting without the participation of an additional parent member or a school psychologist.

subcommittee meeting caused a denial of a FAPE (see Application of the Bd. of Educ., Appeal No. 09-124).

Next, the parties dispute whether the student's program was predetermined and whether the parent had the opportunity to participate in the formulation of her son's IEP. The impartial hearing officer did not make a decision with respect to either of these issues. The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]). Here, the hearing record reflects that the parent attended the March 2009 IEP meeting and had the opportunity to express her concerns and opinions (Tr. pp. 23-24, Parent Ex. B at p. 2). While the parent alleged in her September 2009 due process complaint notice that the goals and objectives on the IEP were developed outside of the March 2009 IEP meeting (Parent Ex. A at p. 2), the student's special education teacher testified that she drafted the student's goals before the March 2009 IEP meeting and discussed them with the parent at the meeting (Tr. p. 23). The special education teacher did not recall the parent expressing any disagreement or concerns at the March 2009 IEP meeting about the goals, proposed program, or the student's classification (Tr. p. 24).[9] Thus, I find that the evidence in the hearing record does not support the parent's allegation that the district predetermined the student's program for the 2009-10 school year.

Regarding the parent's assertion that she was denied the ability to meaningfully participate in the formulation of her son's IEP, federal and State regulations require districts to take steps to ensure that parents are present at their child's IEP meetings and are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]; see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at *14-15 Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d. 366, 378-79 [S.D.N.Y. 2006]; see also Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]). The parent asserts in her due process complaint notice that she was denied the ability to meaningfully participate because she voiced concerns regarding the proposed program that were "ignored" by the March 2009 IEP team (Parent Ex. A at p. 3). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K., 569 F. Supp. 2d at 383 ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Edu., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella, 2006 WL 3697318, at *1). The IDEA guarantees an

[9] I am not persuaded by the parent's allegation that the goals and objectives on the student's IEP do not target the student's educational, emotional and social needs (see Parent Ex. A at p. 2). The March 2009 IEP included goals and objectives addressing fluency and decoding, reading comprehension, math, writing, and spelling (Parent Ex. 3 at pp. 6-8), which the hearing record shows are areas of need for the student.

"appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). In this case, where the hearing record indicates that the parent attended the March 2009 IEP meeting and was able to voice concerns about the placement and whether the student "would get into a good high school" (Tr. p. 24), and absent any evidence in the hearing record to suggest that the parent was precluded from presenting her concerns to the district, there is no basis to find that the district "ignored" the parent's concerns or failed to afford the parent the opportunity to participate in the development of her son's IEP merely because the parent disagrees with the CSE subcommittee's recommended placement. Based on the foregoing, I decline to find that the parent was denied the opportunity to meaningfully participate in the development of her son's IEP for the 2009-10 school year.

The parent further contends that she was denied the ability to participate because the CSE failed to identify "a specific placement" for the student at the March 2009 CSE subcommittee meeting (Parent Ex. A at p. 3). In addition, the parent alleges that the district failed to ensure that there was "a valid IEP and appropriate placement for [the student] prior to the start of the school year in accordance with New York State Education law" (id.). The district argues that its failure to set forth "a specific placement" on the student's IEP did not rise to the level of a denial of a FAPE.

The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortars' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]). (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).[10, 11] This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational

[10] The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

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

placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; see Application of a Student with a Disability, 09-082; Application of a Student with a Disability, 09-074; Application of a Student with a Disability, 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). Thus, as held by the Second Circuit, the lack of a specific school location on a student's IEP does not constitute a per se violation of the IDEA (K.L.A., 2010 WL 1193082, at *2; T.Y., 584 F.3d at 420; see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]).

Here, the district formulated an IEP for the student that specifically identified a placement on the continuum of placement options, a general education classroom in a community school with SETSS (see 34 C.F.R. § 300.115; 8 NYCRR 200.6). The hearing record further reflects that the CSE subcommittee discussed the student's educational placement at the March 2009 IEP meeting, and considered other placement options for the student (Tr. p. 24; Parent Ex. B at pp. 10-11). As a school district is not required to list a specific school location on the IEP and may select a specific location so long as it is made in conformance with the CSE's educational placement recommendation (see K.L.A., 2010 WL 1193082, at * 2), there appears to be no legal basis for the parent's claim that she was unable to participate in the selection of the particular school. As far as her allegation that the district did not timely notify her of the specific location of the student's proposed program, the IDEA requires only that a district have an IEP in effect for each student with a disability at the beginning of each school year (20 U.S.C. § 1414[d][2][a]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]). A district's delay "does not violate the IDEA so long as [the district] still has time to find an appropriate placement for the beginning of the school year in September" (M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256 at *9-*10 [S.D.N.Y. Aug. 27, 2010]; Tarlowe, 2008 WL 2736027 at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; see Application of a Student with a Disability, Appeal No. 08-088). Here, the district informed the parent of the specific location of the student's proposed program in August 2009, prior to the start of the school year (see Dist. Ex. 2 at p. 3). The hearing record reflects that the parent was familiar with the proposed school because her son had previously been enrolled there (Tr. p. 91; see Parent Ex. A at p. 3). By the parent's own admission, before the start of the 2009-10 school year, she was able to advise the district's recommended school that her son would not be attending and that she had enrolled him at Winston Prep (Parent Ex. I). There is no evidence in the hearing record that the delay in receiving the placement notice impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or 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]; see Tarlowe., 2008 WL 2736027 at *6). Accordingly, I decline to find that the district failed to offer the student a FAPE on the basis that the parent did not receive timely notice of the specific location of the student's program.

Regarding the parent's assertion that she was not given a copy of the IEP at the March 2009 IEP meeting, the hearing record demonstrates that she participated in the creation of the student's IEP (Tr. pp. 94-95; Parent Ex. B at p. 2). There is no allegation that the parent never received a

copy of the IEP before the start of the school year and the hearing record demonstrates that the student's teachers at Winston Prep had a copy of the March 2009 IEP (Tr. p. 132; see 34 C.F.R. § 300.322[f], 300.323[d]; see generally Application of a Student with a Disability, Appeal No. 09-097). Further, the parent has not shown that the district's failure to provide her with a copy of the IEP at the time of the March 2009 meeting impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits (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]; A.H., 2010 WL 3242234, at *2). Under these circumstances, I decline to find a denial of a FAPE based on the parent's allegation that she did not receive the IEP at the time of the March 2009 meeting.

Turning to the parent's assertion that the IEP did not include an appropriate level of related services, the parent has not described how the recommended services are inadequate (see Parent Ex. A at p. 3). Moreover, the hearing record demonstrates that the student does not receive any related services at Winston Prep. Given the lack of specificity in the due process complaint notice (see 8 NYCRR 200.5[i][1]) and the parent's failure to develop this claim during the impartial hearing, I decline to render a decision with respect to the level of related services and cannot find a denial of a FAPE on this basis.

I will now consider the appropriateness of the district's recommended program for the student for the 2009-10 school year as set forth in the March 2009 IEP. The impartial hearing officer did not make a ruling on the appropriateness of the district's recommended program. The parent argues that the district's program was inappropriate because the district recommended the same school that the student had previously attended, the students in the recommended class did not have similar needs to the student, the student-to-teacher ratio was too large, the teachers were not Orton-Gillingham certified, the school building was too large, and the student previously attended the program and did not make adequate progress (Parent Ex. A at p. 3). The district argues that its recommended program and services were designed to confer the student with educational benefits during the 2009-10 school year. The district further argues that the parent's claims regarding the appropriateness of the recommended program stem from the private neuropsychological evaluation, which the CSE did not have at the time of its March 2009 meeting and was not provided to the district until after the parent unilaterally enrolled the student at Winston Prep.

The hearing record demonstrates that the March 2009 CSE subcommittee developed an individualized program for the student based on information that was before it at the time of the meeting (see J.S. v. North Colonie Cent. School Dist., 586 F.Supp.2d 74, 84 [N.D.N.Y. 2008] citing J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [holding that a determination of whether an IEP is reasonably calculated to enable a student to receive educational benefits is a necessarily prospective approach and courts must refrain from engaging in "Monday morning quarterbacking"]). The parent provided the private neuropsychological evaluation to the district in September 2009 (Parent Ex. I), and there is no indication in the hearing record that the parent requested that the CSE reconvene to consider the private evaluation. Accordingly, I concur with the district's contention that retrospective information should not be considered in evaluating the substantive appropriateness of the district's recommended program because it has no bearing on whether the IEP was reasonably calculated to benefit the student at the time that it was developed (Antonaccio v. Bd. of Educ. of Arlington Cent.

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

Contrary to the parent's assertions, I find that at the time it was formulated, the March 2009 IEP was reasonably calculated to confer educational benefits to the student (see Antonaccio, 281 F. Supp. 2d at 724-25). The hearing record shows that the student demonstrated deficits in decoding, that he had trouble understanding vocabulary which impacted his ability to comprehend what he had read, and that he had weak spelling skills and difficulty composing written pieces (Parent Ex. B at pp. 3, 4). In addition, the student exhibited deficits in math computation and problem solving (Tr. pp. 19, 123; Parent Ex. BB at pp. 3-4). The student required reminders to remain focused on classroom lessons and to stay engaged with classroom assignments (Parent Ex. B at p. 5). To address the student's needs, the CSE recommended that the student participate in a general education program and receive SETSS five times per week for 45 minutes in a group of eight (id. at pp. 1, 9). I find that the March 2009 IEP described the student's academic and social needs (id. at pp. 3-6). In addition, the annual goals and short-term objectives contained in the IEP specifically targeted the student's identified needs (id. at pp. 6-8). The short-term objectives also provided insight into the strategies that would be employed by the student's teacher to address the student's deficits. For example, the student's IEP included short-term objectives designed to assist the student in improving his fluency and decoding skills by becoming familiar with the rules that govern the pronunciation of vowel sounds, by dividing multisyllable words into their syllable parts, by using familiar/known words and parts of words to assist in decoding unknown multisyllable words, and by removing prefixes and suffixes from unfamiliar multisyllabic words and decoding the base word (id. at p. 6). Further, the IEP included objectives targeting the student's weaknesses in reading comprehension, which required the student to use context clues and substitute a known familiar word for an unfamiliar word as a means of enhancing comprehension (id. at p. 7). With respect to writing, the student's IEP objectives required the student to use graphic organizers and outlines to organize his written responses, to develop paragraphs from the related information he had organized, and to edit his paragraphs for subject/verb agreement, capitalization, and punctuation (id. at p. 8). In addition, the IEP included a spelling objective related to the student's lack of familiarity with the various spelling patterns of words that sound alike but have multiple spellings (id. at pp. 4, 8). Lastly, the IEP included short-term objectives designed to improve the student's mathematical skills (id. at p. 7). Specifically, the objectives targeted improving the student's familiarity with basic multiplication facts and solving multi-step math problems by underlining the information that let the student know what procedures he needed to use to solve the problem and sequentially completing each step (id.). The SETSS teacher testified that she pushed into the student's language arts or math class five periods per week (Tr. pp. 19-20). She

further testified that she consulted with the general education teacher to make sure that she understood the lesson that was being taught on a given day and could determine what kind of modification or explanation she would need to provide the student (Tr. pp. 25-26). The SETSS teacher reported that she created study guides to help the students who received SETSS with math tests (Tr. p. 26). She noted that she often worked with the student individually on decoding, reading comprehension, and fluency (Tr. p. 32). The SETSS teacher testified that she observed improvements in the student's decoding, comprehension, and math skills (Tr. pp. 20, 40). Contrary to the parent's assertions that the student failed to make progress at the district's school, I note that the hearing record indicates that the student received grades of B and C in the public school setting (Tr. p. 92; Parent Ex. C at p. 1).

In summary, any procedural errors asserted by the parent were either not supported by the hearing record or given the substantive propriety of the March 2009 IEP, did not rise to a level where relief under the IDEA is appropriate (see Grim, 346 F.3d at 381). Moreover, there is no showing that any procedural error impeded the parent from meaningfully participating in the formulation of her son's IEP (see Cerra, 427 F.3d at 193). I also conclude that the CSE's recommendation of a general education classroom in a community school with SETSS was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (see 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]). As earlier noted, I have considered the parent's cross-appeal, which asserted that the impartial hearing officer failed to consider the issues before her. Having determined that the district offered the student a FAPE, I need not reach the issue of whether Winston Prep was appropriate for the student or weigh the equities; thus, 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). Accordingly, I will sustain the petition and dismiss the cross-appeal.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED, that the impartial hearing officer's decision dated June 25, 210 is annulled in its entirety.

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

ROBERT G. BENTLEY
STATE REVIEW OFFICER