



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-101

Application of the [REDACTED]  
[REDACTED] SCHOOL DISTRICT for review of a  
determination of a hearing officer relating to the provision of  
educational services to a student with a disability

### Appearances:

Ingerman Smith, LLP, attorneys for petitioner, Ethan D. Balsam, Esq., of counsel

The Law Offices of Skyer, Castro, Cutler & Gersten, attorneys for respondents, Jesse Cole Cutler, 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 respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing in April 2009, the student was attending an ungraded class at Stephen Gaynor, a private school for students with language-based learning difficulties (Tr. pp. 29, 314, 340, 513, 548). Stephen Gaynor has not been approved by the Commissioner of Education 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 an other health impairment (OHI) is not in dispute in this appeal (Dist. Ex. 17 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record reflects that at the time of the impartial hearing the student had been living in the United States since 2006 (Tr. p. 510). Previously, the student had no exposure to

formal education and had been exposed to three languages, including English (Tr. pp. 509-10; Dist. Exs. 4; 8 at p. 2; 17 at p. 4).

After attending kindergarten at a school in another district between September 2006 and January 2007, the student's family moved, and on February 1, 2007, the student was enrolled as a general education student in a collaborative kindergarten class in a district elementary school, where she remained for the rest of the 2006-07 school year (Tr. pp. 512-13).<sup>1</sup>

During the 2007-08 school year, the student attended a general education first grade class in a district school consisting of about 21 to 22 students, a regular education teacher, and an assistant teacher (Tr. p. 222). As a result of the student's October 2007 performance of six out of twelve on a primary literacy assessment (PLA), the student qualified for academic intervention services (AIS) in reading two times per week for 30 minutes, as well as educationally related support services (ERSS) in speech-language therapy to address articulation errors (Tr. pp. 26-27, 146, 228, 230-31). Also in October 2007 the parents requested an instructional support team (IST) meeting because the student had difficulty with vocabulary and words (Tr. pp. 73, 232). However, rather than have an IST meeting at that time, at the teacher's suggestion, the parents agreed to wait until results of the next PLA reassessment would be available in January 2008, by which time the student would have completed eight to ten weeks of AIS reading support (Tr. pp. 232-33).

The student's report card for the first quarter of the 2007-08 school year indicated that the student made a "nice adjustment" to first grade (Dist. Ex. 19). The student was described as an "emergent reader," with a memory for sight words that was beginning to grow (id.). The student was learning about the characteristics of good writing and new strategies to decode words (id.). The student was described as an active participant in math and science activities (id.). A rubric included in the report card reflected that the student either displayed "developmentally appropriate" skills or was "making progress" (MP) in reading and listening, penmanship, writing and speaking, science, social studies, mathematics, and personal social development (id.). The report card specifically indicated that the student knew the letter sounds for the entire alphabet, knew the numbers zero through twenty, and recognized the following shapes: circle, square, triangle, rectangle, and oval (id.).

A January 2008 readministration of the PLA yielded a score of eight out of twelve (Dist. Ex. 6 at p. 1). The hearing record reflects that based on this score, the student no longer required AIS reading support (Tr. p. 236). However, the student's classroom teacher recommended that she continue to receive AIS reading services until the end of the school year because the student was in a "nice comfort zone" and she could continue working on strategies with other students receiving the same services (id.).

The second quarter report card for the 2007-08 school year described the student as a "wonderful learner" who "loves" reading workshop and exhibits understanding during guided instruction (Dist. Ex. 19). The student was able to help other students learn new words (id.).

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<sup>1</sup> The hearing record indicates that the collaborative class consisted of general education and special education students (Tr. p. 514).

The report card noted that the teacher encouraged the student to practice phonetic strategies during independent reading and to review her words at home as often as possible (id.). The report card also indicated that the student showed interest during math instruction and that she was able to master addition facts and count by tens and fives (id.).

The third quarter report card for the 2007-08 school year indicated that the student did a "nice job" on reading assignments, was able to read fluently although she lacked comprehension at times, and made "great strides" during writing workshop (Dist. Ex. 19). Penmanship improved "greatly" (id.). The report card noted that the student needed to focus on perfecting her "word wall" words (id.).

The hearing record reflects that a private psychiatric evaluation of the student was conducted between January and May 2008, and that the sources of information for the psychiatric evaluation included an interview with the parents, a child behavior checklist, and play sessions with the student (Dist. Ex. 7 at p. 1). The resultant evaluation report indicated that the parents requested a consultation regarding the student's "anxiety, learning problems and behavioral difficulties" (id.). The student's history was noted in the evaluation report to include severe deprivation and trauma, dehydration, and illnesses related to malnutrition (id. at pp. 1-2). The report also noted that the student had previously exhibited "extreme behavioral problems, which have since settled down somewhat," including hitting, throwing dishes to the ground when angry, and awaking in the night screaming and wandering out of the house (id. at p. 2). The evaluation report indicated that at times, the student appeared to "dissociate" and looked "glazed" (id.). The student received medication for anxiety and post-traumatic symptoms, which reportedly had lessened but were still significant at the time of the evaluation (id.).

As a result of her observation of the student, the evaluating private psychiatrist indicated in the psychiatric evaluation report that the student was very talkative and readily told the evaluator about her family and pets (Dist. Ex. 7 at p. 2). In addition, the student told the evaluator that she had a problem with "getting angry, when she screams and cries, and can't stop" (id.). The evaluator characterized the student's speech as "clear," but language and syntax were "moderately delayed and deviant" (id.). The student was further described as having a very high activity level, being distractible and impulsive, moving quickly from story to story and toy to toy in an incoherent way, and exhibiting word finding difficulties (id.). The evaluation report reflected the following diagnoses offered by the psychiatrist: an attention deficit hyperactivity disorder (ADHD), a post-traumatic stress disorder (PTSD), and a language disorder (id. at pp. 2-3). The report noted that "distractibility, impulsivity, hyperactivity, language and behavioral difficulties have severely hindered [the student] in school, home and social functioning," and that at the time of the evaluation the student was "unable to progress academically and developmentally at the expected pace, as she need[ed] a setting with more support" (id. at p. 3). The evaluator recommended a small class with a low student-to-teacher ratio; a school able to remediate language-based learning disabilities and provide special education for language, reading and writing; a class with other "bright" students to allow the student to learn from her peers; and continuation of medication for anxiety (id.).

A private neuropsychological assessment of the student was conducted on three dates in April 2008 to determine the student's then current level of cognitive, academic, and emotional

functioning, and to facilitate educational planning (Dist. Ex. 8 at p. 1). Behaviorally, the neuropsychological assessment report indicated that the student was well related and displayed a good sense of humor, a positive mood, an appropriate range of affect, and thought processes that were logical and linear (id. at p. 3). The neuropsychological assessment report also indicated that the student was hard working, cooperative, respectful, and motivated when challenged (id.). The student took pride in her work and benefited from brief breaks and the provision of continual reassurance (id.). The student's activity level was described as "typical for her age" (id.). She was generally attentive to tasks, although she displayed weaknesses in impulsivity, working memory, and mental set shifting (id.). The assessment report noted that the student's basic language comprehension abilities were intact as she was able to follow oral directions (id.). The student often initiated conversation, and although she displayed word retrieval difficulties, when provided with focus, the student elaborated her responses to open-ended questions (id.). The report indicated that the student displayed difficulty providing grammatically and sequentially correct complete sentences on test items and projective narratives (id.). Articulation weaknesses were noted to affect her speech intelligibility (id.).

Although a battery of formal testing occurred as part of the neuropsychological assessment, the assessment report noted that the tests had norms based on a monolingual population and should therefore be interpreted with caution (Dist. Ex. 8 at p. 3). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index (VCI) standard score (SS) of 108 (average range), a perceptual reasoning index (PRI) SS of 96 (average range), a working memory index (WMI) SS of 86 (low average range), and a processing speed index (PSI) SS of 115 ("above age expectations when compared to other children her age within the national normative sample") (id. at pp. 1, 4). A 29-point discrepancy between the PSI and the WMI was described as "significant" and resulted in the examiner not being able to report a full scale score (id. at p. 4). Instead, because the VCI and PRI were similar, the evaluator indicated that the student's general ability index (GAI) standard score was 102 (55th percentile) (id.). Administration of the Test of Nonverbal Intelligence, Third Edition (TONI-3) yielded a SS of 97 (42nd percentile) (id.).

Additional standardized testing results from assessing sensorimotor functioning revealed that the student's ability to perform automatic cognitive tests quickly, particularly when pressured to maintain focused attention, as well as her ability to maintain adequate graphomotor control on a timed paper-and-pencil task, were within age expectations and above (Dist. Ex. 8 at pp. 1, 6). On supplementary tasks that focused on verbal attention, the student's skills ranged from average to superior (id. at p. 6). The student exhibited strength and performed within the superior range for a novel task that required sustained listening skills and response inhibition (id.). Verbal short-term memory and the ability to repeat what was heard accurately after one presentation, measured within the lower limits of the average range (id.). The student's ability to hold a visual sequence in working memory measured within the average range (id.). Her overall performance on a sustained visual attention task measured within age expectations (id.). However, the evaluator noted difficulties with inattention and impulsivity on another test (id.). The student's performance on tasks requiring visuospatial processing skills was variable and ranged from below average to within the high average range (id.). The student performed within the average range on a structured task that required orientation and basic map reading skills, but she demonstrated difficulties with advanced planning, impulsivity, and directionality (id.).

In regard to the student's receptive language abilities, the neuropsychological assessment report indicated that the student's receptive language abilities ranged from below average to within the average range (Dist. Ex. 8 at p. 7). However, the assessment report indicated that "vulnerabilities" in word retrieval and working memory compromised her performance level (id.).<sup>2</sup>

The neuropsychological assessment report indicated that the student's expressive language skills were a significant weakness when compared to her receptive language skills, and noted weaknesses in word retrieval and elaborated expression (Dist. Ex. 8 at p. 7).<sup>3</sup> Phonological processing skills per administration of subtests of the Comprehensive Test of Phonological Processing (CTOPP) ranged from the low end of average to within the high average range of scores (id. at pp. 1, 7). The assessment report indicated that the student's memory and learning skills varied, reflecting weaknesses in word retrieval, and that reported scores on the Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2) measured either in the "high average" range, "above age expectations," or within the lower limits of the average range (id. at p. 8). The student's ability to spontaneously reproduce details of simple geometric designs from memory was measured to be within the borderline range of scores (id.). The evaluator indicated in the assessment report that the limited exposure period for this subtest did not provide the student with enough time to organize and remember the various aspects of information presented (id.). The student's executive functions skills as measured by selected subtests of the Developmental Neuropsychological Assessment Test (NEPSY-II) were described as variable and ranged from below average to within the high average range of scores (id.). Strength was noted in the student's ability to maintain a complex mental set in working memory on a novel language based task (id.). Nonverbal conceptual reasoning and ability to find multiple solutions to problems was within the average range (id.). The student's ability to generate novel designs quickly measured below age expectations due to difficulties in holding directions in working memory and spatial processing (id.).

Basic academic skill development per administration of the Woodcock-Johnson Tests of Achievement-Third Edition (W-J III ACH) academic skills subtest yielded a SS of 105 (63rd percentile) (Dist. Ex. 8 at p. 8). Academic knowledge in science, social studies, and the humanities per administration of the W-J III ACH academic knowledge subtest yielded a SS of 80 (9th percentile) (id.).

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<sup>2</sup> The neuropsychological assessment report indicated that administration of the Receptive One Word Picture Vocabulary Test (ROWPVT) yielded an average score in the 39th percentile (Dist. Ex. 8 at pp. 1, 7). Administration of the understanding spoken paragraphs subtest of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) yielded a score in the 50th percentile, within age expectations (id. at p. 7). Relatively less developed skills were noted on the oral comprehension subtest (SS 90) (25th percentile) and the understanding directions subtest (SS 93) (31st percentile) of the Woodcock-Johnson III NU Tests of Achievement (W-J III) (id.).

<sup>3</sup> Administration of the Expressive One Word Picture Vocabulary Test (EOWPVT) yielded a borderline range score in the third percentile, and administration of the W-J III picture vocabulary subtest yielded a borderline SS of 76 (5th percentile) (Dist. Ex. 8 at pp. 1,7). Similar performance was noted on the word structure (5th percentile) and formulated sentences (5th percentile) subtests of the CELF-4 (id. at p. 7).

In regard to reading skills, administration of the W-J III ACH letter-word identification subtest yielded a SS of 108 (71st percentile), revealing that the student's ability to decode single words and to use phonics skills in order to read nonwords was within the average range (Dist. Ex. 8 at p. 8). Administration of the W-J III ACH passage comprehension subtest yielded a SS of 95 (38th percentile) within the lower limits of the average range, reflecting the student's ability to use contextual cues in order to provide a missing word in a sentence-length reading comprehension task (*id.*). Administration of the Gray Oral Reading Tests, 4th Edition (GORT-4) yielded a reading accuracy score in the 25th percentile and a reading rate score in the 37th percentile; scores described in the assessment report as within the lower limits of the average range (*id.*). The report noted that the student's ability to respond to multiple choice questions about text that she read aloud only once was "relatively reduced" per administration of the GORT-4 comprehension subtest (25th percentile) (*id.* at p. 9).

In regard to written expression, administration of the W-J III ACH spelling subtest yielded a SS of 103 (58th percentile), within the average range (Dist. Ex. 8 at p. 9). Administration of the W-J III ACH writing samples subtest yielded a SS of 93 (32nd percentile) in the lower limits of the average range (*id.*).

Administration of the W-J III ACH math fluency subtest yielded a SS of 116 (85th percentile) in the high average range, indicating that the student's ability to rapidly retrieve math facts from memory was a strength for her (Dist. Ex. 8 at p. 9). Administration of the W-J III ACH calculation subtest yielded a SS of 97 (43rd percentile), indicating that the student's ability to complete structured math problems and word problems requiring counting, addition, subtraction, and knowledge of time was within the average range (*id.*).

Evaluation of the student's emotional functioning yielded no symptoms of clinical depression (Dist. Ex. 8 at p. 9). The student presented as happy, described herself in positive terms, and displayed strong skills in understanding how another person might feel or react in various situations (*id.*). Themes from projective narratives reflected the student's positive outlook on life and indicated that she was benefiting from support and medication (*id.*).

Among other things, the neuropsychological evaluator recommended placement in a structured, nurturing, and highly specialized school for "bright" students with language-based learning disabilities, a small class size, and a high teacher-to-student ratio due to the student's "significant weaknesses in expressive language" (Dist. Ex. 8 at p. 11). Speech-language therapy was recommended to be increased to three times weekly on an individual basis in order to address the student's weaknesses in word retrieval, grammar, and verbal and written expression (*id.*). In addition, individual remediation with a learning specialist two times per week was recommended to solidify skills in reading fluency, reading comprehension, and written expression (*id.*). It was also recommended that the student receive accommodations of extended time (50 percent) for all test taking situations, including standardized testing and exams that involve writing; that testing be completed in a quiet environment (without distraction) with frequent breaks; and that instructions and test items should be read to the student as needed (*id.*).

The hearing record reflects that in approximately April 2008, the student's classroom

teacher established a "classroom behavior academic plan" to support the student in addressing social difficulties she was experiencing with one of her classmates and in helping her learn to "not rush" through her work (Tr. pp. 241-42).

A May 13, 2008 Committee on Special Education (CSE) consent for referral and evaluation form signed by the student's mother indicated that she understood that the student had been referred to the CSE for evaluation to determine eligibility for special education services, that she had received a copy of the "Procedural Safeguard Notice," and that she granted consent for referral and evaluation by the CSE regarding the student (Dist. Ex. 9).

On or about May 16, 2008, the parents submitted an application for admission to Stephen Gaynor (Dist. Ex. 21 at p. 1). The parents indicated on the application that the student's "language and learning issues have challenged her ability to retain information and to make consistent progress" (*id.* at p. 3). In addition to personal and family information, the parents indicated on the application that the student "greatly loves school, learning and socializing with both teachers and children" (*id.* at pp. 1-3). On or about May 30, 2008, the parents signed an enrollment contract for placement of the student at Stephen Gaynor for the 2008-09 school year (Dist. Ex. 22 at pp. 1-2).

Sometime in May 2008, readministration of the PLA yielded a score of 12 out of 16 correct (Dist. Ex. 6 at p. 1). A June 5, 2008 classroom observation report completed by the district reflected that the student was observed in her classroom during a class book discussion (Dist. Ex. 10). The student responded to a question requiring her to relate the story from a book to her personal experiences and the observer was impressed that the student used several "helping verbs" in answering the question (*id.*). During a math activity involving a sheet of calculation problems, the student used a number line, as did most other students in the class (*id.*). The student worked independently, purposefully, moved from one calculation problem to the next, and wrote down the answers (*id.*). Several times, the student was noted to interrupt her work to check it against the work of two boys seated near her, but she did not change her answers (*id.*). After remaining with this assignment for 15 minutes, the student raised her hand to show her work to the teacher (*id.*). All of her answers were correct (*id.*). During an independent reading time, the student was observed to read a book quietly to herself and appeared "completely absorbed" in the book (*id.*). The student was also observed telling time and most of her answers were correct (*id.*). The observation report indicated that the student presented as a happy, social, and motivated student in the classroom (*id.*).

In June 2008, the district conducted a psychological evaluation (Dist. Ex. 11). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a verbal IQ score of 95 (37th percentile), a nonverbal performance IQ score of 87 (19th percentile), and a full scale IQ score of 87 (19th percentile) (*id.* at pp. 1-3).<sup>4</sup> During a task in which the student was asked to draw a human figure, her score for details based on the "Goodenough" scale yielded a

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<sup>4</sup> The district psychological evaluation report indicated a performance scale score of 84 in the 14th percentile on p. 1 of the evaluation report (Dist. Ex. 11 at p. 1). Within the body of the report, the performance score was indicated as 87 in the 19th percentile (*id.* at pp. 2-3). The hearing record offers no explanation for the discrepancy.

mental age of seven years (id. at p. 2). Results gleaned from a writing sample reflected that the student was a beginning writer, with her sentences described as complete but lacking initial capitalization (id. at pp. 2-3). With regard to spelling and reading, the student was noted to apply phonics skills that she had been taught (id.). The evaluation report indicated that her written letters were well formed (id. at p. 3). The student's conversational speech was described as age appropriate (id.).

On June 9 and 11, 2008, the district conducted an educational evaluation of the student (Dist. Ex. 12 at p. 1). The educational evaluation report indicated that the student worked "very hard" during all testing sessions and was well focused for all tasks (id.). Administration of subtests of the Wechsler Individual Achievement Test, Second Edition (WIAT-II)<sup>5</sup> yielded a superior range SS of 130 (98th percentile) for written expression; a high average SS of 117 (87th percentile) for numerical operations; and average range standard scores for the listening comprehension (SS 91) (27th percentile), oral comprehension (SS 91) (27th percentile), reading comprehension (SS 98) (47th percentile), pseudoword decoding (SS 98) (47th percentile), word reading (SS 102) (55th percentile), spelling (SS 106) (66th percentile), and math reasoning (SS 100) (50th percentile) (id.). Although the student performed in the average range in the area of oral language, the evaluation report indicated that this was a relative weakness for her (id. at p. 2).

Administration of the Beery-Buktenica Test of Visual-Motor Integration (VMI) yielded scores within the average range for visual-motor integration, visual perception, and motor coordination (Dist. Ex. 12 at p. 2). On the "DRS," a test of reading skills and comprehension, the student performed at the 2.2 passage level, and was able to read a passage with 89 percent accuracy, answering 86 percent of questions correctly (id.). At the 1.8 passage level, the student read with 91 percent accuracy, had 100 percent comprehension, and was able to retell the story with good sequence and detail (id.). An informal writing sample obtained from the student consisted of two sentences with some errors in spelling, grammar, and punctuation (id.). The evaluator concluded that the student was a beginning reader who had good phonics and that her phonemic awareness skills were developing (id. at p. 3). The student was able to read at the end of first grade level with good decoding and comprehension, and was beginning to express her thoughts in writing at a grade appropriate level (id.). The evaluator determined that the student's math skills were at a mid-second grade level in computation and at the end of the first grade level in math reasoning (id.).

On June 11, 2008, the district conducted a speech-language evaluation (Dist. Ex. 13 at p. 1). The speech-language evaluation report indicated that at the time of the evaluation, the student had been receiving AIS reading support as well as ERSS speech-language support one time per week for 30 minutes to facilitate her articulation (id.). Administration of the Goldman-Fristoe 2 Test of Articulation (GFTA-2) yielded a SS of 83 (5th percentile) (below average) (id. at pp. 1-2). Administration of the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4) and the Expressive Vocabulary Test, Second Edition (EVT 2), each yielded a SS of 81 (10th percentile) (low average) (id. at p. 1). Administration of the Test of Narrative Language (TNL) yielded a SS of 12 (75th percentile) for narrative comprehension tasks, a SS of 8 (25th

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<sup>5</sup> The educational evaluation report indicated that the norms of the WIAT-II are based on grade (Dist. Ex. 12 at p. 1).

percentile) for oral narration tasks, and an average narrative language ability index of 100 (50th percentile) for a student in the first grade (id. at pp. 2-3).

The speech therapist indicated in the speech language evaluation report that the student's language scores revealed average abilities in memory and sequencing skills (Dist. Ex. 13 at p. 3). Some difficulties with vocabulary, articulation, and the student's ability to orally make up a story from a sequence of pictures were noted; the evaluator indicated that these skills would continue to emerge, and that "for a child who has been in this country for [two] years it is important to note that she has obtained many skills and is retaining many skills" (id.).

A June 13, 2008 district reading teacher report indicated that the student had been attending AIS reading support since fall 2007 (Dist. Ex. 14). The report noted that the student initially received AIS support individually in the reading room, but at the time of the report she was changed to a small group of two students that met two times per week for 30 minutes (id.). The reading teacher report indicated that in April 2008, the student's accuracy rate was 95 percent on the benchmark book (id.). Periodic assessment of the student's performance on the "SIPPS" program ranged from 90 to 100 percent (id.). The reading teacher indicated that the student "catches on very quickly" (id.). The reading teacher also indicated that the student had accomplished sound blending; knew initial sounds, digraphs, short and long vowel sounds; and had an adequate sight word vocabulary based upon her June PLA assessment score of 97 percent and the SIPPS sight word component (id.). The reading teacher report further indicated that the student was able to sequentially retell a story and make accurate predictions (id.). Occasionally, the student made careless errors due to reading too fast, a habit that the reading teacher was addressing (id.).

A June 18, 2008 teacher report written by the student's first grade teacher indicated that overall the student was hard working, respectful to other students as well as adults, loved coming to school, and was making "great gains" in all academic areas as well as becoming a more confident learner (Dist. Ex. 15 at pp. 1-2). Specifically, in reading, the teacher report described the student as able to perform very well independently and during group work (id. at p. 1).<sup>6</sup> The report noted that she was able to read independently for a sustained time period of 25 minutes (id.). The teacher report indicated that on May 7, 2008, the student scored a 96 percent accuracy rate on her last reading assignment and was able to tell all details of the story (id.). The student scored 4 out of 4 on a comprehension check and identified 97 out of 100 words for the first grade level (id.). In math, the student was described as having a "great understanding" of math facts, and was able to meet the benchmark in 13 out of 15 areas for the spring assessment, scoring 69 out of a possible 76 points (id.). In writing, the student was described as having "shown great strides" in her writing skills (id.). In October 2007 and January 2008, it was reported that the student's writing was hard to understand because she was not writing in complete sentences (id.). However, in March through June 2008, the student's writing "improved dramatically," as she was able to comprehend her own writing, write in complete sentences, use capital letters appropriately and understand the appropriate use of punctuation (id.). Regarding academic

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<sup>6</sup> The teacher report included information about the student's performance on the October 2007 reading assessment that qualified the student for AIS reading support and the student's progress when she was reassessed in January and May 2008 (Dist. Ex. 15 at p. 2). The teacher report also indicated that the student was receiving ERSS speech- language therapy for articulation (id.).

weaknesses in math, reading and writing, the student was able to understand each lesson and asked questions when she had difficulty understanding tasks (id.). The student occasionally displayed "some frustration," and needed to be patient when doing her work and to slow down at times to avoid simple mistakes rather than rushing through assignments (id.). The teacher report indicated that the student's confidence appeared to have grown since the beginning of the 2007-08 school year (id.). Behaviorally, the teacher report indicated that the student's attention and concentration levels were appropriate for first grade and she was able to complete tasks on time (id. at p. 2). The teacher report indicated that the teacher and the parent e-mailed each other on a weekly basis to discuss the student's difficulties, and that there was carryover from school to home which seemed to assist the student in feeling more confident (id.).

The student's fourth quarter report card for the 2007-08 school year indicated "great progress" and that the student had a "wonderful year" (Dist. Ex. 19). According to the report card's rubric, the student was making progress in her ability to retell a story with details and in sequence, read aloud with expression and fluency, form individual letters and numerals correctly, write legibly, use capital letters appropriately, use punctuation appropriately, express ideas clearly when speaking, and in working on money (concepts), and word problems (id.). All of the other skills included in the rubric for the fourth quarter were at a developmentally appropriate level (id.).

On July 21, 2008, the CSE convened for an initial eligibility determination meeting regarding the student for the 2008-09 school year (Dist. Ex. 17 at p. 1). Attendees were the CSE chairperson, a district special education teacher, a regular education teacher, a speech therapist, a psychologist, and the student's mother (Tr. pp. 40, 42; Dist. Ex. 17 at p. 4).<sup>7</sup> Although there was no additional parent member in attendance, the resultant IEP indicated that the student's mother wished the meeting to proceed without one (Dist. Ex. 17 at p. 4). The IEP reflected the student's social history before and after attending school within the district (id.). The IEP further reflected the student's background consistent with the information included in the student's evaluations (id.). The IEP reflected that, based upon the CSE's discussion and review of all of the evaluations and teacher reports from the district, the student's private evaluations, a physical examination, and social history information; the student was eligible for special education programs and services as a student with an OHI (id. at pp. 1-2, 4-5). The CSE determined that the student required support through individual psychological consultation one time every two weeks for 30 minutes in a special location, speech-language therapy in a small group (3:1) three times per week for 30 minutes in a speech room, and accommodations of directions repeated and clarified, verbal prompting, and positive reinforcement (id.). In addition, the CSE recommended that a functional behavioral assessment (FBA) be conducted at the start of the 2008-09 school year and that a behavior plan be developed as appropriate (id. at pp. 4-5). Furthermore, the IEP noted that the speech therapist, psychologist, teacher, and student's mother should meet in November 2008 to discuss the student's progress in the social/behavioral and speech-language areas (id. at p. 1).

A written social history conducted immediately after the CSE meeting on July 21, 2008,

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<sup>7</sup> Although the name of the student's mother was not included on the IEP, testimony by the supervisor of special education indicated that this was a typographical error and that the student's mother attended the CSE meeting, and it was stipulated during the proceedings that the student's mother attended the CSE meeting (Tr. pp. 40, 42).

with the student's mother acting as informant indicated that the student was social and motivated; that she struggled with post-traumatic stress disorder, was impulsive and "over reactive;" that she had difficulty completing work independently, remaining seated, being attentive, and comprehending teachers' instructions; and that she needed more individual attention (Dist. Ex. 18 at pp. 1, 4). The written social history report further indicated that the student had difficulty remembering instructions from her teacher and required a behavior plan to regulate herself (id. at p. 4). At the time of the social history, the student continued to demonstrate word finding difficulties and did not remember names of simple words (id.). She tended to become disorganized and confused in large groups or new situations (id.). The social history report indicated that the student had a good relationship with her family, the student was affectionate, and that the student got along well with other children and had friends (id.). The social history report further noted that the student's mother reported that the student was a bright, sensitive child, who struggled with language and anxiety, and had a history of trauma (id. at p. 5).

In a due process complaint notice dated September 17, 2008, the parents, through their attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Dist. Ex. 23 at p. 1). Specifically, the parents alleged that before the July 21, 2008 CSE meeting, the district failed to inform the parents about the process to follow for requesting a CSE review and/or evaluation despite the parents' requests for a "Child Study Team" meeting and for a CSE evaluation of the student for special education services (id. at p. 2). The parents further alleged that given the "irregularities" that occurred at the July 21, 2008 CSE meeting, and the district's "insistence" on proceeding without an additional parent member, the student's regular education teacher and a social history, the CSE's failure to include an additional parent member significantly impeded the student's mother's ability to participate in development of the IEP and program recommendation for the student and denied the student a FAPE (id. at p. 3). In addition, the parents alleged that the CSE did not have information about the student's educational and social issues that had presented during the 2007-08 school year, because the social history report was completed after the CSE meeting; the CSE did not have information during the CSE review because the student's teacher was not present at the meeting; and concerns of the CSE that recommendation of additional services would make the district responsible for private school placement "inappropriately affected the services mandated for [the student]" (id.).

The parents further alleged that the July 21, 2008 IEP failed to meet all of the student's educational needs (Dist. Ex. 23 at p. 3). The parents specifically contended that the recommended related services of psychological counseling and speech-language therapy were not appropriate to meet the student's needs, and that while that the IEP indicated that an FBA should be conducted and a behavior plan developed as appropriate, the failure of the CSE to conduct the FBA before development of the IEP denied the student a FAPE (id. at pp. 3-4). The parents further alleged that the student's mother disagreed with the recommendations made by the July 21, 2008 CSE and made those disagreements known. The parents contended that the general education environment recommended by the CSE was inappropriate for the student who required placement in a special education classroom (id. at p. 4). As relief, the parent sought reimbursement for tuition paid to Stephen Gaynor for the 2008-09 school year (id. at p. 5).

The district, through its attorney, responded to the parents' due process complaint notice on September 29, 2008, denying the allegations made in the parents' complaint (Dist. Ex. 24). The district alleged that the July 21, 2008 CSE properly evaluated the student and that the resultant IEP offered her a FAPE. The district further alleged that Stephen Gaynor was not an appropriate placement for the student and was not in the least restrictive environment (LRE), and that equitable considerations did not support an award of tuition reimbursement (id. at p. 3).

The impartial hearing began on April 1, 2009 and concluded on April 23, 2009, after four days of testimony. In a decision dated August 3, 2009, the impartial hearing officer found that although the student made "significant progress" supported by district provided services during the 2007-08 first grade school year, the district failed to offer the student a FAPE for the 2008-09 school year, that Stephen Gaynor was an appropriate placement for the student, and that the equities favored tuition reimbursement (IHO Decision at pp. 9, 14, 17, 18).

Specifically, in reaching his decision, the impartial hearing officer determined that the private evaluation reports must be afforded "much more weight" than the district's evaluation reports (IHO Decision at p. 12). Regarding the district's evaluations, the impartial hearing officer noted that neither the district's psychological evaluation nor educational evaluation contained a date indicating when the testing was performed or when the report was written (id.).<sup>8</sup> The impartial hearing officer found that the district's evaluation reports were not nearly as comprehensive as the reports of the private examiners (id.). As to the district's psychological and educational evaluation, the impartial hearing officer noted that the summary and recommendations section of the evaluation reports did not contain any recommendations (id.). As to the educational evaluation, the impartial hearing officer noted that the VMI was normed on age, which made the results questionable as there was testimony that the student may be one year older than stated on her birth certificate (id.). Also, the impartial hearing officer noted that the school psychologist who conducted the psychological evaluation had the private psychoeducational report before conducting her evaluation (id.). The impartial hearing officer noted that although the findings of the private evaluation were clearly contrary to those of the school psychologist, there was no attempt by the school psychologist to comment on them (id.). The impartial hearing officer indicated that while the district's witnesses testified that the parents' reports were considered at the CSE meeting, none of the recommendations in those reports were included in the student's IEP (id.).

Regarding the CSE meeting, the impartial hearing officer found that the required additional parent member was not in attendance at the July 21, 2008 CSE meeting and that such constituted a violation of the "parent's rights under the law" (IHO Decision at pp. 12-13). The impartial hearing officer further found that although the student's mother had consented to proceeding without the additional parent member, she consented because she was anxious to finalize the student's program for the fall (id. at p. 13). The impartial hearing officer also noted

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<sup>8</sup> Despite the impartial hearing officer's finding, I note that a review of the district's psychological evaluation indicates the dates of evaluation as June 5 and 6, 2008 (Dist. Ex. 11). I also note that a review of the district's educational evaluation indicates that testing was conducted on June 9 and 11, 2008, and that the report is dated June 11, 2008 (Dist. Ex. 12). Moreover, a review of the private psychiatric evaluation reveals that it is an undated report and a review of the private neuropsychological assessment also reveals that it is an undated report, although the dates of testing are indicated in both reports (Dist. Exs. 7; 8).

that the student's mother was not advised of the absence of the additional parent member until the day of the CSE meeting and that the CSE was unable to advise the parent as to when the CSE meeting would be rescheduled in the event that she did not consent to proceed (id.).

The impartial hearing officer also found that the failure to develop a social history prior to the CSE meeting violated the parents' rights and denied the student a FAPE (IHO Decision at p. 14). The impartial hearing officer found that providing the student's social history at the time of the CSE meeting was not acceptable under the regulations and noted that the student's mother testified that the social history that was discussed at the CSE meeting was incomplete (id.).

Regarding the student's prior educational progress, the impartial hearing officer found that while the student did make "significant progress" in the first grade (while in a general education program), she did so with support from the speech therapist and an AIS reading program (IHO Decision at p. 9). The impartial hearing officer further found that the district violated the 60 day timeline in the regulations to complete the evaluations of the student "as the date of the referral ... was not extended" (id. at pp. 13-14).<sup>9</sup> Based on all of the above, the impartial hearing officer determined that the district did not offer the student a FAPE for the 2008-09 school year (id. at p. 14). Regarding his findings pertaining to CSE composition, the development of the social history, and the timeliness of the evaluation process, the impartial hearing officer did not explicitly discuss whether he found that the alleged 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]).

The impartial hearing officer went on to find that the parents' unilateral placement of the student at Stephen Gaynor was appropriate (IHO Decision at p. 17). Specifically, the impartial hearing officer found that the student was making academic progress at Stephen Gaynor (id.). Furthermore, he found that there is "no obligation" on the part of a parent to be sure that the student is being educated in the LRE<sup>10</sup> and that there was no evidence in this case of what the student's LRE would be; therefore, he declined to reduce the tuition award on that ground (id. at pp. 17-18). Lastly, the impartial hearing officer found that the equities favored the parents because they had cooperated in the evaluations of the student and had participated in the CSE meeting (id. at p. 18).

On appeal, the district contends that it offered the student a FAPE for the 2008-09 school year. The district contends that the impartial hearing officer misapplied the record before him in

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<sup>9</sup> I note that pursuant to State regulations, a district must complete the individual evaluation of a student within 60 days from the date of receipt of parental consent to evaluate, not 60 days from the date of referral as indicated by the impartial hearing officer in his decision (8 NYCRR 200.4[b][1], [d]; see 20 U.S.C. § 1414[a][1][C][i][I]; C.F.R. § 300.301[c][1][i]).

<sup>10</sup> While parents are not held as strictly to the standard of placement in the LRE as school districts are, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

relying on the private evaluations rather than the district's evaluations. The district alleges that the parents waived the presence of an additional parent member at the July 21, 2008 CSE meeting. Although the district failed to secure a written waiver of the parent member, the district asserts that the parents acknowledged and the IEP accurately reflected that the presence of an additional parent member was voluntarily waived and that, in any event, the student's mother actively participated at the CSE meeting. The district also contends that the absence of the student's regular education teacher from the CSE meeting did not significantly impede the parents' rights as another regular education teacher attended the meeting. The district also notes that although this issue was raised in the parents' due process complaint notice, it was not addressed by the impartial hearing officer. As to the social history, the district contends that the CSE conducted a verbal social history at the CSE meeting prior to the CSE's recommendations regarding the student's educational program. The district asserts that the district offered to adjourn the CSE meeting to a later date so that a social history could be conducted, that the student's mother indicated a willingness to proceed, verbally provided the social history to the CSE, and that at the conclusion of the CSE meeting, the student's mother met with the district for the sole purpose of documenting the student's social history.

In addition, noting that the impartial hearing officer did not address this issue although it was raised in the parents' due process complaint notice, the district contends that the student did not exhibit behavioral issues in the classroom that warranted an FBA and that the IEP reflected the CSE's recommendation that an FBA be conducted because of the student's mother's concern that the student's behavior was impacting her performance in school. The district further asserts that the parents' unilateral withdrawal of the student from the district rendered the obligation to conduct an FBA moot. The district further contends that the impartial hearing officer *sua sponte* concluded that the CSE was not in compliance with the 60 day timeline to evaluate the student imposed on the CSE by the regulations. The district argues that this issue was not raised in the parents' due process complaint notice and that it was not raised during the impartial hearing; therefore, the impartial hearing officer lacked the jurisdiction to render a determination on this issue. The district further argues that the parents canceled two previously scheduled CSE meetings. Lastly, the district contends that it offered the student a FAPE in the LRE; that the parents did not select an appropriate educational placement as it was too restrictive; and that equitable considerations do not support an award of tuition reimbursement because the parents did not intend to send the student to public school.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE. The parents specifically allege that the district failed to prove the appropriateness of the recommended program; that the hearing record does not contain sufficient information regarding the educational services offered to the student for the 2008-09 school year; that the district failed to ensure that the hearing record contained information regarding how the proposed program would address the student's identified special education needs; that the district failed to provide information as to how the programs and services offered by the proposed district school were specially designed to meet the student's unique needs; and that the CSE's recommendations for the student were not based on individualized needs, but on the available programs within the district.

In addition, the parents assert that the district failed to properly evaluate the student before convening a CSE meeting. With regard to the social history, the parents contend that they informed the district that they felt "uncomfortable" sharing all details surrounding the student's background at the CSE meeting, that it was not until after the meeting that they felt comfortable discussing the student's background with the district, and that one of the CSE's members informed the student's mother that deferring the meeting in order to obtain the social history would possibly result in the inability to complete the IEP process before the beginning of the school year due to vacations. Also, the parents allege that the district failed to conduct an FBA before the CSE meeting. The parents further allege that the district denied the parents meaningful participation by failing to ensure the attendance of an additional parent member during the development of the IEP. The parents assert that the CSE did not consider a request by the student's mother to discuss the classification of the student at the meeting and that the CSE refused to consider a more restrictive placement. The parents further allege that the district denied the parents meaningful participation by failing to ensure the attendance of an appropriate regular education teacher at the CSE meeting. The parents also assert that the impartial hearing officer correctly held that Stephen Gaynor was an appropriate placement for the student and that the equities favored the parent. Lastly, the parents assert that the district's petition was not verified.<sup>11</sup>

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 (see 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]; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). 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]).

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<sup>11</sup> Although the parents' contend that the district's petition was not verified, the petition received by the Office of State Review contained a proper verification (see 8 NYCRR 279.7).

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 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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 statute 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).

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).

Initially, I will address the district's contention that the impartial hearing officer erred in sua sponte raising and deciding that the CSE was not in compliance with the 60 day timeline imposed on the CSE to evaluate the student pursuant to State regulations (8 NYCRR 200.4[b][1], [d]). The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708,713 [7th Cir. 2007]).

In the instant case, the district asserts that the impartial hearing officer improperly found that the CSE was not in compliance with the 60 day timeline to complete the evaluations of the student and formulate an IEP. The parents did not assert in their due process complaint notice that the evaluations or IEP were untimely and the issue was not raised by the parents during the impartial hearing.

Based upon the forgoing, I find that the impartial hearing officer erred in sua sponte raising an issue that was neither identified in the parents' due process complaint notice, nor raised during the impartial hearing. The impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; Application of the Bd of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

I will now address whether the July 2008 CSE was duly constituted. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL

1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York State law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]).

It is undisputed that an additional parent member did not attend the July 21, 2008 CSE meeting at which the 2008-09 IEP for the student was developed (Tr. pp. 40, 42; Dist. Ex 17 at p. 4.). Furthermore, there is no written parental waiver of the additional parent member contained in the hearing record (Tr. p. 45). While the hearing record reflects that there was a verbal agreement to go forward without the additional parent member (Tr. p. 538), this agreement does not comport with State regulations.<sup>12</sup> While the lack of an additional parent member, absent a proper waiver, is a procedural error and contrary to State law and regulation, I am not persuaded by the evidence in the hearing record that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). A review of the hearing record reflects that the parents had some familiarity with the IEP process as the parents had another child attending school within the district who was classified as eligible for special education services (Tr. p. 46). Also, a review of the hearing record indicates that the student's mother actively participated in the CSE meeting by providing a verbal social history, including information from the private evaluations into the discussion, and by asking questions and seeking clarification (Tr. p. 47). Although the July 2008 CSE meeting was improperly constituted under State law and regulation in the absence of a proper waiver (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]), there is insufficient evidence in the hearing record to demonstrate that the composition of the July 2008 CSE meeting rose to the level of a denial of a FAPE (R.R., 2006 WL 1441375, at \*5; Mills, 2005 WL 1618765, at \*5; see Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). I caution the district, however, to ensure that it complies with the requirements of State regulations pertaining to the attendance of an additional parent member at CSE meetings.

I will next consider the absence of the student's first grade regular education teacher for the 2007-08 school year from the July 2008 CSE meeting (Tr. pp. 91, 248).<sup>13,14</sup> The CSE must

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<sup>12</sup> The hearing record reflects that the student's mother wanted the CSE meeting to go forward in the additional parent member's absence because the district was unable to provide a specific date for a rescheduled meeting at that time (Tr. pp. 44-45, 537-38).

<sup>13</sup> Although the parents raised this issue in their due process complaint notice and at the impartial hearing and it has been raised on appeal, the impartial hearing officer did not consider the absence of the regular education teacher from the July 2008 CSE in his decision.

include not less than one regular education teacher of the student if the student is, or may be, participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). Here it was anticipated that the student would be participating in the regular education environment. The regular education teacher "shall, to the extent appropriate," participate in the development of the IEP of the student, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). Accordingly, I find that the absence of the student's regular education teacher from the July 21, 2008 CSE meeting renders the CSE improperly constituted. However, I note that another regular education teacher from the student's school<sup>15</sup> attended the July 21, 2008 CSE meeting, and that the student's first grade regular education teacher submitted a June 18, 2008 report to the CSE regarding the student's academic strengths and weaknesses in reading, math, and writing, as well as actions taken to facilitate the student's progress in reading, articulation, and dealing with frustration (Tr. pp. 40-41, 42, 118; Dist. Exs. 15 at pp. 1-3; 17 at p. 4). Moreover, the student's first grade regular education teacher testified that his written report was consistent with the academic performance and behavior exhibited by the student when she was in his first grade class (Tr. pp. 228-40; Dist. Ex. 6 at pp. 1). Notwithstanding that the July 21, 2008 CSE was not properly constituted because of the absence of the student's regular education teacher, I find that under the circumstances of this case, the hearing record does not demonstrate that the lack of the student's regular education teacher at the July 21, 2008 CSE meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. I therefore find that there is insufficient information in the hearing record to conclude that the failure to include the student's regular education teacher at the July 21, 2008 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student with a Disability, Appeal No. 08-064). I do, however, caution the district to ensure compliance with the procedures for the development of an IEP.

I will next consider whether the failure of the district to conduct a social history prior to the July 21, 2008 CSE meeting resulted in a denial of a FAPE. State law and regulation require that an initial evaluation include a social history (8 NYCRR 200.4[b][1][iii]). A social history is defined as "a report of information gathered and prepared by qualified school district personnel pertaining to the interpersonal, familial, and environmental variables which influence a student's general adaptation to school, including but not limited to data on family composition, family history, developmental history of the student, health of the student, family interaction and school adjustment" (8 NYCRR 200.1[tt]). In this case, a social history was not conducted prior to the July 21, 2008 CSE meeting and a written report was not prepared until after the meeting (see Dist. Ex. 18). The hearing record reflects; however, that the student's mother verbally provided

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<sup>14</sup> The hearing record reflects that the student's regular education teacher was unable to participate in the CSE meeting because he was attending the first day of summer session graduate school classes (Tr. pp. 91, 221-22, 248).

<sup>15</sup> The regular education teacher from the student's school that attended the July 21, 2008 CSE meeting was teaching third grade in the district at the time (Tr. p. 118).

in-depth information regarding the student's social history for approximately 45 minutes during the CSE meeting, which lasted between 1 1/2 to 2 hours (Tr. pp. 57, 89-90). Testimony by the district supervisor of special education indicated that she told the student's mother at the CSE meeting that the student's social history would need to be taken at the meeting or the meeting would need to be adjourned to a subsequent date (Tr. pp. 24, 85). The student's mother met with the school psychologist immediately after the CSE meeting and a written social history was prepared for the student's file (Tr. p. 88). A review of the student's July 21, 2008 IEP reflects that the CSE considered the student's social history information as provided by the student's mother (Dist. Ex. 17 at pp. 3-4). Testimony by the supervisor of special education indicates that the determination that the student was eligible for special education services as a student with an OHI was based on the student's psychiatric diagnoses that the student's mother shared with the CSE at the meeting as part of the verbal social history (Tr. p. 59). Accordingly, I find that the failure to conduct a written social history prior to the CSE meeting did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefits. I note that upon completion of the written social history after the CSE meeting by the student's mother, there was no suggestion by the student's mother to reconvene a CSE meeting, nor is there evidence in the hearing record that reconvening a CSE after the written social history was required. I caution the district, however, to ensure that it complies with New York State regulations pertaining to conducting a social history.

I will next consider whether the district's failure to develop an FBA resulted in the denial of a FAPE.<sup>16</sup> In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>17</sup> In addition to the federal requirement, State regulations require that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]).<sup>18</sup> Additionally, under State regulations when considering more restrictive

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<sup>16</sup> Although the parents raised this issue in their due process complaint notice and at the impartial hearing, and it has been raised on appeal, the impartial hearing officer did not consider whether the district's failure to develop an FBA resulted in a denial of a FAPE.

<sup>17</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

<sup>18</sup> In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>19</sup>

After an independent review of the hearing record, I agree with the district that the student did not exhibit behavioral issues indicating that an FBA was required prior to the time of the July 21, 2008 CSE meeting. Although the hearing record includes information provided by the parents regarding the student's behavior at home, the evidence adduced at the impartial hearing does not support a finding that the student exhibited behavioral concerns that adversely affected her learning. I note that the student's first grade teacher from the student's prior school year in the district testified that the student was "never disruptive" and was "very well behaved" in class (Tr. p. 246). Although the student's teacher testified that he set up a "behavior academic plan" toward the end of the school year, he testified that it was created to address difficulties the student was having communicating with her best friend and the student's tendency to "sometimes" complete her work too quickly, resulting in simple mistakes (Tr. pp. 241-42, 244). Although I find that the facts adduced at the impartial hearing do not indicate that an FBA was required, I note that the student's July 21, 2008 IEP indicated that an FBA should be conducted (Dist. Ex. 17 at p. 4). I further note testimony at the impartial hearing that the CSE included the recommendation for an FBA because of the student's mother's concerns that the student's behavior was affecting her performance in school (Tr. pp. 115-116). In addition, I note testimony that an FBA would have been conducted had the student returned to the district's school for second grade during the 2008-09 school year (Tr. pp. 116-17, 120).

Accordingly, based upon an independent review of the hearing record, I find that the hearing record does not show that the lack of an FBA prior to the July 21, 2008 CSE meeting impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (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 A.C., 553 F.3d at 172-73; J.A., 2009 WL 773937, at \*3-\*4; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419; see also K.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008]).

Next I will consider the evaluations of the student conducted by the district and the private evaluations obtained by the parents in determining whether the program offered by the district for the 2008-09 school year was appropriate. After an independent review of the hearing record, I find that the hearing record does not support the finding of the impartial hearing officer that greater weight should be afforded to the private evaluations (IHO Decision at p. 12). Also, I find that the hearing record does not support the impartial hearing officer's finding that discrepancies between the private evaluation reports and district's evaluation reports and the "paucity" of testimony refuting the private reports, in conjunction with procedural violations, result in a denial of a FAPE (IHO Decision at p. 14).

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<sup>19</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

A CSE must consider any private evaluation report submitted to it by a parent, as part of the CSE's review of a student (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). A board of education may conduct its own evaluations rather than simply accept private evaluations (DuBois v. Connecticut State Bd. of Ed., 727 F.2d 48 [2d Cir. 1984]; Vander Malle v. Ambach, 673 F.2d 49 [2d Cir. 1982]; Rettig v. Kent City Sch. Dist., 720 F.2d 466 [6th Cir. 1983]). Nevertheless, a CSE must be careful to avoid overly repetitive testing (Healey v. Ambach, 103 A.D.2d 565 [3d Dept. 1984]; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of a Child with a Disability, Appeal No. 01-076). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

Initially, I note that the hearing record reflects disagreement regarding the conclusions and recommendations made by experts for the district and those made by the parents' experts, as a result of evaluations conducted by both parties. The hearing record does not indicate that the district attempted to discredit or refute the results of the parents' evaluations. The impartial hearing officer determined in his decision that the summary and recommendations section of the district's psychological evaluation did not contain any recommendations and that given the "strong recommendations" in the private psychoeducational report, he "expect[ed]" some recommendations in the district's report (IHO Decision at p. 12). However, the recommendations section of the district's psychological evaluation indicated that the student was also being evaluated by the educational specialist, and that the evaluations would be discussed at the CSE meeting (Dist. Exs. 11; 12). I find that the lack of a recommendation in the district's psychological evaluation report does not adversely affect the weight to be afforded the report and that the CSE meeting was an appropriate forum for the specialists to discuss the report with the other members of the CSE and make a recommendation after reviewing and discussing all relevant information regarding the student.

After a review of the hearing record, I find that that the district considered the private evaluations and other information presented by the parents at the July 2008 CSE meeting, but that the CSE arrived at a different conclusion and recommendation than advocated for by the parents, and that the evidence in the hearing record supports a finding that the program offered by the district was appropriate for the student.

The district's supervisor of special education testified that, although the CSE did not have a copy of the private psychiatric evaluation, the CSE had a psychiatric note from the psychiatrist indicating the student's diagnoses of ADHD and PTSD (Tr. p. 48; Dist. Ex. 17 at p. 5) and that the student's July 21, 2008 IEP reflected those diagnoses (Dist. Ex. 17 at pp. 3-4). Also, the hearing record reflects that the CSE reviewed the findings included in the private neuropsychological evaluation report (Tr. p. 50; Dist. Exs. 10-15).<sup>20</sup> The district's supervisor of

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<sup>20</sup> Testimony by the supervisor of special education indicates that the CSE considered the private neuropsychological evaluation report (Tr. p. 82), although the IEP listed the date of the neuropsychological evaluation report as July 25, 2008, after the July 21, 2008 CSE meeting (Tr. pp. 82- 84).

special education testified that she did not agree with the recommendations for a small highly structured class contained in the private psychiatric note and the neuropsychological evaluation report because the student "never gave any indication in her performance through kindergarten and first grade" that she required the intensive support of a small class in order to learn (Tr. pp. 49, 51; Dist. Exs. 7 at p. 3; 8 at p. 11). The student's first grade teacher indicated that he did not believe that the student needed a small class placement because she was "progressing very, very nicely" in his classroom consisting of 22 students, a classroom teacher, and an assistant teacher and that the student was performing above grade level (Tr. pp. 246-47). Consistent with the district's teacher reports and reassessment results, the student's teacher also testified that the student showed that she was able to improve from the beginning of the school year to the end of the school year, and that her assessments proved that she was able to work and show progress in a general education classroom (Tr. p. 252; see Dist. Ex. 6 at pp. 1-26). The student's first grade teacher indicated that academically, the student's performance was "great" (Tr. pp. 239-40). The student's teacher noted that the student excelled in math and demonstrated "tremendous improvements" over the school year in both math and reading (Tr. pp. 249, 250). The student's speech therapist from the district school testified that she did not agree with the neuropsychologist's recommendation that the student attend a small class setting because the student was making "great progress," she was "such a social student," "she loved her friends in her class," and she told the therapist that she was sad about leaving the district (Tr. pp. 170-01; Dist. Ex. 8 at p. 11). The student's speech therapist testified that her evaluation findings regarding the student's vocabulary were consistent with the private neuropsychological evaluation report, but she did not agree that the student had an expressive language disorder (Tr. pp. 168-69). The speech therapist testified that, based upon her work with the student and conversation with the student's teachers, the student was able to express herself in a manner similar to emerging skills displayed by first-graders as these skills were part of their academics (Tr. p. 169). Furthermore the speech therapist testified that she did not view the student as manifesting an expressive language disorder because of the student's ability to express herself, ask questions, tell a story, and work with other students (Tr. p. 170). The speech therapist further testified that a student with an expressive language disorder would not be able to sequence information or tell a story (Tr. p. 169). The speech therapist characterized the student as "full of energy" and the "strongest student in the room" (Tr. p. 170).

In addition to the information derived from the student's private evaluation available to the CSE at the time of the meeting, the student's July 21, 2008 IEP reflected that the CSE considered its own evaluations, teacher reports, a classroom observation, social history information as reported by the student's mother, other information provided by the student's mother, and a physical examination (Dist. Ex. 17 at pp. 3, 5). The CSE determined that testing results reflected that the student's academic functioning was in the average to high average range in all areas, and therefore the student had no academic needs at that time (id. at p. 3). The student's speech-language skills were found to be within the average range for language, except for vocabulary which was in the low average range and weakness in the student's articulation due to a lisp and difficulty blending consonant sounds (id.).

The hearing record reflects that "based upon lengthy discussion" at the CSE meeting, which included the student's mother's verbal social history regarding the student, the CSE determined that the student was eligible for special education services as a student with an OHI

(Tr. pp. 174-75; Dist. Ex. 17 at p. 4).<sup>21</sup> The CSE recommended that the student receive related services of psychological consultation and speech-language therapy; and classroom accommodations of directions repeated and clarified, verbal prompting, and positive reinforcement; as well as an FBA/BIP as appropriate;<sup>22</sup> consultation by a psychologist with the teacher regarding behavior intervention; a meeting with the speech therapist, psychologist, teacher, and the parents early in the school year to discuss the student's progress; and monitoring of the student's behavior (Dist. Ex. 17 at pp. 1-5).

Regarding the student's language needs, the CSE determined that the student needed to improve her semantic, verbal expressive, and articulation skills (Dist. Ex. 17 at p. 3). Socially, the IEP indicated that the student received diagnoses of ADHD and PTSD, which could manifest in social and/or behavioral difficulties (*id.*). To address this, the CSE identified the student's possible need for an FBA and implementation of a BIP as appropriate, as well as psychological consultation with the teacher by the school psychologist, to facilitate behavior intervention (*id.* at pp. 3-5). In addition, the CSE addressed the student's tendency to rush through her work by recommending accommodations of directions repeated and clarified, verbal prompting, and positive reinforcement (*id.* at pp. 1-2). In consideration of the student's medical history and medication to address her diagnoses, the CSE determined that the student's behavior needed to be monitored, and that the parents would keep the school informed of any changes in the student's medical/physical status (*id.* at p. 4).

In determining whether the recommended program offered by the district was appropriate, I have considered that the student's recommended program must 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, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the

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<sup>21</sup> Testimony by the speech teacher indicated that the concerns regarding the student's anxiety reported by the student's mother were not manifested in the classroom (Tr. p. 175). She also noted that it would have been inappropriate to classify the student with a speech or language impairment because the student did not demonstrate, nor did formal testing reflect, a struggle in her speech-language skills that would result in a disability that required an IEP (Tr. p. 176).

<sup>22</sup> Testimony by the supervisor of special education indicated that the CSE did not initially consider the need for an FBA because the student demonstrated no behaviors in the classroom or in any part of the school building that required an FBA (Tr. pp. 58-59). The supervisor indicated that had the student returned to the district for second grade, the district "would have absolutely conducted [an FBA]," and "[w]hether or not a behavioral plan would have resulted would be determined as a result of that assessment" (Tr. p. 117).

special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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

A review of the hearing record demonstrates that during the 2007-08 school year, when the student was in a general education first grade class, she made progress in all academic areas and in her social development (Dist. Ex. 19). The impartial hearing officer found that the student made "significant progress" in first grade while in a general education program with support from the speech therapist and an AIS reading program (IHO Decision at p. 9). Evaluations conducted by the district and teacher reports were consistent with the student's 2007-08 report cards (Dist. Exs. 10-15; 19). Teacher comments on the 2007-08 report card and testimony by district personnel that the student was motivated to learn, transitioned and adjusted to her classes, and that she quickly internalized classroom routines and rules were consistent with teacher comments from the charter school that the student attended prior to entering the district, and the 2006-07 district kindergarten report card (Tr. pp. 169-70, 228-40; Dist. Exs. 1 at pp. 3-5; 5; 10; 13 at p. 3; 15 at p. 2; 19). A review of the first grade vocabulary, reading, and writing assessment samples in the hearing record further reflects the student's progress throughout the 2007-08 school year (Tr. pp. 228-40; Dist. Ex. 6 at pp. 1-26).

In discussing the first grade teacher's progress report regarding the student, the supervisor of special education testified that the student was described as having performed well with continuing progress between the period of time the teacher began working with her until June 18,

2008, and that the teacher's only concern involved "typical frustrations" the student experienced when she made a mistake and she needed to be "walked through" those times (Tr. pp. 42-43; Dist. Ex. 15 at pp. 1-2). Testimony by the first grade teacher indicates that when the student rushed through her work she tended to make simple mistakes, but when she slowed down in doing her work she performed "at [one] hundred percent" (Tr. p. 250).

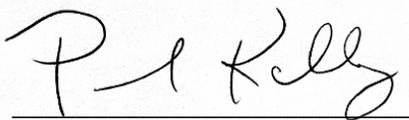
According to the supervisor of special education, the CSE recommended placing the student in a general education second grade classroom, with speech-language therapy services three times per week in a small group, and psychological consultation "so that there would be someone there on a regular basis monitoring her in terms of her social/emotional behavioral status" (Tr. p. 59; Dist. Ex. 17 at pp. 1-2). Corroborative testimony by the supervisor of special education, the student's first grade teacher, and the district speech therapist, as well as evidentiary documentation in the hearing record reveals that the student adjusted to classroom routines throughout her educational history, appeared happy in school, was an inquisitive and diligent worker, and was making academic and social progress in the general education program (Tr. pp. 42-43, 151, 153, 228-40; Dist. Ex. 15 at pp. 1-2). Furthermore, as noted above, the hearing record demonstrates that the student's behavior as reported by the student's mother to the private psychiatric and neuropsychological evaluators was not exhibited in school (Tr. pp. 49, 51, 169-70, 174, 192, 246, 258, 263, 277-78). In light of the student's aforementioned progress in the district throughout the 2007-08 school year and the special education program and services offered for the 2008-09 school year, the hearing record demonstrates that the program offered by the district for the 2008-09 school year was reasonably calculated to confer educational benefits on the student in the LRE.

Having decided that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE, I need not address the parties' remaining contentions, including the issue of whether Stephen Gaynor was appropriate, and accordingly the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and need not address them in light of my decisions herein.

**THE APPEAL IS SUSTAINED.**

**Dated: Albany, New York  
October 5, 2009**



**PAUL F. KELLY  
STATE REVIEW OFFICER**