



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-082

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Advocates for Children, attorneys for petitioner, Matthew Lenaghan, Esq. and Kimberly Madden, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for payment for her daughter's tuition costs at the Sterling School (Sterling) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a fifth/sixth grade classroom at Sterling (Tr. pp. 36, 132, 159, 171). Sterling has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1 [d], 200.7; Tr. pp. 30, 171). Sterling specializes in teaching students with learning disabilities (Tr. p. 30) who function within the average range of intelligence (Tr. p. 167). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student's primary deficits are in academics, including reading, writing and math; but that she also has phonological processing deficits, executive functions deficits in the area of working memory, and difficulty organizing her thoughts, attending to task and accepting assistance from others (Tr. pp. 65, 160, 161; Parent Ex. M at pp. 3, 4). The hearing record also reflects that the student has a low frustration tolerance and "shuts down" when she gets something wrong or when she perceives that the work is too hard (Tr. p.

161; Parent Ex. M at p. 4). The student is "easily swayed, agitated, and distracted by the behaviors of other students around her" (Tr. p. 228). The student's performance on intelligence testing administered in October 2005 yielded a full scale IQ score of 78 (high end of borderline functioning), with noted deficits in processing of abstract symbols and difficulty with the sequencing and manipulation of information in working memory (Parent Ex. T at p. 4). Achievement testing in October 2005 indicated weaknesses in reading and mathematics, specifically in basic decoding skills, phonological awareness, symbol interpretation, and processing of abstract visual-spatial information as well as in writing skills, including spelling, punctuation, and creating sentences (id. at pp. 10-11). Speech-language testing conducted in July 2007 showed deficits in the student's receptive language skills (Parent Ex. O at p. 2).

The parent stated that she first became aware of the student's academic difficulties when the student was in kindergarten and exhibited difficulty identifying letters of the alphabet (Tr. p. 118). According to the parent, when the student was in first grade her teacher informed the parent that the student "wasn't grasping the reading process" and that she might need to be retained in first grade (id.; Parent Ex. T at p. 2). The hearing record reflects that at that time, the district school had initiated daily pull-out reading assistance for the student in a small group and that the parent had also placed the student in an after school private reading and math tutoring program (Tr. pp. 119, 133; Parent Ex. T at pp. 2, 14). According to the hearing record, during the summer between first and second grades, the student attended a five week reading course for two hours per day in a group setting (Tr. p. 119; Dist. Ex. 2 at p. 2). The hearing record reflects that by agreement with the district principal, the student was promoted to second grade under the condition that she would undergo a private psychoeducational assessment to investigate her academic difficulties and assist in determining appropriate remediation (Tr. p. 119; Parent Ex. T at p. 2).

The student underwent a private "psychodiagnostic" evaluation over a four day period beginning on September 10, 2005 and ending on October 23, 2005 (Parent Ex. T). According to the report, the district had requested the evaluation to "evaluate [the student's] cognitive ability as appropriate to the second grade level," to "detect the presence of any learning disability that may underlie [the student's] academic struggles," and "to offer recommendations for services that may help to facilitate [the student's] successful learning" (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) revealed a full scale IQ score of 78 (id. at p. 14). However, because of the significant discrepancy between the student's index scores, which ranged from the borderline range on the verbal comprehension and processing speed indices to the low average and average range on the perceptual reasoning working memory indices, respectively; the evaluators advised that the full scale IQ score of 78 was "not considered to be an accurate summary measure of [the student's] intellectual functioning" and that the student's scores on the WISC-IV "should only be viewed as a minimal estimate of her true cognitive potential" (id. at pp. 4, 14). The student's performance on the Clinical Evaluation of Language Fundamentals-Third Edition (CELF-3) indicated that the student's overall language abilities fell within the average range at the 42nd percentile (id. at pp. 12, 14). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) indicated that the student's academic performance ranged from the borderline to the average range (id. at pp. 7, 14). According to the evaluators, the student showed significant deficits in basic decoding skills and phonological awareness and presented as a "virtual nonreader despite her efforts to compensate through a limited sight vocabulary" (id. at p. 14). Results of administration of the Gray Oral Reading Test-Fourth Edition (GORT-4) supported this finding with the student

attaining a score on the sum of fluency and comprehension subtest that fell below the first grade level and at the 2nd percentile (id. at pp. 13, 14). In mathematics, the student's scores fell within the average range in math reasoning and the low average range in numerical operations with a math composite score at the 16th percentile (id. at pp. 7, 8). Her performance was limited by her dependence on using her fingers as an external aid for even the simplest problems, which prevented her from working with larger numbers that required "carrying" or "borrowing" (id. at p. 8). The student exhibited difficulty with symbol interpretation and processing of abstract visual-spatial information which affected her ability to interpret and solve math equations (id. at pp. 9, 14). The student's performance on the Bender Visual-Motor Gestalt Test indicated that her deficits in working memory, specifically her ability to manipulate numbers in her mind, affected her ability to work with large quantities that could not be counted on her fingers (id. at p. 14). The student's overall performance in the low average range (27th percentile) on the spontaneous writing section of the Test of Written Language-Third Edition (TOWL-3) indicated that she could use pictorial stimuli to write a story despite her difficulties with grammar, spelling, and punctuation (id. at pp. 10, 15). The report also reflected the evaluators' diagnostic impressions of the student that included Axis I diagnoses of a reading disorder and a mathematics disorder (id. at p. 15).

The psychodiagnostic evaluation report indicated that the student's difficulties had begun to severely affect her self concept, evidenced by her self denigrating and discouraging comments, a tendency to give up prematurely on material she might know, and her expectations of failure (Parent Ex. T at p. 15). The evaluators strongly recommended immediate interventions to revive the student's motivation to succeed, including daily individualized reading and math remediation focused on decoding skills, phonological awareness, and basic math facts; 1:1 assistance when possible; a resource room program with the greatest possible frequency; and utilization of pictorial cues with written and numerical work (id.). The evaluators further recommended that for the following academic year, the student be placed in a school that specialized in teaching children with learning disabilities in a social environment that did not stigmatize her difficulties or, if that were not possible, continued daily individual and small group assistance in school (id.). In addition, the evaluators recommended that the parent pursue 1:1 tutoring after school through a program that specialized in the remediation of reading, as well as other disabilities (id.). The psychodiagnostic evaluation report indicated that a specific tutoring service was suggested to the parent that "would be able to meet with [the student] twice a week at a reasonable cost" (id.).

On January 27, 2006, when the student was in second grade and after she was referred to the Committee on Special Education (CSE) by the parent, a district social worker completed an initial social history of the student with the parent acting as informant (Dist. Ex. 2).¹ The social history reflected that the student had a healthy medical history with vision and hearing screenings within normal limits (id. at p. 1). The social history also indicated that the student had attended public school since kindergarten and despite good attendance and effort, she presented with academic problems in reading comprehension (id.). The parent reported that the student had begun to feel pressure from her peers related to her inability to keep up with the rest of the class and that the student sometimes came home from school crying (id. at p. 2). The

¹ District Exhibits 1 through 4 were submitted as attachments to the district's answer on appeal, as they were not initially provided to the Office of State Review with the hearing record.

parent also reported that the student's siblings made her feel "unease" and that the student's academic difficulties were "greatly" impacting on her self esteem (id.).

On February 10, 2006, the CSE convened for the student's initial review (Parent Ex. S at pp. 1, 2). According to the resultant individualized education program (IEP), the student was determined eligible for special education programs and services as a student with a learning disability (id. at p. 1). The February 10, 2006 IEP included a recommendation that the student be placed in a collaborative team teaching (CTT) class (id.). According to the parent, during the latter part of the 2005-06 school year, the student received "pull-out groups for reading" (Tr. pp. 133, 34).²

The parent unilaterally placed the student at Sterling for the 2006-07 school year (Tr. pp. 134-35). The hearing record reflects that the student's classes at Sterling during the 2006-07 school year included language arts, math, science, social studies, gym, and "tutoring" (Parent Ex. R). By stipulation of settlement, the district agreed to fund the student's attendance at Sterling for the 2006-07 school year (Parent Ex. Q at pp. 1, 7).

The hearing record reflects that on June 18, 2007, the CSE convened for an annual review of the student (Parent Ex. P at pp. 1, 2). The resultant June 2007 IEP continued the student's classification as a student with a learning disability and changed the student's recommended special education programs and services to a special class placement with a student to teacher ratio of 12:1 (id.). The June 2007 IEP included a recommendation that the student receive one individual 30-minute counseling session per week in a separate location (id. at pp. 1, 6). The June 2007 IEP also indicated that the student required the support of a full-time small class placement to address her academic delays, attentional difficulties, and low frustration tolerance (id. at p. 5).

On July 25, 2007, a district "speech and language evaluator" conducted a speech assessment and a language assessment, and prepared a speech-language evaluation report, which also included the evaluator's behavioral observations of the student (Parent Ex. O). According to the evaluator, the purpose of the evaluation was to consider "an initial request for possible speech and language services" for the student (id. at p. 1). The evaluator reported that the student exhibited fatigue and/or boredom, but not frustration during the testing and that she engaged in very little test appropriate conversation (id.). The evaluator further reported that according to the parent, this was not typical of the student's behavior (id.). Administration of the CELF-4 revealed the student attained scores in the moderate range of disability in the concepts and following directions subtest, and in the average range in the recalling sentences, formulated sentences, expressive vocabulary, and understanding spoken paragraphs subtests (id. at pp. 1, 2, 3). The student achieved scores in the average range on the expressive portion of the word classes subtest; and scores in the severe disorder range in the receptive portion of this subtest (id. at p. 3). The evaluator reported that although the student presented with an overall score in the average range, the difference between her expressive and receptive language scores indicated that therapy would be valuable in addressing the student's receptive language needs in the classroom because "comprehension, recall and the ability to act upon spoken directions are essential for achieving in all subject areas and for internalizing scripts and rules for behavior"

² The parent testified that during the latter part of second grade the student "was getting what you call pull-out, which would be the equivalent of... resource room" (Tr. p. 133).

and because "the use of associations, word opposites, and synonyms is emphasized in pairing words with shared or opposite meanings, substituting synonyms for earlier acquired word forms, and editing written text for meaning and precision" (id.). The evaluator recommended that the student receive speech-language therapy at a frequency of two 30-minute group (not to exceed 5 students) sessions per week (id.).

The hearing record includes a subsequent IEP dated August 10, 2007 (Parent Ex. N). The August 2007 IEP included a recommendation for two 30-minute sessions of speech-language in a group of five per week, as recommended in the July 2007 speech-language evaluation (id. at pp. 1, 14).

The hearing record reflects that the parent unilaterally placed the student in fourth grade at Sterling for the 2007-08 school year (Tr. pp. 122, 135). By stipulation of settlement, the district agreed to fund the student's attendance at Sterling for the 2007-08 school year (Parent Ex. L at pp. 1, 7).

On October 9, 2007, as part of the student's annual review, a district teacher observed the student at Sterling (Dist. Ex. 4). The district teacher observed the student in her class for 45 minutes during a phonics lesson (id. at p. 1). The class included one teacher and four students (id.). The classroom observation report reflected that the student was motivated to participate, required only minimal assistance to read "short O" words on a white board, and was happy to receive praise for her correct responses (id.). However, the classroom observation report also indicated that the student required frequent prompts and reminders to remain focused and exhibited disruptive behaviors including banging pencils on the desk, banging into furniture, getting out of her chair, stamping her feet, making noise, and calling out without raising her hand (id. at p. 2). The classroom observation report also indicated that the student was "very distracted by noise within the classroom and in the hall way" and "although she benefited from teacher re-direction, [she] did not seem able to control her impulsivity" (id.). The classroom observation report noted that the student "seemed to relate well" to the teacher and to her classmates (id.).

On May 23, 2008, the CSE convened for the student's annual review and to develop her IEP for the 2008-09 school year (Parent Ex. M at pp. 1, 2). The meeting attendees included the parent and her sister, a school psychologist who also acted as district representative, a school social worker, the regular education teacher who had completed the October 2007 classroom observation of the student, the director of Sterling who acted as a special education teacher, and an additional parent member (id. at p. 2). The hearing record reflects that the May 2008 CSE meeting lasted at least one hour (Tr. p. 57) and that the parent and the director of Sterling participated in the meeting (Tr. pp. 57, 40, 43, 124, 146, 162-63, 164, 165, 195). The CSE determined that the student continued to be eligible for special education programs and services as a student with a learning disability (Parent Ex. M at p. 1). The May 2008 CSE recommended that the student's placement be changed from a special class in a community school with a student to teacher ratio of 12:1 to a special class in a community school with a student to teacher ratio of 12:1+1 and related services of one 30 minute individual counseling session per week and two 30 minute speech-language therapy sessions per week in a group of five, all in a separate location (id. at pp. 1, 2). The May 2008 IEP indicated that the CSE also considered a special class with a student to teacher ratio of 12:1 and a special class in a specialized school; however, it rejected the former because it felt

that the student would benefit from an additional staff person in the classroom due to the student's need for "a behavioral component" and rejected the latter as being too restrictive and because the student could "be reactive and can occasionally get aggressive" with other students "if they exhibit aggressive tendencies themselves" (id. at p. 11).

Reflecting discussion at the May 2008 CSE meeting and based on teacher estimates of the student's instructional levels, the student's present levels of academic performance in the IEP stated that the student was at a mid-second grade level in decoding and reading comprehension, an upper first grade level in spelling, and an early second grade level in math calculation and word problems (Tr. pp. 41-42; Parent Ex. M at p. 3). The May 2008 IEP indicated that the student's academic management needs included: utilizing a multisensory approach when presenting directions, explanations and instruction of content; concrete examples and experiences when presenting new information; verbal praise and encouragement as motivators; daily review of skills and concepts previously introduced; visual cues, prompts and signals to maintain attention; highlighting or underlining important words, phrases, etc. in assignments; simple, concrete, one-step directions and asking the student to repeat directions; and the use of visual organizers-venn diagrams, time lines, webs, graphs, and charts especially for writing assignments (Parent Ex. M at p. 3). The student's present levels of social/emotional performance reflected on the May 2008 IEP indicated that the student was a good friend, patient and helpful with her peers, but that she did not readily accept the help of others, was easily frustrated and often "shuts down when she gets something wrong" (id. at p. 4). The May 2008 IEP reflected that the student's behavior did not seriously interfere with instruction and that the student's counselor and classroom teacher provided her with behavioral support (id.). To address the student's needs, the May 2008 IEP included annual goals and corresponding short-term objectives to address the student's deficits in reading decoding and comprehension, math calculation and reasoning skills, expressive writing, coping with anxiety, frustration, and semantic skills (id. at pp. 6-9).

The hearing record reflects that the parent received the district's notification of its proposed placement in the "middle" of August 2008 (Tr. p. 125; see Parent Ex. K). The parent reportedly attempted to visit the recommended district placement in August, but was told there was no staff available and to come back during the first week of school (Tr. pp. 125-26; see Parent Ex. K).

By letter dated August 18, 2008, the parent, through her attorney, notified the district that it had "failed to offer [the student] an appropriate program for the 2008-09 school year" and that the parent was giving the district notice that she was "unilaterally placing [the student] in the Sterling School for the 2008-09 school year" and would be seeking tuition payment for such placement (Parent Ex. K). The parent informed the district that although she had received a district letter dated August 12, 2008, which reportedly recommended that she visit the proposed school, she had "attempted several times to speak with the school to arrange a visit but received no response," and that while she was willing to visit the school in the future, she could not agree to send the student to the school before she had visited (id.).

By letter dated November 17, 2008, the parent advised the district that she had visited the proposed school on October 16, 2008; had spoken to school staff, including the special education teacher of the proposed class; and that she was notifying the district of her rejection of the recommended placement (Parent Ex. G). The parent indicated that she "strongly believe[d]" that

the proposed placement did not provide the student with a free appropriate public education (FAPE) (id. at p. 1).³ In particular, the parent indicated that based on her visit, the special education teacher indicated that she "d[id] not utilize the multi-sensory approach" mandated in the student's IEP (id.). The parent further indicated that the student was "not guaranteed the help she needs" in reading, at the proposed placement and that if the student were to receive the needed extra assistance in reading, it would take "several months" (id. at pp. 1-2). The parent also informed the district that the proposed classroom included only boys and students with emotional issues, which she believed "was not an appropriate environment given [the student's] learning disability and sensitivity" (id. at p. 2). The parent also indicated that since the school included students only up to fifth grade, her daughter would have to change schools twice within a single year and that, since the student "has a hard time adjusting to change," she was afraid that her learning would be "set back" (id.). Further, the parent wrote that the school's mainstreaming policy did not comply with the student's May 2008 IEP, which recommended a 12:1+1 setting (id.).

As indicated above, the parent enrolled the student at Sterling for the 2008-09 school year, where she received instruction in language arts, math, science, social studies, gym, and a remediation period that focused on reading (Parent Exs. D; E; F; H). The student also received counseling and speech-language therapy at Sterling, as well as private counseling outside of school (Tr. pp. 141-42, 210-13, 224-25, 232; see Parent Ex. A).

By due process complaint notice dated January 15, 2009, the parent, through her attorney, requested an impartial hearing alleging that the district had failed to offer the student a FAPE for the 2008-09 school year (Parent Ex. C). The parent asserted that the annual goals in the May 2008 IEP were "procedurally inadequate" in that the math goals were the same as what had been recommended in the previous school year's IEP and that particular short-term objectives relating to decoding were targeted to a grade level that exceeded the targeted grade level for the annual goal relating to that area (id. at p. 2). Additionally, the parent contended that the recommended district school did not respond to her attempt to visit it prior to the student's enrollment (id. at pp. 1-2). Further, the parent asserted that when she was able to visit the recommended placement, she found it to be "inadequate" (id. at p. 2). In particular, the parent contended that the recommended placement would not have provided sufficient academic support because the special education teacher did not sufficiently utilize a multisensory approach as provided for in the student's May 2008 IEP and because the teacher would not provide the student with the extra assistance that she required in reading (id. at pp. 2-3). Further, the parent alleged that the recommended placement would not have provided sufficient support for the student's social/emotional needs because the student would be placed in a classroom with students who had a "range of issues" and would be "acting out," and in a classroom with only boys, which the parent alleged would be "very isolating" for the student (id. at p. 3). The due process complaint

³ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

notice requested that the district provide funding for tuition at Sterling for the 2008-09 school year and transportation to and from the school (id.).⁴

On February 9, 2009 a resolution session response form was signed by the parent's attorney and a district representative which indicated that the parent requested that the district agree to waive the resolution process and to proceed to the impartial hearing (Dist. Ex. 1).

The impartial hearing began on May 8, 2009, and concluded on May 26, 2009, which was the second day of testimony. The impartial hearing officer rendered a decision dated June 12, 2009, which found that the district's recommended placement and IEP for the 2008-09 school year were appropriate and denied the parent's request for tuition at Sterling (IHO Decision at p. 4).

The impartial hearing officer determined that the student's May 2008 IEP mandated that she would receive a 1:1 paraprofessional to address her distractibility in the classroom (IHO Decision at p. 2). The impartial hearing officer further determined that both the recommended public school program and the private school program chosen by the parent were appropriate for the student and provided "adequate math and reading programs" and utilized a multisensory approach (id. at p. 3).⁵ The impartial hearing officer also concluded that the district had not designated the offered class to be an all male class and that its make up could be "fluid and changing" (id.). Likewise, the impartial hearing officer concluded that the parent's argument preferring one type of multisensory reading program over another that was "widely accepted in education" was "strained," and that the parent's argument that the additional 1:1 paraprofessional that the district offered the student somehow resulted in a more restrictive program was also without merit (id.). The impartial hearing officer concluded that contrary to the parent's assertions regarding the least restrictive environment (LRE,) the public school program had a larger population and "more varied possibilities of exposure and experiences" for the student and appeared to be a less restrictive program than the private school program (id.). The impartial hearing officer noted that it "appeared" that the parent was "scared" that the student might have to leave private school (id.), then concluded that there was a "strong implication" that any other placement outside of the private school would not have been acceptable to the parent (id.).

Although the impartial hearing officer noted that the parent was not able to see the offered public school class "in a timely manner," he determined that the parent's ability to participate in the CSE meeting "was not adversely impacted in any substantial way" (IHO Decision at pp. 3-4). Lastly, the impartial hearing officer determined that some of the IEP goals "could have been slightly more specific," but overall were sufficient and reflected the needs of the student at the time of the CSE meeting (id.). The impartial hearing officer found the district's placement to be appropriate and denied the parent's request for tuition reimbursement at Sterling for the 2008-09 school year (id.).

⁴ The parent's due process complaint notice did not allege that Sterling was an appropriate placement for the student or that the equities favored the parent (see Parent Ex. C).

⁵ Although the impartial hearing officer referred to a "multi-media approach" two times in his decision, it is clear from the context of the hearing record that he meant to refer to a "multisensory approach" (see IHO Decision at p. 3).

The parent appeals the impartial hearing officer's decision, asserting that the district did not present sufficient evidence to meet its burden to demonstrate the appropriateness of the proposed placement and program. Specifically, the parent asserts that the May 2008 IEP annual goals were not appropriate for the student. The parent also contends that the May 2008 CSE was not properly composed because the regular education teacher who attended the CSE meeting had not taught in many years. The parent further alleges that the district denied the parent's request to visit the proposed placement and that this affected the parent's ability to participate in the placement process. Regarding the proposed district placement, the parent alleges that the students in the district's proposed class would not have been appropriately grouped for instructional purposes and that the evidence with respect to the proposed class showed that in light of the student's needs, the class would not have been appropriate for the student. Further, the parent asserts that the proposed classroom would not have met the student's needs because it had an "inappropriate gender ratio," in that the class contained all boys and further, that the class contained students with significant behavioral problems. The parent contends that the recommended placement would not have provided the student with multisensory instruction in all subject areas, and that the district's testimony relating to the receipt of multisensory instruction in reading was inconsistent with what the parent had been told when she visited the proposed school. Further, the parent contends that the impartial hearing officer "correctly determined" that Sterling was an appropriate placement for the student and alleges that the student made significant progress at that school. Finally, the parent asserts that the impartial hearing officer incorrectly "impl[ied]" that the parent was not really considering public school and alleges that equitable considerations support the parent's request for relief in that she was "sincere" about the possibility of the student attending a public school.

The district answers, asserting that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2008-09 school year. Specifically, the district contends that the impartial hearing officer correctly determined that the fact that the parent was unable to visit the proposed school and classroom before the beginning of the 2008-09 school year did not deny her a meaningful opportunity to participate in the IEP process. The district further alleges that the student would have been functionally grouped in the proposed classroom. It also contends that the annual goals in the May 2008 IEP were appropriate in that they addressed the student's deficiencies and that the only goals that were restated from the student's prior IEP were the speech-language goals, which met the student's needs. Further, the district asserts that the recommended classroom would have been able to meet the student's needs and that it would have been able to provide the multisensory instruction that was required by the student's May 2008 IEP. The district further asserts that the CSE was "duly constituted" and included all of the required members. Additionally, the district contends that the parent did not meet her burden to show that the student's placement at Sterling was appropriate because Sterling is not the student's LRE and did not provide all of the student's required related services. The district also contends that the parent failed to establish that the equities are in her favor. It asserts that the parent did not provide the district with adequate notice regarding the student's unilateral placement at Sterling and that the parent did not seriously intend to enroll the student in public school.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that

the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. Feb. 3, 2009].

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR

200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Parents are to be afforded an opportunity to participate in the IEP formulation process (34 C.F.R. § 300.322; see Cerra, 427 F.3d at 192; Gavriety v. New Lebanon Sch. Dist., 2009 WL 3164435, at *29 [N.D.N.Y. Sept. 29, 2009]). 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 (Forest Grove, 129 S. Ct. at 2488; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

I will now turn to the merits of the parent's appeal. I will first address the parent's contention that the May 2008 CSE was not properly composed. The parent's January 15, 2009 due process complaint notice did not raise the issue of CSE composition (see Parent Ex. C). While there was some testimony at the impartial hearing with respect to when the regular education teacher who participated in the May 2008 CSE meeting had last taught, the parent's attorney did not assert, either in his opening statement or closing argument, that the May 2008 CSE was improperly composed (Tr. pp. 29-33, 51-53, 246-56). Consistent with this, the impartial hearing officer's decision did not address the issue of the composition of the May 2008 CSE. 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. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint 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. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). I find that the parent's contention with respect to the composition of the May 2008 CSE, which was raised for the first time on appeal, is outside the scope of my review and I will therefore not consider it (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

Next, I will address the parent's contention that her inability to visit the proposed placement prior to the beginning of the school year impacted her ability to participate in the placement process as the student's specific placement was not discussed at the May 2008 CSE meeting. The impartial hearing officer concluded that the ability of the parent to see the class "in a timely manner" did not impact her ability to participate in the IEP formulation process in a meaningful way.

I agree with the impartial hearing officer that the fact that the parent did not have the opportunity to visit the recommended placement prior to the start of the 2008-09 school year did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her daughter (see 20 U.S.C. 1415[f][3][E][ii]; 34 C.F.R. 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]). The IDEA requires that a valid IEP be in effect "at the beginning of each school year" and a school district's delay does not violate the IDEA so long as the school district "still has time to find an appropriate placement ... for the beginning of the school year in September" (Tarlowe, 2008 WL 2736027, at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 428560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; see 20 U.S.C. § 1414[d][2]). The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 1119496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; 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]; Tarlowe, 2008 WL 2736027, at *6; K.Y. v. Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 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; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). 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,⁶ 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]).⁷ 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 placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049). While encouraging school districts to work with parents and offer opportunities to observe classroom and placement options, OSEP has opined that the IDEA does not provide a general entitlement to parents of children with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). Here, the parent had an adequate opportunity to participate in the development of the IEP, which was not significantly impeded (Cerra, 427 F.3d at 192).

In this case, the parent makes no claim that the student's special education and related services needs could only be met in a particular classroom or school and there is no evidence in the hearing record that this is the case. Moreover, contrary to the parent's claims and as set forth below, the hearing record shows that the proposed district program was reasonably calculated to confer educational benefits to the student. As a result of the May 2008 CSE meeting, the district offered the student services along the continuum of services, in particular a 12:1+1 special class with counseling as a related service (see 8 NYCRR 200.6[e], [h]). The parent testified that she was in agreement with the May 2008 CSE's recommendation for a 12:1+1 program and that she did not voice any objections at the CSE meeting regarding the program, although she had a chance to participate and ask questions (Tr. pp. 50-51, 65, 124, 146). Based on the above, I find that the lack of a parental visit to the particular classroom identified by the district prior the start of the 2008-09 school year did not (a) impede the student's right to a FAPE, (b) significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause 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 Application of the Dep't of Educ., Appeal No. 08-097; see also Cerra, 427 F.3d at 192).

The parent next contends that the student would not have been appropriately grouped for instructional purposes in the proposed class and that the student's needs would not have been met in that class. In particular, the parent alleges that the district did not show that the student would have been functionally grouped and that the impartial hearing officer did not address this issue; that the proposed class contained students with "significant" behavior problems and that the proposed classroom had an "inappropriate gender ratio."

⁶ See 8 NYCRR 200.6 for New York State's continuum of services.

⁷ 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 environment 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).

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], [h][3]; see Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102).⁸ State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). 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]). However, the regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Upon careful review, I find that the hearing record shows that the student would have been suitably grouped for instructional purposes in the district's proposed fifth grade classroom. The special education liaison from the proposed district school testified that she was familiar with the students in the proposed class, as well as with the proposed class itself because she had observed the proposed classroom and had substituted for the classroom's assigned teacher on numerous occasions (Tr. pp. 73, 76, 79, 94, 111). The special education liaison testified that, at the time of the impartial hearing, the recommended class was composed of seven students ages ten and eleven, a certified special education teacher, and a paraprofessional (Tr. pp. 78-80). The special education liaison further testified that the class included one student with a learning disability, one student with mental retardation, two students with an emotional disturbance, one student with multiple disabilities, and two students with speech or language impairments (Tr. pp. 80, 81; see 34 C.F.R. 300.8[c][4], [6], [7], [10], [11]; 8 NYCRR 200.1[zz][4], [6], [7], [8], [11]). The special education liaison also testified that the school provided related services including occupational therapy, physical therapy, speech-language therapy, and counseling (Tr. pp. 77, 85). She testified that the range of the students functioning in both reading and math in the proposed was from second to fifth grade (Tr. pp. 80-81, 97-98, 109, 112). In this case, the hearing record

⁸ See Walczak, 142 F.3d at 133 (approving IEP that placed student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed).

reveals that the student functioned within the same range of reading and math levels as the students in the recommended class (compare Tr. pp. 80-81, 97-98, 109, 112, with Parent Ex. M at p. 3). Moreover, the special education liaison testified that the classroom teacher addressed the students' different functional levels in reading and math by grouping the students for instruction and utilizing the additional paraprofessional in the room (Tr. pp. 82, 83-84, 95, 102). She further testified that the classroom teacher "individualize[d] the reading program to fit the needs of each child" (Tr. p. 82). The special education liaison also testified that the classroom teacher used individualization to accommodate the students' differing math levels (Tr. p. 83). This witness testified that the students received 1:1 attention from the classroom teacher depending on the lesson and the needs of the student (Tr. pp. 101-02). Further testimony by the special education liaison indicates that the students in the 12:1+1 class exhibited needs for structure, behavior, and academics, as did the student in the instant case (Tr. p. 100; Parent Ex. M at pp. 3, 4). The special education liaison also testified that a student who presented with the student's grade, age and functional levels "could have been appropriately served" at the proposed school (Tr. p. 87).

The parent alleges that the proposed class contained students with significant behavior problems and was therefore, inappropriate. However, the special education liaison testified that a student who exhibited behavior problems in the class would have an individualized behavior plan and that the class was "well managed" behaviorally (Tr. p. 84).⁹ The special education liaison testified that most of the students in the recommended class did not have behavior problems and that only two of the students in the recommended class had been identified with behavior problems (Tr. p. 110). She further testified that most of the students in the class did not require functional behavioral assessments (FBAs) (id.). Although the parent contends in her petition that the student should not be grouped with "overly aggressive peers," the special education liaison's description of the behaviors of the two students whom she identified as having behavior problems reflected that such behaviors were limited to "sometimes" getting up, walking around, and attempting to distract other students by talking to them (Tr. p. 114).¹⁰ She also testified that the frequency of these behaviors varied (Tr. p. 101). Additionally, as well as indicating that students' behavior would be addressed by individualized behavior plans, the special education liaison also testified that if there were a concern with inappropriate behavior in the classroom, it would be handled by the two classroom staff, or if necessary, by other school resources, which included the school counselor, the assistant principal or a third district staff person (Tr. pp. 100-01, 114-15).¹¹ Finally, I note that the hearing record contains no evidence

⁹ The hearing record reflects that the parent testified that she was concerned about the students' behavior when she observed the class on her visit to the proposed school (Tr. p. 150). However, the hearing record reflects that the parent did not observe the students in their assigned classroom, but in the school auditorium, where they were for a program (Tr. pp. 128-29, 149, 150).

¹⁰ While the student's current speech-language therapist testified that students with "extreme behavioral issues" might interfere with the student's ability to maintain focus, the special education liaison testified that the two students in the classroom she identified with behavioral difficulties had behavioral intervention plans (BIPs) and the hearing record does not indicate that there were students with "extreme behavioral issues" in the proposed class (Tr. pp. 84, 110-113; see 8 NYCRR 200.22[b]). I further note that the student's May 2008 IEP indicated that the student should not be placed in a class with students who exhibited "aggressive tendencies" (Parent Ex. M at p. 8; see Tr. pp. 50).

¹¹ The special education liaison variously referred to the third district staff person as a "character education teacher," a "character reputation teacher," or as a "career education teacher" (Tr. pp. 101, 114).

that the positive behavior intervention strategies used in the proposed classroom were insufficient to prevent the students' behavioral difficulties from impeding the learning of this student to the extent that she would be denied a FAPE.

Based on the above, I find that the student would have been suitably grouped for instructional purposes in the proposed fifth grade classroom at the district's recommended school. I also find that the classroom staff provided by the 12:1+1 program would have addressed the student's need for redirection in order to focus and her need for support when she became frustrated with academics (see Tr. pp. 37, 39, 50, 140, 194; Parent Ex. M at pp. 3, 4). Furthermore, as set forth below, I agree with the impartial hearing officer that in this case the gender composition of the proposed class did not render the class inappropriate for the student.

Regarding the parent's argument that the student should not have been placed in a class with all boys, neither federal nor State regulations require that students be grouped by gender (see 200.1[ww][3][i], 200.6[a][3], [h][2], [3]; see also Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 1256 [E.D. Va. 1992]; Bales v. Clarke, 523 F. Supp. 1366, 1371 [E.D. Va. 1981]). Moreover, the hearing record does not support the parent's argument that the gender composition of the proposed district class would have rendered the placement inappropriate for the student. The director of Sterling testified that while she didn't see the student did not relate much to the boys at Sterling, the director indicated that she was "[not] saying that [the student is] not socially appropriate" with them (Tr. p. 180). Further, the special education liaison testified that a female student was added to the proposed classroom during the 2008-09 school year (Tr. pp. 98, 99). State regulations also provide that the social needs of a student are not to be the sole determinant of placement (see 8 NYCRR 200.6[a][3][ii]). As indicated above, the hearing record shows that the student would have been grouped appropriately in the proposed class with respect to her social/emotional needs (see Application of the Bd. of Educ., Appeal No. 07-072).

The parent also asserts that the annual goals on the May 2008 IEP were not appropriate for the student. The impartial hearing officer concluded that while some of the annual goals "could have been slightly more specific," overall they appeared to be sufficient and responsive to the input of the student's teachers and the specific needs of the student at the time of the IEP (IHO Decision at p. 4). For the reasons set forth below, I agree with the impartial hearing officer and find that the annual goals set forth in the May 2008 IEP are appropriate for the student.

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The May 2008 IEP addressed the student's academic needs through two annual reading goals and nine corresponding short-term objectives related to increasing the student's decoding

and comprehension skills; two annual math goals with ten corresponding short-term objectives related to increasing the student's calculation and math reasoning skills; and one annual writing goal with five corresponding short-term objectives related to improving the student's expressive writing skills (Tr. pp. 39, 40, 41, 42-43, 44-45, 46-48; Parent Ex. M at pp. 6-8). The student's social/emotional needs were addressed in the May 2008 IEP by one annual counseling goal with three corresponding short-term objectives related to decreasing the student's frustration in relation to school assignments and responsibilities (Tr. pp. 40, 48, 49; Parent Ex. M at p. 8). The student's speech-language needs were addressed by two annual speech-language goals with six corresponding short-term objectives related to improving the student's semantic skills and her understanding of multiple step directions (Tr. pp. 40, 48; Parent Ex. M at p. 9). The annual academic goals were based on teacher estimates of the student's functional levels in reading, math, and written expression provided by the Sterling school and reflected expected growth of approximately 3/4 of a grade level to one full grade level (Tr. pp. 42, 43; Parent Ex. M at pp. 3, 6, 7, 8). The counseling and speech-language annual goals and short-term objectives were appropriately linked to the student's needs as reflected in the present levels of performance on her May 2008 IEP (Parent Ex. M at pp. 3, 4, 8, 9). As indicated, the May 2008 annual goals and short-term objectives reflected the student's significant areas of need in reading, math, writing, speech-language, and social/emotional performance (see Tr. pp. 36, 37-38, 39, 42-49, 57-58, 163; Parent Exs. M at pp. 3, 4, 5; O; R; T). I find that some of the goals may be broad or vague when viewed alone and out of context; however, the short-term objectives comprehensively addressed the student's needs, were both detailed and measurable, and cured any deficiencies in the annual goals (see Tarlowe, 2008 WL 2736027, at *9; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096; Application of a Student with a Disability, Appeal No. 08-086; Application of a Child with a Disability, Appeal No. 07-117; see also M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]). Moreover, the hearing record reflects that the annual goals and short-term objectives were discussed at the May 2008 CSE meeting (Tr. p. 40).

In her due process complaint notice, the parent alleged that the math goals contained in the May 2008 IEP were the same as those in the previous school year's IEP (Parent Ex. C at p. 2). A comparison of the two IEPs reveals that the specific annual goals and short-term objectives for math were not duplicative (compare Parent Ex. M at p. 7 with Parent Ex. N at pp. 6-7). The hearing record reflects that Sterling provided teacher estimates for the student's present levels of performance on the May 2008 IEP and the annual goals on the IEP reflected the student's present levels of performance (Tr. pp. 40, 42, 43; Parent Ex. M at pp. 3, 4, 6-9). The district's regular education teacher who participated at the May 2008 CSE meeting testified that math was described as being "rather difficult" for the student, which resulted in the CSE recommending an annual goal that reflected less than a full year of anticipated growth in the student's math skills (Tr. p. 46). As such, the hearing record does not support the parent's contention that the student's math goals on the May 2008 IEP were the same as those on the student's 2007 IEP and denied the student a FAPE.

With regard to the student's decoding skills, the parent alleges that the short-term objectives to "read all vowel combinations in 3rd and 4th grade level words with 80% accuracy" and "to break 3rd and 4th grade level multi-syllable words into component syllables and read the words correctly with 80% accuracy," exceeded the student's annual goal to "develop decoding skills to a mid 3rd grade level" (Parent Ex. C at p. 2). Although these two short-term objectives reflected that the student would be expected to perform at the fourth grade level with regard to

these two specific decoding skills, I find that this is not inconsistent with the expectation that the student would increase her overall decoding skills to a mid-third grade level. I further note that the district's regular education teacher who participated at the May 2008 CSE meeting testified that the CSE did not want to limit the student to only third grade material and that the student should be exposed to as much material as possible (Tr. p. 45). She further testified that during the course of the day, the teacher in the proposed classroom utilized a variety of third to fourth grade level multisensory materials such as class books, text, and internet research which could provide the student with opportunity for decoding vowel combinations in fourth grade level words (Tr. p. 45).

With regard to the student's annual speech-language goals and short-term objectives, the hearing record reflects that the 2008-09 annual goals (as well as the corresponding short-term objectives) were the same as those on the student's August 10, 2007 IEP (compare Parent Ex. M at p. 9, with Parent Ex. N at p. 11). However, the parent did not raise this as a concern in her due process complaint notice or at any point during the impartial hearing. Moreover, the hearing record reflects that the speech-language annual goals and short-term objectives contained in the August 2007 IEP had not been met by the beginning of the 2008-09 school year, which was when the May 2008 IEP was to be implemented, and that new speech-language annual goals and short-term objectives appropriate to the student's needs were developed by her speech-language therapist as that school year progressed (see Parent Ex. A at pp. 1, 2; see also Parent Ex. M at p. 9).

The parent further contends that the recommended placement did not provide the student with the necessary multisensory instruction that she needed and which was mandated by her May 2008 IEP. In particular, the parent alleges that the district did not show that the student would be provided with multisensory instruction across all content areas; that there was no evidence that multisensory instruction was provided in science, social studies or math; and that incomplete information was provided regarding the extent to which the classroom teacher in the recommended class was trained in the Wilson program and how the Wilson program would be effectively used in the student's class. The impartial hearing officer concluded that the student's placement "provide[d] adequate math and reading programs utilizing a multi[sensory] approach." The district asserts that the proposed placement would have been able to provide the multisensory instruction mandated on the student's May 2008 IEP.

The district's regular education teacher who participated in the May 2008 CSE meeting testified that the student "best learns ... with a multisensory approach" (Tr. p. 43). Consistent with this, the student's May 2008 IEP provided that the student's academic management needs included a "multi-sensory approach when presenting directions, explanations, and instruction content" (Parent Ex. M at p. 3). The special education liaison testified that all of the class was provided with multisensory modalities (Tr. p. 83). With respect to reading, the special education liaison testified that the classroom teacher is trained in and uses, among other things, the Wilson reading program, which she described as geared toward students with deficits in decoding and encoding and which she testified was "very multi-sensory" (Tr. pp. 81-82, 90-91). The special education liaison also testified that she is trained in and uses the Wilson reading program in the classroom as well and had attended training with the special education teacher of the recommended class (Tr. pp. 90-92). With respect to math, the special education liaison testified that the teacher in the recommended classroom utilized charts, models, manipulatives, and the computer for math instruction (Tr. p. 109). The special education liaison also testified that when

she taught the students math in the recommended classroom, she also used multisensory techniques according to the student's needs, including manipulatives (Tr. pp. 93-94).

Based on the above, the parent's contention that the recommended placement did not provide the student with necessary multisensory instruction is not supported by the hearing record. While the hearing record does not contain information to show that the recommended placement would have provided the student with multisensory instruction in science and social studies areas, the hearing record does show that the student would have received multisensory instruction in reading and in mathematics (Tr. pp. 81-82, 83, 90, 91, 109), which are the two specific areas that evaluators have identified as significant deficit areas for the student (see Tr. pp. 36, 41, 57-58, 163; Parent Exs. T at pp. 7-9, 10, 13, 15; M at p. 3). I note also that the student's multisensory instruction in reading would be provided using the Wilson reading program, a methodology which the hearing record indicates is "very multi-sensory" and which the parent indicated should be provided to the student in the recommended classroom (Tr. pp. 81-82, 83, 90-91, 147-48). The hearing record further shows that the student would have received two periods per day of such multisensory reading instruction at the recommended placement (Tr. p. 83). Contrary to the parent's assertion, I also find that the hearing record provides evidence that the classroom teacher had been trained in the Wilson reading program (Tr. pp. 90-92).

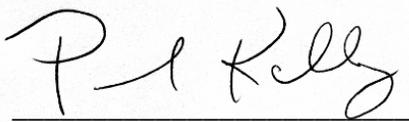
Lastly, I agree with the impartial hearing officer that the district offered the student a placement in the LRE. The hearing record shows that the student would have had access to nondisabled peers during lunch, gym, grade projects, and other activities (Tr. pp. 78, 85).

Therefore, based on the hearing record, I find that special education programs and services recommended in the May 2008 IEP and the 12:1+1 class recommended by the district were reasonably calculated to confer educational benefits to the student and I will uphold the impartial hearing officer's determination that the district offered a FAPE to the student in the LRE for the 2008-09 school year. I therefore need not reach the issue of whether Sterling is appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 8, 2009**



**PAUL F. KELLY
STATE REVIEW OFFICER**