



The University of the State of New York

The State Education Department State Review Officer

No. 08-045

**Application of the [REDACTED] 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, G. Christopher Harriss, Esq., of counsel

Skyer, Castro, Foley, & Gersten, attorneys for respondent, Lara Hirsh, 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 the district to reimburse the parent for her son's tuition costs at the Sterling School (Sterling) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Sterling in an 8:1 fourth grade class and was receiving speech-language therapy and counseling as related services (Tr. pp. 1, 20, 177, 205-06, 218-22; see Parent Exs. A-B). The Commissioner of Education has not approved Sterling as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

During the 2003-04 school year, the student attended first grade in a general education setting at a district public school (see Tr. pp. 226-27). At that time, the student's teachers first reported that during "group sessions, group read-aloud" the student would "tend to just space out, stare around" (Tr. p. 226). At the end of the 2003-04 school year, the student's mother—who is a special education teacher in the district—decided that her son would repeat first grade because he "was not up to that grade level" (Tr. pp. 226-27, 249).

During the 2004-05 school year, the student repeated first grade in a general education classroom in a district public school (Tr. pp. 226-27). The student began to express anxiety about "not keeping up" and that "the words were just racing by" (Tr. p. 227). The student's mother "knew that there was some sort of processing issue with my special education background" (Tr. pp. 227-28). In addition, the student began to realize that he was not "keeping up with his peers and feeling embarrassed about it" (Tr. p. 228). The student's teacher allowed his mother to act as the student's 1:1 paraprofessional in the classroom for approximately 20 minutes per day in the morning, during which time the student's mother observed the student's distractibility, work-related anxiety, and difficulty focusing (Tr. pp. 228-29). The student's teacher described episodes when the student would "suddenly freeze up . . . like a deer in the headlights" (Tr. p. 230). As a result of the concerns raised about the student's school performance, the student's mother referred him to the district for an initial evaluation (Tr. pp. 227-30; see Parent Ex. L at p. 4).

After completing the evaluation process, the Committee on Special Education (CSE) convened in February 2005 and found the student eligible for special education programs and services as a student with a learning disability and developed an individualized education program (IEP) that recommended placement in a 12:1+1 collaborative team teaching (CTT) classroom with counseling as a related service (Tr. pp. 230-32; Parent Ex. F at pp. 1-2, 11). The student's mother testified that an individual present during the CSE meeting recognized her son's presentation as selective mutism and that she became aware that her son's episodes of "freezing up" only occurred in an academic setting (see Tr. pp. 231-32). At that time, the CSE developed annual goals and short-term objectives to address the student's needs in the areas of reading comprehension, spelling, auditory comprehension skills, mathematics, and his ability to perform independently (Parent Ex. F at pp. 6-8). The student transferred to a CTT classroom soon after the CSE meeting and remained in that placement through the end of the 2005-06 school year (see Tr. pp. 232, 234-35, 238).

Soon after the February 2005 CSE meeting, the parent obtained a private neuropsychological evaluation of her son in March and April 2005 (Tr. pp. 232-34; Parent Ex. L at p. 1). At the outset, the psychologist reported that the student met the diagnostic criteria for selective mutism—a childhood anxiety disorder—which required "highly modified approaches to neuropsychological assessment" (Parent Ex. L at pp. 1, 8). He also noted that the district's previous psychological evaluation in January 2005 did not identify selective mutism and did not reflect an accurate portrayal of the student's intellectual ability or potential (id.). In addition, the psychologist noted that the student was diagnosed with a metabolic disorder that impaired neural development, which could result in developmental delays, cognitive impairments, motor or gait abnormalities, and various behavioral syndromes (id.). The student had recently started treatment for the disorder with the hope that the medication could reconstitute neurocognitive development and improve functioning (id. at p. 2).¹

¹ The psychologist noted that the recent diagnosis of the student's metabolic disorder "might partially or fully explain [the student's] cognitive delays" and suggested continued follow-up with the student's pediatric immunologist (Parent Ex. L at p. 9).

To evaluate the student, the psychologist modified the assessment methods used in order to optimize the student's responses, noting that the assessment process itself placed "great psychological demands" on the student even with the modifications (Parent Ex. L at p. 2).² At first, the student responded non-verbally by pointing, and as he became more comfortable in the testing situation, he would supply one-word or "very brief" answers (id.). The student did not tolerate any tests, such as motor speed or perceptual speed tests, which created "performance pressure due to the timing factor" (id.). At the time of the neuropsychological evaluation, a medication trial had been initiated to address the student's difficulties with attention and focus (id. at p. 5).

In addition to the modified assessments, the psychologist observed the student at home and in the classroom, interviewed the student's mother, and discussed the student with his classroom teachers (Parent Ex. L at pp. 2-5). The psychologist reported that the student "never displayed aggressive behavior among his peers nor toward adults" and that his "tendency is to internalize his anxiety" which was a "significant dimension of his functioning" (id. at p. 4). A conversation with the student's September 2004 first grade teacher indicated that the student demonstrated a "marked behavioral change" during the course of the 2004-05 school year (id.). The student's teacher noted that early in the year, the student "seemed to engage more readily in verbal interaction with both teacher and peers; with peers, however, this was evident only during play activities and never during academic activities" (id.). The teacher noted that initially, the student was "engaged and responsive" during small group settings or an after-school reading enrichment group; as the year progressed, however, the student became less willing to engage (id.). The teacher reported that the student would "shut down" in a 1:1 setting and that he was "reluctant to the extreme" (id.). The teacher also reported that the student continued to be "socially and verbally engaged with his peers while on the playground," but he became "increasingly mute during class activities" and would "physically freeze when stressed" (id.). The psychologist observed similar behaviors during his observations of the student in both the office setting and in the classroom setting (id.).

Over the course of four office visits, the psychologist noted that the student's "manner of engagement" with him did not change significantly (Parent Ex. L at p. 5). The student remained "extremely reticent" to engage with the psychologist or to perform tasks without the presence of his mother, although the student easily separated from his mother and did not display any "overt stress" with separation (id.). Similarly, the student did not display separation anxiety upon entering the school setting (id.). After leaving the office, the psychologist "surreptitiously listened" to the student and his mother's conversation, which revealed "normal prosody, adequate and age-appropriate pragmatics, correct grammatical and syntactical structure, and normal comprehension at the level of casual discourse" (id.). Upon re-entering the office, the student "resumed his mute stance" (id.).

² The psychologist obtained additional estimates of the student's abilities by training the parent to administer portions of certain tests, audio-taping the procedures, and creating a competitive situation between the student and his siblings to motivate the student to perform (Parent Ex. L at p. 2). In addition, in an effort to conduct a modified assessment of the student's language, the evaluator "listened in" to a ten-minute interaction between the student and the parent, reviewed audio-taped interactions, observed the student interacting with his siblings at home, and interviewed the parent while listening to the audio-taped interactions (id.).

In contrast, however, the psychologist observed the student engage in "spontaneous and playful interactions" at home with his siblings where he spoke "fluently without self-consciousness or discomfort" (Parent Ex. L at p. 5). At home, the student could respond to simple questions posed by the psychologist with "phrases or simple sentences" and he engaged more readily with the psychologist (id.). During a classroom observation, the psychologist noted that the student displayed "difficulty responding to simple directions given by the teacher to the class and he adopted his 'frozen stance' when puzzled by what was expected of him" (id. at p. 5). During a small group reading lesson, the psychologist observed the student participate "as requested" with "adequate verbal comprehension and cooperation" but that he offered "very limited verbal responsiveness" (id.).

Based upon his evaluation, the psychologist opined that the student's diagnosis of selective mutism "impacts broadly on [the student's] functioning in the classroom, and in any setting in which his anxiety rises to a point of sufficiently impairing his psychological comfort" (Parent Ex. L at p. 8). The psychologist noted that the student appeared "especially sensitive to any perceived academic pressure, whether that be in the presence of his peers or even when he is 1:1 with an adult making performance demands" (id.). The psychologist also noted that the student was "highly sensitive to his own capabilities" and as such, the student may hesitate to perform on tasks where he feared his performance may be "harshly judged" or will not meet his own "standard for adequacy" (id.). The psychologist opined that the student's selective mutism was "responsive, in part, to his awareness of his cognitive deficits" (id.). He noted that selective mutism was "amenable to treatment via psychotherapy and medication" and recommended an exploration of "both avenues of treatment" (id.).

Administration of selected subtests of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) with modifications placed the student's verbal scale abilities within the normal range (Parent Ex. L at pp. 6, 10). With respect to assessments that measured the student's visual-perceptual and visual reasoning abilities, the results indicated that the student performed within the average range of ability (id. at pp. 6, 10-11). Assessments for attention indicated that the student exhibited "impaired attention, with particularly marked impairment in the visual domain" and that the student's anxiety was a "potent disrupter of attention" and was "particularly marked" when the psychologist "confronted [the student] with cognitive demands" (id. at p. 9). However, the psychologist opined that in this case, the student's impaired attention arose from an "underlying cognitive etiology and that the impact of the anxiety [was] secondary" (id.).

On the Integrated Auditory and Auditory Continuous Performance Test, the student's scores placed him "slightly above the cut-off for Attention Deficit Disorder" (Parent Ex. L at p. 9). The psychologist noted, however, that the student's scores also demonstrated that the student's "capacity for auditory attention . . . should and will support learning under optimized environmental conditions" (id.). Assessment of the student's visual attention reflected a severe impairment, which would impact the student's comfort in the classroom (id. at p. 10). Selected subtests used to assess the student's language and memory revealed weaknesses in phonological awareness, understanding instructions requiring a "grasp" of formal grammar, memory requiring linkages of auditory and visual stimuli, and linguistic memory processing (id. at p. 12). In

addition, the student displayed a mild and variable degree of disarticulation in his speech (id. at p. 11).

Overall, the psychologist concluded that the student presented with normal intellectual potential with a learning rate "compromised by probable neurocognitive weaknesses in attention, formal language functions, linguistic memory and perceptual-motor speed" (Parent Ex. L at p. 12). On the Adaptive Behavior Assessment System—Second Edition (ABAS-II) parent form completed by the student's mother, the student's global adaptation was in the "lower half of the broad normal range" (id. at p. 13). The psychologist noted, however, that the student displayed "normal social functioning and nearly age-appropriate peer interaction skills" with "those who are well-acquainted with him" (id.). The psychologist recommended educating the student in a "highly structured and supportive setting" where he would feel "maximally comfortable" and the "academic program can be carefully tailored to his specific needs" (id.). He opined that small groupings and an "optimal teacher/student ratio would be best at this time" (id.). In addition, the psychologist recommended psychotherapy, such as creative arts therapy, with possible medication to reduce anxiety (id. at pp. 8, 13).

In September 2005, the student's mother obtained a private auditory processing evaluation (Parent Ex. M). Assessments revealed that the student exhibited a borderline deficit in auditory processing with particular difficulty noted in auditory integration (id. at pp. 2, 5). The student also exhibited difficulties with auditory/visual integration, which the evaluator noted was associated with "severe reading, phonics and spelling difficulties" (id. at pp. 2-3, 5). The student could not perform several tasks used to assess phonemic awareness and/or temporal integration, (id. at pp. 3-4). Assessments used to measure auditory comprehension and following directions indicated that the student performed in the deficient range (id. at p. 4). The evaluator made the following recommendations: follow-up with a pediatric neurologist; sound enhancement within the classroom; continued monitoring of his hearing and middle ear function; speech-language therapy to improve phonemic awareness, social language, eye contact, formal receptive and expressive language, and speech production; Earobics to strengthen auditory processing and phonemic awareness; reading instruction with a specific phonological awareness approach; counseling for anxiety; and placement in a small, structured language enriched classroom for individualized instruction and facilitation with peers (id. at p. 6).

During the 2006-07 school year, the student attended a small, private special education school, which served students with learning disabilities and auditory processing difficulties (Tr. pp. 238-39). The student's mother testified that although the student made some progress, he continued to exhibit difficulty in "processing in the language/reading area" (Tr. pp. 239-40). She also testified that "it was a mutual decision" between herself and her son's then-current private school to seek an alternative placement for the student for the 2007-08 school year in a "smaller environment with a more intensive, structured approach to reading" (Tr. p. 240).

By notice dated May 10, 2007, the district invited the parent to attend the student's annual review scheduled on May 22, 2007 (Dist. Ex. 3). Testimony indicates that due to a miscommunication between the parent and her mother, the parent appeared at the district on May 21, 2007 for the annual review (Tr. p. 240). Although the parent appeared on the wrong date, the CSE agreed to convene on May 21, 2007, to conduct the student's annual review and to develop

the student's IEP for the 2007-08 school year (Tr. pp. 26-27, 41, 65-66, 240-41; Dist. Ex. 1 at p. 1). Participants in the CSE meeting included: the student's mother and grandmother, a school psychologist (as district representative and committee school psychologist), a regular education teacher, a special education teacher, a social worker, and an additional parent member (Dist. Ex. 1 at p. 2). The school psychologist testified that prior to the CSE meeting, the district attempted to schedule the participation of one of the student's then-current private school teachers at the CSE meeting, but the private school teachers were unavailable (Tr. pp. 41, 65-66). She also testified that since the CSE agreed to meet a day earlier than scheduled, "we knew that the people from the school wouldn't be available, but we had [their] reports" (*id.*).

To develop the student's 2007-08 IEP, the CSE relied upon documents contained within the student's special education file, including the 2005 neuropsychological evaluation report, the district's 2005 psychological report, previously conducted speech-language and occupational therapy (OT) evaluations, a newly prepared progress report by the student's private school teachers during the 2006-07 school year, a classroom observation report of the student while he attended private school during the 2006-07 school year, a medical report, and January 2007 teacher estimates of the student's current instructional levels (Tr. pp. 26, 28-29, 32-33, 49-50, 100, 104, 106, 125, 241, 250-51; *see* Dist. Ex. 1 at pp. 3-7).³ The district's school psychologist testified that the private school's progress report also contained information about the student's progress in speech-language therapy and OT (Tr. pp. 28-29). She also testified that the CSE relied upon the 2005 neuropsychological evaluation report "because of the complexity of [the student's] disability" and that the private school's progress report played a "considerable part" of the annual review because it provided information about the student's "up-to-date functioning" (Tr. pp. 32-33, 43-44).

Concerning the student's present levels of academic and learning characteristics, the CSE noted the student's diagnosis of selective mutism, and that his normal intellectual potential was compromised by neurocognitive weaknesses in attention, formal language functions, linguistic memory and perceptual motor speed (Dist. Ex. 1 at p. 3). Based upon the private school teachers' progress report, the CSE indicated that the student's selective mutism "profoundly" impacted "his daily participation" and "ability to learn" (*id.*). According to the progress report, the student continued to struggle academically, he had received reading instruction in a small group using the Orton-Gillingham based program "Preventing Academic Failure," and as the year progressed, the student participated in "skywriting, answered non-academic questions, and was able to read aloud" (*id.*). The IEP also noted that writing continued to be challenging for the student and he was "non-responsive or resistant" during many writing lessons (*id.*). In math, although the student participated in group instruction that followed the third grade curriculum, he exhibited an inconsistent willingness to participate (*id.*). The IEP indicated that the student "chose to only work on things that he is very comfortable with" and avoided new topics (*id.*). January 2007 teacher estimates placed the student at a second grade instructional level for reading, a first grade instructional level for writing, and a third grade instructional level for mathematics (*id.*). To address the student's academic management needs, the CSE recommended "small group instruction, multi-sensory reading methodology, preferential seating, opportunity

³ The classroom observation report, the medical report, the district's 2005 psychological report, and the private school teachers' progress report were not submitted into evidence at the impartial hearing.

for non/verbal responding, verbal and visual prompts, teacher lead-in to facilitate responding, teacher facilitation of peer interactions, and positive reinforcement" (*id.* at pp. 3-4).

Within the section regarding the student's present levels of social/emotional performance, the IEP indicated that as the 2006-07 school year progressed, the student's presentation changed from a non-speaking student in academic settings to a student who became more comfortable in the classroom and was able to interact more with teachers and peers (*see* Dist. Ex. 1 at p. 5). The IEP noted that the student enjoyed "playing games" but that at times, he could "become very silly and attention seeking with his peers" (*id.*). This section of the student's IEP referred to the district's 2005 psychological report, which indicated that the student appeared "as anxious and resistant" and that although the student appeared to want "greater autonomy . . . he [was] very dependent upon adults" (*id.*). The report also noted that the student had "little tolerance" for frustration and avoided "anything that he does not know or cannot do well" (*id.*). The CSE documented that the student's behavior did not seriously interfere with his instruction and could be addressed by a special education teacher (*id.*). In addition, the IEP contained recommendations for the student's social/emotional management needs, including "facilitation of social interactions with peers, modeling, opportunities for creative expression in art and dramatics, positive reinforcement, [and] counseling as a related service" (*id.*).

The CSE developed 15 annual goals and 62 short-term objectives to address the student's identified areas of needs and to target reducing the student's anxiety and feelings of acceptance in a small group, his response to typical school experiences, interactions with peers, mathematics, fine motor skills, visual perception skills, reading decoding, reading comprehension, receptive language, auditory processing skills, expressive language, written communication skills, and independence in performing assignments (Dist. Ex. 1 at pp. 8-11; *see* Tr. pp. 34-35). The annual goals included an age and/or grade level performance that the student would be expected to demonstrate in order to achieve each goal, and in addition, the annual goals included multiple short-term objectives to clarify and specify the actual skill the student would be expected to perform (*see* Dist. Ex. 1 at pp. 8-11; *see also* Tr. pp. 52-62). The IEP included four pages of annual goals' progress reports, which provided charts for the student's providers to fill out regarding the method of measurement used to measure the student's progress and which would then be used in preparation for the student's "next evaluation" (Dist. Ex. 1 at pp. 12-15; *see* Tr. pp. 60-62, 136-37, 139-40).

Based upon the information presented and discussed at the CSE meeting, the CSE recommended placement in a 12:1+1 special class in a community school, with counseling, speech-language therapy, and OT as related services (Dist. Ex. 1 at pp. 1, 18). The CSE recommended one 30-minute session of counseling per week in a 3:1 setting, two 30-minute sessions of OT per week in a 1:1 setting, two 30-minute sessions of speech-language therapy per week in a 1:1 setting, and two 30-minute sessions of speech-language therapy per week in a 2:1 setting (*id.* at p. 18). In addition, the CSE recommended testing accommodations including extended time (double), separate location, calculator permitted, directions read and reread, and questions read to student (*id.*). The IEP's modified criteria for promotion required the student to meet 50 percent of the third grade English Language Arts' (ELA) standards and 60 percent of the fourth grade mathematics' standards (*id.* at p. 19).

The student's mother testified that after the CSE meeting, she "found out about" Sterling, she met with the Sterling School, and she signed an enrollment contract and paid a non-refundable deposit on June 14, 2007, for the 2007-08 school year (Tr. pp. 242, 258-59, 262-63). In July 2005, the student's grandmother⁴ left a "series of [telephone] messages" at the district to notify the district that the student had not yet received a recommended placement (Tr. pp. 242, 254-55, 263).

By Final Notice of Recommendation (FNR) dated August 9, 2007, the district notified the parent of the final recommendations for the 2007-08 school year, which included placement in a 12:1+1 special class in a community school at a specified location with related services of speech-language therapy, counseling, and OT (Dist. Ex. 4). The student's mother contacted the recommended school and spoke with the principal, who offered her an appointment to visit during August 2007 and to speak with the principal (Tr. pp. 255-56). The student's mother testified that she declined to visit the recommended placement at that time because school was not in session and she would not have had an opportunity to observe the classroom (Tr. pp. 243, 256-57).

By notice of unilateral placement dated August 20, 2007, the parent advised the district that she placed her son at Sterling for the 2007-08 school year, that she rejected the student's 2007-08 IEP as procedurally and substantively inappropriate, that the parent was denied meaningful participation at the CSE meeting, and that the recommended placement did not provide an appropriate functional group for her son (Parent Ex. B). The notice also indicated that the parent would seek funding for the unilateral placement of the student at Sterling (id.).

In late fall 2007, the student's mother visited the placement recommended in the August 9, 2007 FNR (Tr. pp. 244, 257-58). She testified that one student had a 1:1 paraprofessional and that behaviorally "there was no, obvious, commotion at the time" (Tr. p. 244). She noted that it was a "full class" and that most of her observation "was discussing with the teacher, who we spoke with on the phone" about the structure of the class (id.). At the time of her observation, the students were "going to a cluster class" (id.). The student's mother also testified that the classroom teacher "mostly" used the "SRA method" for reading instruction, which she did not believe was appropriate for her son (Tr. pp. 244-45).

By due process complaint notice dated December 21, 2007, the parent alleged that the district failed to offer her son a free appropriate public education (FAPE)⁵ for the 2007-08 school year (Parent Ex. A at p. 1). The parent asserted the following procedural and substantive

⁴ According to the student's mother's testimony, the student's grandmother had previously worked for the district (Tr. p. 254).

⁵ 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]).

challenges as a basis for the denial of a FAPE: the CSE changed the student's program from a CTT class to a 12:1+1 special class without the required evaluations pursuant to the regulations implementing Section 504 of the Rehabilitation Act of 1973; the CSE was not properly composed; the annual goals and short-term objectives were insufficient and failed to include any measurable standards for progress; and after visiting the recommended placement, the student's mother determined it was not appropriate for her son (id. at pp. 1-4).

At the impartial hearing, the district presented the school psychologist and the special education teacher who had attended the May 21, 2007 CSE meeting as witnesses (Tr. pp. 22-68, 120-52). The district also presented the special education teacher who taught the recommended 12:1+1 special class during the 2007-08 school year as a witness (Tr. pp. 68-91).

The school psychologist testified that because the May 21, 2007 CSE meeting was an annual review, the CSE reviewed the documents and materials contained within the student's special education file for his initial evaluation in 2005 in addition to the newly prepared private school progress report and classroom observation report (Tr. pp. 28-29, 49-50). She noted that the student was "up for a triennial" in 2008 (Tr. p. 28).⁶ She recalled that the student displayed strengths in perceptual reasoning, his ability to read words in isolation, and in mathematics (Tr. pp. 29-30). The school psychologist also testified that non-academically, the student was "athletic" and interested in art and music, which indicated that he could "participate and enjoy interactions with typically developing peers within the family and the community and in certain aspects of the school curriculum" (Tr. p. 30). She also identified the student's weaknesses, noting his communication disorder accompanied by anxiety; difficulties with attention, visual attention, and auditory attention; auditory processing; expressive language due to selective mutism; and his behavior difficulties, which manifest as either being "silly" or "not quiet when he's supposed to be" (Tr. pp. 30-31). The school psychologist noted that the student was not aggressive and did not act out in other ways (Tr. p. 31). According to her testimony, the CSE "had a lot of conversation" about "what happens as children get in a learning situation and become aware of their difficulties, then it kind of exacerbates that anxiety" and "exacerbates the communication disability" (Tr. pp. 31-32).

With respect to the recommendations for the 2007-08 school year, the school psychologist testified that the CSE added counseling as a related service to address the student's "manifestations [of] shyness and difficulty with social behavior, and . . . acknowledgement of an anxiety piece" (Tr. p. 34). She discussed at length the goals and short-term objectives developed by the CSE, how the CSE arrived at the expected levels of achievement, and that the CSE used the private school teachers' progress report to assist in the creation of the student's goals and short-term objectives (Tr. pp. 34-35, 52-63, 65-66). Regarding the recommended placement in a 12:1+1 special class in a community school, the school psychologist testified that the CSE considered a general education setting, but determined that the student required "more support than could be provided" in a general education setting, "even with push-in support or [CTT]" and thus rejected placement in a general education setting with supports, including CTT (Tr. p. 37). She explained that according to the district's continuum, a CTT classroom is considered a general education setting (Tr. pp. 45-46). The CSE also considered a "more restrictive program" such as

⁶ The hearing record indicates that the district initiated evaluations in fall 2007 for the student's triennial review due in 2008 (Dist. Ex. 2; Parent Ex. E; see Tr. pp. 159-64, 168).

a special class in a special school, but rejected it because it was too restrictive at that time for the student (Tr. p. 37). She also testified that placement in a special class in a special school would deprive the student of access to his typically developing peers (Tr. pp. 50-51). Although the district offers special classes with a smaller student-to-teacher ratio in special schools, the school psychologist further testified that those special classes would not be an appropriate functional grouping for this student and would be too restrictive (Tr. p. 51). Therefore, the CSE recommended a 12:1+1 special class in a community school with "extra adult support" and access to typically developing peers (Tr. pp. 37, 51-52).⁷

During cross-examination, the school psychologist acknowledged the student's need for individualized instruction within the context of the classroom and that all of the adults working with the student had to be "sensitive" to his need to "facilitate communication" (Tr. p. 52).

Regarding the CSE's recommendation for placement in a 12:1+1 special program in a community school, the special education teacher who attended the May 21, 2007 CSE meeting testified that the CSE rejected placement in a general education setting because the student required a "small, structured setting" (Tr. pp. 129-30). He also noted that the CSE rejected placement in a special school because it would be "too restrictive at this time for [the student's] academic needs" (Tr. p. 130). On cross-examination, the special education teacher acknowledged that it had been approximately four years since he taught in a classroom (Tr. pp. 130-31). Although the school psychologist predominately prepared the student's annual goals and short-term objectives, she consulted with the special education teacher and he reviewed the goals and objectives (Tr. p. 131). He further testified that the "main reason that we recommended a more restrictive environment was due to the anxiety and emotional reasons" based upon information contained in the student's 2005 neuropsychological evaluation report, the district's 2005 psychological report, and the private school's report (Tr. pp. 134-35). The special education teacher also had experience teaching students with selective mutism in the past (Tr. pp. 137-38).

The special education teacher who taught the recommended 12:1+1 class during the 2007-08 school year testified that she had a master's degree in learning disabilities, board certification, and 22 years of experience as a special education teacher (Tr. pp. 70-71). During the 2007-08 school year, the teacher's classroom contained six students and was staffed with two additional adults—a paraprofessional and a crisis management paraprofessional (Tr. pp. 71-72; see Dist. Ex. 5).⁸ She identified the students' classifications as learning disabled, language

⁷ The parent presented a district social worker as a witness at the impartial hearing, who testified that a special class in a community school constituted the "next level of service after a collaborative team teaching recommendation" (Tr. pp. 170-71).

⁸ The district submitted a class profile of the recommended 12:1+1 special class into evidence at the impartial hearing (Dist. Ex. 5). The class profile indicated that the students ranged in age between 10 and 11 year old, the student's reading levels ranged between "PK.1 - 02.9," and the math levels ranged between "PK.1 - 04.6" (id.). According to State regulations, the "chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months" (8 NYCRR 200.6[g][5]; see 8 NYCRR 200.6[g][4]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]).

impaired, and/or an emotional disturbance (Tr. p. 72). With respect to the students classified with an emotional disturbance, the teacher testified that "at times" these students would exhibit "acting out behaviors" (Tr. p. 81). She further explained in testimony that for students classified as emotionally disturbed, "it's not so much the exhibiting of it as that's their classification" (Tr. p. 88). The students ranged in age from 10 to 11 years old, and were considered fourth and fifth grade students (*id.*). At the time of the impartial hearing, the students' reading levels ranged between first and fourth grade, and the student's math levels ranged between third and fifth grade (Tr. p. 73; Dist. Ex. 5). To address the students' different levels of academic functioning, individual needs, and individual goals, the special education teacher used small group instruction according to the students' strengths and weaknesses (Tr. pp. 76-77). She indicated that based upon the student's reported levels of academic functioning, he would fit into her class and within the functioning levels of her current students (Tr. p. 77).

During the day, the students participated in a "small whole-group lesson to introduce" material, and then the students would "break up into small groups . . . so that we can work on individual levels" (Tr. p. 73). The small groups ranged from 3:1 to 1:1 settings, depending upon the student (*id.*). The special education teacher testified that the classroom was very structured and that she used the "teacher's college" curriculum, as well as her own specific methods with individual students—such as Lindamood Bell and Orton-Gillingham (Tr. pp. 73-74, 85). With respect to reading methodologies used in her classroom, the teacher testified that the methodology depended upon the student and the student's needs (Tr. p. 85). She stated that the SRA Reading Mastery Plus methodology was "very language-based, and direct instruction—teacher directed," that it required a student to master a certain goal or skill before moving on to the next level, and it was very repetitive (Tr. pp. 85-87). Recently, the teacher implemented more of the Lindamood Bell and Orton-Gillingham methods for one current student because she was not making "enough progress for me" (Tr. p. 86).

The special education teacher testified that she had reviewed the student's IEP, recalled that the student received speech-language therapy, OT, and counseling, and that the services listed on the student's IEP could be provided at the proposed school (Tr. pp. 75-76). She also testified that she had previously taught a student with selective mutism, and that she currently had a student in her class who presented similar to a student diagnosed with selective mutism (Tr. pp. 82-83). She recalled the visit with the student's mother during fall 2007 and noted that the student's mother was "understandably concerned" about the other students in the class, as well as their behaviors, "just like a mom" (Tr. pp. 81-82).

The parent testified on her own behalf, and she also presented Sterling's director as a witness (Tr. pp. 172-224, 225-64). Testimony by the student's mother indicated that she attended the May 21, 2007 CSE meeting and participated in the process that determined the recommendation for placement in a 12:1+1 special class in community school (Tr. p. 252). She testified that she "was concerned" about the recommendation and that the CSE "discussed it at length because collaborative team teaching . . . was too large, self-contained in a specialized school was too restrictive, so there were concerns" (*id.*). The student's mother noted that she was included in the discussion regarding the recommended placement and further, that "there were not too many options" (*id.*). She also testified that as a special education teacher "familiar with certain special education class make-ups," she understood that a "mixture of kids" were placed in

12:1+1 settings, and that she was concerned about distractions because "most likely there would be a degree of emotionally disturbed students and extreme varying levels" in the classroom (Tr. pp. 241-42).

Testimony also indicates that the student's mother was familiar with the IEP process, that she felt "comfortable" at the May 21, 2007 CSE meeting, that she was aware of "multiple materials" used to draft the IEP, and that although she knew she could request to review these documents, she made no such requests (Tr. pp. 249-51). The student's mother also testified that she did not object to any of the annual goals or short-term objectives at the CSE meeting, nor did she raise any concerns about the annual goals or short-term objectives (Tr. p. 251). She also did not object to or raise any concerns at the CSE meeting regarding the student's classification (Tr. pp. 251-52). Although she did not object to the recommended 12:1+1 special class placement, she did raise concerns about the recommended placement as noted above (Tr. p. 252). Finally, the student's mother testified that she did not object to or raise any concerns about the recommended related services of speech-language therapy, OT, or counseling at the CSE meeting (Tr. p. 253).

At the time that she visited the recommended placement location, she testified that her son "was making significant progress from the beginning, as far as I saw" at Sterling (Tr. pp. 243-44). She also noted that at that point in time, she "needed to commit to a school" (Tr. pp. 244, 257). While at Sterling, the student's mother testified that her son improved his word attack skills and appeared more confident with respect to social/emotional development (Tr. p. 246). She was also "satisfied" with the counseling provided at Sterling and believed that her son did not require OT services as recommended by the CSE (Tr. pp. 247-49).

Sterling's director also provided testimony at the impartial hearing (Tr. pp. 172-224). She founded Sterling in 1999 to serve second through sixth grade students, aged 8 to 12, who have been "diagnosed as having reading deficits and who, we think, would benefit from the small class sizes and the Orton-Gillingham Instruction we provide" (Tr. pp. 173-74). The director has a State certification as a reading specialist, a master's degree in reading, and a master's degree in educational administration (Tr. pp. 172-73, 211). Sterling employs nine full-time staff and one part-time staff, and all of the classroom teachers hold either State certifications or master's degrees (Tr. p. 175). At the time of the impartial hearing, 24 students attended Sterling; Sterling also offers speech-language therapy and counseling as related services, but does not provide OT services (Tr. pp. 176-77, 221).

Prior to admitting the student for the 2007-08 school year, Sterling's director spoke to the head of the student's then-current private special education school who recommended Sterling to the student's mother because Sterling was "so much smaller" (Tr. p. 178). She learned from the head of the private school that the student used a Wilson Program for reading while enrolled there and it provided some benefit to the student (*id.*). She noted that Sterling had previously served students with selective mutism (Tr. p. 179).

While at Sterling, the student received one 60-minute session per week of speech-language therapy in a 3:1 setting, reading instruction using the Orton-Gillingham multisensory approach in a 1:1 setting, math instruction in a 3:1 setting, one 45-minute session per week of

counseling in a 1:1 setting, and one session per week of counseling in a classroom-wide group setting (Tr. pp. 1, 20, 177, 205-06, 218-22).⁹ She noted that the small groups allowed the student to more easily focus (Tr. pp. 187-88). The director testified that if the student was asked a question in front of his peers, "most of the time you will just get a blank look" (Tr. p. 189). In order to facilitate a response in front of a larger group, the director would sometimes advise the student that he would be the "third person" called on and she would provide his question to him in advance (*id.*). In his speech-language therapy, the director testified that the student worked on pragmatics and socialization skills to improve his communication (Tr. p. 181). She described the student's reading level as "emergent" and that the student was grouped for reading and math instruction with students of similar level skills (Tr. pp. 191-92). Sterling uses the Orton-Gillingham approach for reading instruction and for writing skills (Tr. pp. 193-95). The students are also taught keyboarding (Tr. pp. 195-96).

When asked how the student has progressed academically, the director testified that "he has been able to become somewhat more engaged" (Tr. p. 197). In her science class at that time, the student began using "some scientific vocabulary" in his responses (*id.*). She also observed the student express himself "a little bit better" (Tr. p. 198). While the director found it difficult to "judge" any changes in the student's anxiety levels, she did note that he would no longer sit by himself during lunch, which suggested an increase in his social confidence (Tr. pp. 198-99). She explained that although the student was making progress academically, he remained at an early second grade/beginning third grade curriculum level and that he still required a significant amount of remediation (Tr. p. 200).

Socially and emotionally, the director explained that it was also difficult to judge the student's progress since he "does not participate a lot" during sessions with the guidance counselor in the classroom-wide group sessions (Tr. pp. 202-03). The student would participate in games during his 1:1 sessions with the guidance counselor, but he was not a student "who chats a lot" (Tr. p. 203).

The director testified that she had reviewed the student's May 21, 2007 IEP during the admissions process "to see what is being said about this child, what is being recommended for this child" (Tr. p. 205). She also used the student's IEP to note what academic management needs and related services were recommended (*id.*). The director did not find the IEP goals particularly useful because "the goals are not necessarily derived from an Orton-Gillingham curriculum so they do not, necessarily, make sense sometimes with the sequence that we are using to teach" (*id.*). She also noted that she looked at the recommended modifications so that she could provide the same or similar modifications in the classroom (*id.*).

With respect to student-to-teacher class ratios, the director indicated that the student does not "always perform without a lot of support in a class of eight" and although there is not much difference between a class of eight and a class of twelve, "the biggest difference is that three periods out of every day he is in a much smaller group where the grouping of students are at the skill level that he is at" (Tr. pp. 207-08). All of the students at Sterling have IEPs and they do not have the opportunity to work with students in a mainstream environment (Tr. pp. 217-18).

⁹ The student's mother testified that he received one 2.5 hour session per week of speech-language therapy (Tr. 261). The hearing record does not further clarify this inconsistent testimony.

In her decision dated April 24, 2008, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2007-08 school year because the evidence presented did not establish that the recommended special education programs and services were "reasonably calculated" to confer educational benefits to the student (IHO Decision at pp. 9-10). She concluded that the CSE's recommendations failed to sufficiently address the student's selective mutism, the student's needs created by his selective mutism, and the student's distractibility (id. at p. 9). The impartial hearing officer found that the student required a "small, supportive and structure[d] environment" to reduce his anxiety, to meet his need for redirection, and to address his speech-language needs (id.). She concluded that the district failed to present evidence to establish that the recommended 12:1+1 special class "could address these specific, significant special education needs" (id.).

The impartial hearing officer also noted that the annual goals and short-term objectives were not appropriate and demonstrated the CSE's failure to "appreciate and address" the student's special education needs (IHO Decision at p. 9). She determined that given the student's previous levels of performance, no basis existed upon which to conclude that the student could meet fourth grade level goal expectations in math, third grade level goal expectations in reading, and age/grade level goal expectations in receptive and expressive language (id.). In addition, the impartial hearing officer noted that the goals and objectives failed to specify any method of measurement of the student's progress (id. at pp. 9-10). Based upon the foregoing, the impartial hearing officer found that the district failed to sustain its burden of proof and the parent prevailed as to the first criterion for an award of tuition reimbursement (id. at p. 10).

Moving on to the second criterion for an award of tuition reimbursement, the impartial hearing officer concluded that the parent met her burden to establish the appropriateness of the unilateral placement based upon the "uncontroverted" testimony of Sterling's director and the parent (IHO Decision at p. 10). She indicated that the director's testimony clearly established that Sterling met the student's special education needs because it provided a "small, structured and supportive environment" that reduced the student's level of anxiety, provided sufficient "teacher supervision" to keep the student on task, and addressed the student's receptive and expressive language needs (id.). The impartial hearing officer noted that the student made "specific gains" in expressive language as a result of his reduced anxiety, his work with the guidance counselor, and the speech-language therapist's focus on pragmatics and socialization skills (id.). The small class size at Sterling, the small group instruction, and the individualized instruction addressed the student's need for "frequent redirection" (id.). In addition, the student made progress in decoding and reading comprehension through Sterling's use of the Orton-Gillingham method of instruction for reading and writing (id.). Finally, the impartial hearing officer concluded that the parent prevailed with respect to the third criterion for an award of tuition reimbursement, equitable considerations, because she attended CSE meetings, she provided information to the CSE, she cooperated with the district, she expressed concerns at the CSE meeting, and she visited the proposed placement (id.). Based upon her findings and conclusions, the impartial hearing officer directed the district to reimburse the parent for the costs of her son's tuition at Sterling for the 2007-08 school year within 15 business days of the receipt of proper proof of payment (id. at p. 11).

On appeal, the district asserts that the impartial hearing officer erred when she concluded that the district failed to offer a FAPE to the student for the 2007-08 school year. Although the impartial hearing officer did not address the parent's allegations regarding the CSE's composition, the district contends that the CSE was properly composed, that the student's mother—a special education teacher—did not object to the composition of the CSE at the meeting, and that the hearing record does not contain evidence that, even if the CSE was not properly composed, that it resulted in a denial of a FAPE to the student for the 2007-08 school year. The district further alleges, in the alternative, that if the district failed to offer a FAPE to the student for the 2007-08 school year, the impartial hearing officer erred in concluding that Sterling was an appropriate placement for the student and that equitable considerations favored the parent. In her answer, the parent seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the petition.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

Additionally, students with disabilities must be educated 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 200.6[a][1]; see Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). While parents are not held as strictly to the LRE standard as school districts are, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]). The requirement of

instruction in the LRE must, however, be balanced against the requirement that each student with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]).

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, 142 F.3d at 130; 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 Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 child 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 proof upon the school district during an impartial hearing, except that a parent seeking tuition

reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007; see Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-018).

A thorough review of the hearing record indicates that contrary to the impartial hearing officer's finding, the hearing record establishes that the special education programs and related services recommended by the district in the May 21, 2007 IEP were reasonably calculated to confer educational benefits to the student, and thus, offered a FAPE to the student for the 2007-08 school year. The evidence presented in this case indicates that the CSE properly reviewed, considered, and relied upon the student's 2005 neuropsychological evaluation report for the most accurate assessment of the student's cognitive and social/emotional functioning to develop the 2007-08 IEP (Tr. pp. 32-33, 49-50, 125, 250-51; see Dist. Ex. 1 at pp. 3, 5, 7; Parent Ex. L). In addition, the CSE properly reviewed, considered, and relied upon the student's private school progress report and classroom observation report, as well as the January 2007 teacher estimates of instructional levels, to determine the student's most up-to-date functioning to develop the 2007-08 IEP (Tr. pp. 49-50, 104, 125, 241, 250-51; see Dist. Ex. 1 at pp. 3, 5, 7, 8-11). The hearing record also indicates that the student's mother knew that the CSE considered multiple materials at the CSE, she did not object to the CSE's reliance upon the information or materials considered, she did not request additional evaluations to supplement the CSE's current information about the student, and she does not currently allege that she reported new or additional information to the CSE that was not fully or properly considered in the development of the student's 2007-08 IEP (see Tr. 249-51; see generally Tr. pp. 225-64). Moreover, the IEP accurately reflects the information contained in the materials reviewed and considered by the CSE regarding the student's present levels of academic and social/emotional performance (see Dist. Ex. 1 at pp. 3-11, 16-19).

In addition, the hearing record supports the conclusion that the 2007-08 IEP sufficiently identified the student's areas of need, including the student's selective mutism diagnosis, how that diagnosis impacts the student's ability to function in an academic setting, the needs created by his selective mutism, and the student's difficulties with anxiety, focus, attention, communication, and distractibility (see Dist. Ex. 1 at pp. 3-11, 16-19). The CSE sufficiently addressed the student's identified needs by recommending a small, structured academic setting with additional adult support, small group instruction, a multisensory reading methodology, and a variety of supports and services to facilitate the student's communication difficulties, including opportunities to respond non-verbally, verbal and visual prompts, teacher lead-in to facilitate responding, teacher facilitation of peer interactions and peer social interactions, opportunities for creative expression in art and dramatics, modeling, and positive reinforcement (Dist. Ex. 1 at pp. 3-7). In addition, the CSE also recommended to continue speech-language therapy and OT as related services, but added counseling as a related service to further address the student's manifestations of shyness, anxiety, difficulty with social behavior, and difficulties with communication (Tr. p. 34; Dist. Ex. 1 at pp. 3-11, 18). The hearing record further demonstrates that the annual goals developed by the CSE address the student's identified needs in the areas of anxiety, mathematics, fine motor skills, visual perception skills, reading decoding, reading comprehension, behavior, peer interactions, receptive language skills, auditory processing skills, expressive language skills, working independently, and writing (Dist. Ex. 1 at pp. 8-11). In

addition, the CSE developed sufficient and measureable short-term objectives to achieve specific skills and to measure the student's progress in achieving those skills (*id.* at pp. 8-15). The hearing record indicates that the student's mother did not object to any of the annual goals or short-term objectives at the CSE meeting, nor did she raise any concerns about the annual goals or short-term objectives at the CSE meeting (Tr. p. 251).

According to the evidence presented, the CSE properly recommended placement in a 12:1+1 special class in a community school with related services to address the student's identified needs. The hearing record indicates that the CSE engaged in a lengthy discussion at the CSE meeting about the student's placement, which included consideration of the IDEA's LRE mandate, the small, structured setting required by the student, the student's current levels of functioning, the student's need for additional adult support and facilitation of communication, and the student's need for individualized instruction (Tr. pp. 30, 37, 45-46, 50-51, 129-30, 134-35, 241-42, 252). The student's mother testified that she felt comfortable at the CSE meeting, that she understood the IEP process, that she participated in the discussion regarding the recommended 12:1+1 special class, and that she expressed concerns about the size and make-up of the classroom (Tr. pp. 241-42, 249-52).

Furthermore, the hearing record sufficiently establishes that the recommended 12:1+1 special class would have met the student's needs and at the time of the recommendation, was reasonably calculated to confer educational benefits to the student. Significantly, the special education teacher who taught the recommended 12:1+1 special class during the 2007-08 testified that her class contained six students, it was staffed with three adults, the students received small group instruction in order to address each student's individual needs, instructional levels, and functional levels, and the recommended placement could provide the student's related services (Tr. pp. 71-74, 75-77). The evidence presented also establishes that the student's reading and math levels fell within the range of academic abilities of the students within the 12:1+1 special class (Tr. pp. 73, 77; Dist. Ex. 5). The special education teacher testified that she used a variety of multisensory approaches for reading instruction (Tr. pp. 73-74, 85-87). The special education teacher also had experience teaching students with selective mutism (Tr. pp. 82-83). In addition, during her visit to the proposed classroom in late fall 2007, the student's mother did not observe any "commotion" or behavior disturbances to substantiate her concern regarding the inclusion of students classified as emotionally disturbed within the recommended placement (Tr. pp. 72, 241-42, 252).

In conclusion, I do not find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is supported by the hearing record. Based upon the evidence in the hearing record, the district's recommended special education programs and services in the proposed May 21, 2007 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the

foregoing, I concur with the district that it offered the student an appropriate program for the 2007-08 school year. Having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of the student at Sterling was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS SUSTAINED.

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

**Dated: Albany, New York
July 8, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**