



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-097

**Application of the BOARD OF EDUCATION OF THE  
[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:**

Jaspan Schlesinger, L.L.P., attorneys for petitioner, Carol A. Melnick, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Neal H. Rosenberg, 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 2009-10 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Stephen Gaynor (Tr. pp. 505-06; Dist. Ex. 37 at p. 1). Pursuant to her July 8, 2009 individualized education program (IEP) for the 2009-10 school year, the student was classified as a student with a learning disability, and recommended to receive direct and indirect consultant teacher services, resource room, special class mathematics and English language arts (ELA), counseling, and speech-language therapy (Dist. Ex. 37 at pp. 1-2). Stephen Gaynor is a private school which 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 a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]; see Tr. pp. 18, 673).

The hearing record reflects that from an early age the student exhibited various medical conditions and received services through the Early Intervention Program, and the Committee on Preschool Special Education (CPSE) of another district (Tr. pp. 626, 633-34; Dist. Ex. 16 at p. 2). A psychological evaluation of the student conducted at four years of age indicated that the student's cognitive abilities were in the low average range, and that her adaptive skills were at the low end of the borderline range (Dist. Ex. 1 at p. 6). The evaluator reported that most of the student's cognitive delays related to her fine motor skill delays and difficulty with visual tracking, as well as "some attentional issues" (id.). Additionally, the student exhibited delays in her activity of daily living skills, motor skills, and she demonstrated a short attention span, a high level of distractibility, and poor visual-motor integration skills (id.).

The hearing record indicates that prior to the beginning of the 2004-05 school year the student moved into the district and began attending kindergarten (Tr. pp. 624-26). About the time the student moved into the district, the student began having toileting accidents and struggling with school work (Dist. Ex. 19 at p. 2). In October 2004 the Committee on Special Education (CSE) convened for the student's initial review and determined that she was eligible to receive special education programs and services as a student with a speech or language impairment (Dist. Ex. 2). The student's 2004-05 special education program consisted of 15:1 "PASS" special class language arts, 15:1 "PASS" collaborative mathematics, and individual counseling, individual occupational therapy (OT), and both individual and group speech-language therapy (id. at pp. 1-2).<sup>1</sup>

According to the student's mother, the student repeated kindergarten due to her difficulty "grasping ideas" and concepts, and the hearing record indicated that during the 2005-06 (second kindergarten year) and 2006-07 (first grade) school years she received a special education program similar to the program she received during the 2004-05 school year (Tr. pp. 626-27; compare Dist. Ex. 2 at pp. 1-2, with Dist. Ex. 3 at pp. 1-2, and Dist. Ex. 4 at pp. 1-2). Additionally, during the 2006-07 school year the parents obtained private speech-language therapy, tutoring, and vision therapy services for their daughter (Tr. p. 629; Dist. Ex. 10).

In May 2007, the school psychologist administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) to the student (Dist. Ex. 6). The student's verbal comprehension, perceptual reasoning, working memory and full scale IQ standard scores were in the average range, and her processing speed standard score of 83 was in the low average range of cognitive ability (id. at p. 4). Emotionally and behaviorally, the student presented as a "cooperative" and "friendly" child, who due to her desire to succeed and perform well, was "likely to experience anxiety relative to her learning concerns" (id.). The student was observed to demonstrate appropriate attention during testing, variable effort with and avoidance of challenging tasks, delayed responses, and a slow work pace during nonverbal tasks (id.). The student's parents reported that although the student expressed her frustration with transitioning from one home to the other, the student was adjusting to changes in her family living situation (id.). Although the student had expressed concerns about her school functioning, the

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<sup>1</sup> The director of pupil personnel services and special education (director of pupil personnel) described the "PASS" program as a "departmentalized special education class program" (Tr. pp. 22, 34).

psychologist reported that the student was enjoying first grade and having a good school year (id.).

During the 2007-08 school year (second grade), the student was placed in "collaborative" language arts and mathematics classes, which the district director of pupil personnel described as general education classes consisting of both a special education and a regular education teacher in the classroom (Tr. pp. 22, 39-42; Dist. Ex. 7). The student also received two sessions per week of both individual and group speech-language therapy and one session per month of OT consultation services (Dist. Ex. 7 at p. 1).<sup>2</sup> The 2007-08 IEP indicated that the student exhibited a moderate delay in language skills that interfered with her participation in age appropriate activities, and that she demonstrated difficulty with short-term memory (id. at p. 2). The 2007-08 IEP reflected that the student exhibited behaviors indicating anxiety, and that she needed to increase her ability to cope with frustration and decrease anxiety (id. at p. 3). In addition to the services provided by the district, the parents obtained one session per week of private counseling services for the student provided by a social worker (Tr. pp. 477-78, 486; see Dist. Ex. 11).

Teacher comments recorded on the student's 2007-08 report card reflected that she was well liked by peers, and was a motivated and hard-working student (Dist. Ex. 8). According to the report card, the student at times became confused by tasks, exhibited difficulty organizing oral and written language, and struggled to "apply one day's lesson to the next" (id.). The report card further indicated that the student benefited from having two teachers in the classroom, small group instruction, and from having multiple opportunities to master a topic (id.). In the majority of areas measuring communication arts and mathematics skills the student received designations of "[p]rogressing [t]owards [c]urriculum [o]bjectives," and she received designations of "[m]eets [c]urriculum [o]bjectives" in social studies and science (id.).

On May 29, 2008 a CSE subcommittee convened to conduct the student's annual review and to develop her IEP for the 2008-09 school year (third grade) (Dist. Ex. 9). According to the May 2008 IEP, the student had exhibited "slow yet steady progress in all areas" and at times, difficulty organizing oral and written language (id. at pp. 2-3). The student's sight word recognition and phonics skills had increased and although her mathematics skills had strengthened, her performance was described as "inconsistent," with number concepts an area of weakness (id. at p. 3). The student's language skills were progressing with support, and she had learned strategies to address word-finding, memory and organizational difficulties (id.). The May 2008 IEP continued to note that some of the student's behaviors indicated anxiety, and additionally that she needed support and reminders to visit the bathroom, especially at times of unexpected transitions (id. at pp. 3-4). In addition to needing to manage her anxiety more effectively, the May 2008 CSE subcommittee indicated that the student needed to increase both her ability to express her frustrations, and her tolerance "for the ups and downs of school life" (id. at p. 4). The CSE subcommittee recommended that for the 2008-09 school year the student receive 12:1 integrated co-teaching services in social studies, ELA and mathematics classes, and also one session of individual speech-language therapy and two sessions of group speech-

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<sup>2</sup> The student's 2007-08 IEP did not offer program modifications/accommodations or testing accommodations (Dist. Ex. 7 at p. 2).

language therapy per week (*id.* at pp. 1-2).<sup>3</sup> The CSE subcommittee further recommended that the student receive testing accommodations of a setting with minimal distractions, extended time and directions read and clarified (*id.* at p. 2).

At the commencement of the 2008-09 school year, the student received integrated co-teaching and related services according to her May 2008 IEP (Tr. pp. 42-45; Dist. Ex. 12). The student also received "building level" counseling services in a group with one other student facilitated by a school psychologist (Tr. pp. 399-401).

In a letter dated October 10, 2008 the student's private social worker informed the director of pupil personnel that her sessions focused on the student's difficulties with anxiety, which she indicated manifested as enuresis and encopresis (Dist. Ex. 11).<sup>4</sup> According to the private social worker, the student's anxiety was exacerbated by the increase in academic demands of school, and she required "small classroom instruction to meet the academic challenges" she faced (*id.*). The private social worker relayed that the student was easily overwhelmed by change and transitions, and required a great deal of structure to "manage both her internal and external worlds" (*id.*). Additionally, the private social worker recommended that the student undergo neuropsychological testing due to her history of anxiety, language processing difficulties, and learning disabilities (*id.*).

According to an October 22, 2008 progress report prepared by the teachers of the student's integrated co-teaching class, the student had "adjusted beautifully" and "seem[ed] very happy" in the co-taught classroom (Dist. Ex. 12). The teachers indicated that the student also volunteered to answer questions, felt comfortable asking for help, and learned classroom routines quickly (*id.*). The progress report described the student as needing reassurance about friendships, being "very sensitive" and eager to please, and that she was a "cooperative, diligent and enthusiastic learner" (*id.*). The teachers provided specific information regarding the student's reading skills, indicating that her current Developmental Reading Assessment (DRA) Level 14 performance was consistent with her DRA performance in June 2008 (*id.*). The report noted that the student enjoyed books, always volunteered to read aloud, and was an active participant in reading discussions (*id.*). In mathematics, the teachers reported that the student was working in a third grade curriculum, but that her lack of mastery of addition and subtraction facts and her lack of ability to count by fives and tens affected her progression with that curriculum (*id.*). The progress report indicated that the student worked well in small groups with individualized support, required individualized support for mathematics, and that her assignments were modified and broken down into parts (*id.*).

On October 27, 2008 the student's speech-language pathologist conducted an evaluation and subsequently prepared evaluation and progress reports (Dist. Exs. 13; 14). Administration of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) yielded composite

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<sup>3</sup> The director of pupil personnel described integrated co-teaching services as "having two teachers in the room, one special educator, one general educator, in a ratio of 12-to-one, having no more than 12 special needs students in the class and no more than 50 percent of the class being students with IEPs" (Tr. pp. 42-43).

<sup>4</sup> The hearing record reflects that enuresis and encopresis refer to bladder and bowel accidents (*see* Dist. Ex. 19).

language scores within the lower end of the average range with the exception of the language content composite score, which "fell below the average range" (Dist. Ex. 13 at p. 4). According to the speech-language pathologist, the student exhibited difficulty with tasks that required her to listen and hold on to auditory information of increasing length and complexity (id.). During therapy sessions, the student worked on increasing her memory, word retrieval, listening and reading comprehension, and problem solving skills (id. at p. 1). Despite progress, the speech-language pathologist reported that the student continued to exhibit weakness with recall and memory, and that her performance during therapy sessions was at times inconsistent (Dist. Exs. 13 at p. 1; 14). Strategies used included chunking information; using semantic word lists, initial sound cues and visual supports; providing repetition, clarification and reteaching; and offering a slower work pace (id.). The speech-language pathologist recommended that the student continue to receive the then-current level of speech therapy services (Dist. Ex. 14).

On October 31, 2008 the CSE subcommittee convened at the parents' request to review the student's program (Dist. Ex. 15). According to meeting information contained in the resultant IEP, the CSE subcommittee reviewed the parents' concerns; including that the student continued to struggle with mathematics, had difficulty generalizing information, and exhibited weak memory skills (id. at p. 4). The parents reported that the student was "still happy about school," and that she was progressing in reading, but that she needed "much repetition" and to work at her own pace (id.). They further indicated that the student "shuts down" with a more rigorous program (id.). The parents informed the CSE subcommittee that the student was receiving private tutoring and private vision services, and requested additional support in mathematics class via an aide (id.). CSE subcommittee information indicated that the teachers reported that the student's "bathroom issues" were "much improved" that year, and reflected that the student was receiving building-level counseling "on a regular basis" (id. at p. 5). Following a review of the teachers' and the speech-language pathologist's progress reports, and the private social worker's October 2008 letter, the CSE subcommittee agreed to advance the student's triennial evaluation timeline and review the results at a future CSE meeting, and also reconvene in two weeks to explore the need for additional mathematics support (id.).

On November 3, 2008 a private psychologist evaluated the student (Dist. Ex. 16). The evaluation report described the parents' view of their daughter's difficulties with language, working memory, reading comprehension and self-confidence, and indicated that the private evaluation was obtained in order to complete the student's application to "special education schools" (id. at pp. 1-2). According to the private psychologist, the parents sensed that their daughter would not be able to keep up within a mainstream setting, and that the collaborative services were insufficient to enable her to overcome her cognitive and academic problems (id. at p. 2). The private psychologist administered the absurdities subtest of the Stanford-Binet Intelligence Scale, Fourth Edition; the House-Tree-Person Test; Human Figure Drawings; the Rorschach Inkblot Test; and the Thematic Apperception Test (TAT) (id.). Following a description of the student's educational and family history, in her report the private psychologist noted that during testing the student was cooperative and hard working, and that she displayed difficulty with expressive language formulation and word retrieval (id. at pp. 3-4). Test results indicated to the private psychologist that the student was a "delightful, well-related girl who perceive[d] her world in conventional terms, and demonstrate[d] good judgment, along with a solid ability to observe her surroundings" (id. at p. 4). The private psychologist reported that the

student's responses to the projective materials suggested that she was an "emotionally grounded girl who [wa]s somewhat young for her age" and further reported that she did not exhibit behavioral problems at school or home (id.). According to the private psychologist, the student's TAT responses indicated that she experienced performance anxiety because she did not always know what to do; a concern typically observed in students with learning disabilities (id.). The evaluation report depicted that the student "worried about getting into trouble and/or expressing anger," and that she was "quick to apologize in order to maintain positive relationships with the important people in her life" (id.). Additionally, the private psychologist reported that the student was "preoccupied" with the "changing relationship patterns within her family," and for this reason as well as her learning difficulties, offered that the student was an appropriate candidate for and would "benefit from a supportive, special education, school environment where she c[ould] learn according to educational needs" (id. at pp. 4-5). Recommendations included that the student receive direct instruction using a multisensory approach and a skills-focused curriculum, and be provided with lessons modified to accommodate her language learning needs (id. at p. 5). The private psychologist opined that as the academic demands increased, the student's "self-esteem [wa]s likely to decline, and she w[ould] probably experience a great deal of performance anxiety if she remain[ed] in a mainstream setting (even with ancillary services)" (id.). Other recommendations included continuing in-school speech-language therapy, and private psychotherapy "to help her deal with the changes in her family," and completion of a comprehensive psychoeducational evaluation (id.).

On November 7, 2008 the CSE subcommittee reconvened as a follow-up to the October 2008 meeting (Dist. Ex. 17 at p. 4). According to the resultant IEP, following a discussion about the student's need for additional mathematics support, the CSE subcommittee recommended that the student receive daily, 30-minute small group sessions of "extra math support" provided by a special education teacher, using a multisensory approach and focusing on areas of weakness including an emphasis on basic mathematics facts (id. at pp. 2, 4). The November 2008 CSE subcommittee added to the student's IEP program modifications, including directions read and clarified, chunking of information into manageable components, and wait time to process information (compare Dist. Ex. 15 at p. 2, with Dist. Ex. 17 at p. 2).<sup>5</sup> According to the November 2008 IEP, the student's teacher reported that the student was making progress in reading and that she was a motivated learner (Dist. Ex. 17 at p. 4). The CSE subcommittee agreed to reconvene in six weeks to review updated testing results and to discuss the student's progress (id.).

The hearing record reflects that during November and December 2008, the district conducted the student's psychological and educational evaluations and a classroom observation, obtained a psychiatric evaluation of the student through the Board of Cooperative Educational Services (BOCES), and prepared updated social history, counseling, and teacher progress reports (Dist. Exs. 18; 19; 20; 21; 22; 23; 24).

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<sup>5</sup> The November 2008 IEP indicated that during mathematics class the student would continue to receive small group instruction with modified "content, process and product" (id. at p. 4). Additionally, the meeting information included in the November 2008 IEP reflected that "scaffolding" would continue, and that the student would be provided with manipulatives, a calculator, differentiated homework, simplified language and breaks as needed, and also that number facts would be available on the student's desk (id. at p. 4).

An administration of the Woodcock-Johnson III Tests of Cognitive Ability (WJ-III COG) yielded a verbal ability standard score in the low average range, a thinking ability standard score in the average range, a cognitive efficiency standard score in the very low range, a phonemic awareness standard score in the high average range, and a working memory standard score in the very low range (Dist. Ex. 18 at p. 2). The psychological evaluation report indicated that based upon results of the WJ-III COG, the student's General Intellectual Ability (GIA) was within the low range; reflecting a discrepancy with prior WISC-IV scores (*id.* at p. 6).<sup>6</sup> The school psychologist offered that a possible explanation for the observed decline in scores may have been related to the student's learning pace, in that she was not learning at a pace that would be expected based upon age normative data (*id.*). The school psychologist indicated that the student's greatest areas of cognitive weakness were in cognitive efficiency and working memory, and that "[f]urther evaluation suggests that [the student's] overall memory is compromised by her weak auditory/verbal memory" (*id.*). As much of classroom instruction was presented via the auditory modality, the school psychologist indicated that the student's instruction needed to be supported by a multisensory approach incorporating visual input to "boost" her memory (*id.*). The school psychologist measured the student's behavioral functioning via testing observations, interview information, and projective drawing data (*id.* at p. 5). The student was able to name several children whom she considered friends, and the school psychologist described the student as "smiling," "talkative" and appearing eager to engage in a friendly manner without visible indication of concern about school performance (*id.*). The student impressed the school psychologist "as a child who want[ed] to perform well and meet academic expectations," and only upon direct questioning expressed any school concerns (*id.*). The school psychologist noted that "[o]ne might infer that [the student's] outward presentation [wa]s a façade for the negative self feelings she experience[d] as related to academic stress and challenge" (*id.*). She further indicated that overall, the emotional/behavioral evaluation results suggested that the student was not experiencing positive feelings about herself at that time (*id.*). The school psychologist recommended that the CSE review the evaluative data to determine how best to support the student's learning (*id.* at p. 6).

The BOCES psychiatrist based his report of the student's psychiatric evaluation on a review of school records, a meeting with the school psychologist and both the student's regular education and special education teachers, a meeting with the parents, and a mental status examination of the student (Dist. Ex. 19 at p. 1). The report provided background information about the student's cognitive and social functional levels; educational history; and concerns about family life, including her difficulty with encopresis and enuresis during times of change within the home environment (*id.* at p. 2). The psychiatrist reported that the private therapy with the social worker had been helping the student manage social issues and address feelings, and that she discussed "issues with her parents on a much more open basis and the soiling has decreased significantly" (*id.*). However, the psychiatrist noted that the student "did have a couple of accidents recently which occurred in the same timeframe as her father's recent remarriage" (*id.*).

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<sup>6</sup> The psychological evaluation report indicated that the GIA "will often be the best single score predictor of various global criteria such as overall school achievement given the relationship to cognitive ability" (Dist. Ex. 18 at p. 2).

The psychiatrist reported that the student's thinking was "clear and coherent" and her insight "quite good," but noted that at times she was unable to provide answers to questions (Dist. Ex. 19 at p. 2). He indicated that the student worried if people did not like her and that her "style" was one of trying to please (id.). The student reported that she often felt nervous, which included physical symptoms and worry about not doing well (id.). The report indicated that "[i]f [the student] d[id]n't do well in school, she [wa]s afraid she w[ould] anger those important to her and therefore not be lovable" (id.). The psychiatrist concluded that the student had "significant difficulties with anxiety and self esteem," adding that as a result of her need to be liked, she had a very difficult time expressing frustration or dislike of others (id. at p. 3). He further concluded that the student's "soiling symptoms" might reflect a somatic or bodily expression of that anger (Dist. Ex. 19 at p. 3; see Tr. p. 410). In school, the psychiatrist reported that the student's need to be "good" made her anxious during times when she was unable to complete work, and when she exhibited anxiety, she might "shut down and become less capable" (Dist. Ex. 19 at p. 3). He added that it was "often a combination of [the student's] cognitive weaknesses and her worry that [led] to academic difficulties" (id.). The psychiatrist offered the student a diagnosis of an anxiety disorder, "NOS" and "rule out personality disorder NOS with features of self esteem dysregulation" (id.). Recommendations noted that the student struggled academically in part due to her emotional needs, and indicated that she needed support in the academic setting so that her anxiety did not intrude on her learning (id. at p. 4). The student also needed to recognize when she was feeling anxious, learn techniques to reduce her anxiety, fully understand her academic capabilities, and understand when other peoples' reactions to her made her feel uncomfortable (id.). Staff working with the student needed to understand her needs in order to provide effective support, and she needed counseling services, to continue with private therapy, and collaboration between family, school and outside professionals (id.).

A district special education teacher administered the WIAT-II to the student, which yielded reading, math fluency, applied problems, and writing sample subtest standard scores in the average range; and calculation, spelling, and writing fluency subtest standard scores in the low average range (Dist. Ex. 20 at p. 3).<sup>7</sup> The special education teacher's report indicated that although the student was quick to answer many of the test items and was at times "impulsive and careless" with her responses, she considered the test results to be an accurate representation of the student's then-current level of academic functioning in a 1:1 setting (id. at p. 1).

A counseling update report prepared by both of the school psychologists who provided the student's building-level counseling services and "lunch bunch" program indicated that the student had participated in sessions, demonstrated an eagerness to share information, and invited a friend to join her during lunch bunch time (Dist. Ex. 22). In a classroom observation report prepared by the school psychologist who provided the student's lunch bunch program, the student appeared to listen to teacher instruction and directions (Dist. Ex. 23; see Dist. Ex. 22). The school psychologist observed the student participating in a class of 18 students by raising her hand appropriately and demonstrating an understanding of "10's" by counting aloud to 100 (Dist. Ex. 23). The student was also observed transitioning from the rug to seat work, and seeking teacher assistance in an appropriate manner (id.). During seat work, the school

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<sup>7</sup> I note that the student's standard scores were based upon third grade norms (Dist. Ex. 20 at p. 6) and the hearing record reflects that the student had repeated kindergarten (Tr. p. 627).

psychologist observed that the student needed support to work with peers and used a chart to solve addition problems (id.). The student did not exhibit difficulty following classroom procedures; distractible, impulsive, or disruptive behaviors; or difficulty with expressive language or following verbal directions (id.).

The special education teacher of the student's integrated co-teaching classes prepared a report that indicated the student had exhibited "some progress" despite her "struggle" with the grade level curriculum (Dist. Ex. 24 at p. 1). According to the special education teacher, the student "required one to one attention for most tasks," and that "small group and one to one support ha[d] helped [the student] with her skills and she ha[d] become more confident" (Dist. Ex. 24). The progress report provided specific information regarding the student's reading, mathematics, and written language skills (id.). The special education teacher reported that the student demonstrated "some social issues" that at times affected her ability to focus, but also that the student appeared to feel comfortable in the class, participated in both small and large group discussions, and frequently volunteered to answer questions (id. at p. 2).

An updated social history completed by the student's mother indicated that the student was "adjusting to her changing family dynamics" and that her father's recent remarriage was a stressor for her (Dist. Ex. 21 at p. 1). The social history reflected that the student was beginning to independently work on homework at home, that she loved to play "school," and that she was a social child who was involved in a variety of after-school activities with peers and loved to be with others (id. at p. 2). The student's mother reported that her daughter had begun having some difficulty reading social cues correctly, was struggling academically, and that she was experiencing more difficulty in school this year as compared to past years (id.).

On December 22, 2008 the CSE convened to review the results of the student's evaluations (Dist. Ex. 25). According to meeting information included in the resultant IEP, the CSE reviewed the student's evaluative data including both the district and the private psychological evaluation reports; the educational and psychiatric evaluation reports; the report card, and the teacher report, classroom observation report and social history (id. at p. 6). Following a discussion of the student's needs identified in the documents before the CSE, the CSE recommended changing the student's classification from a student with a speech or language impairment to a student with a learning disability, "due to the broader nature" of her learning difficulties (id. at pp. 6-7). According to the meeting information included in the December 2008 IEP, the CSE discussed various ways to provide additional support to the student in the area of mathematics (id. at p. 7).<sup>8</sup> The CSE ultimately recommended the addition of a teaching assistant, who would work under the supervision of the special education teacher for 45

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<sup>8</sup> The December 2008 IEP indicated that the CSE considered and rejected placement of the student in a 12:1+3 special mathematics class, as placement in that class would have caused a scheduling conflict with the student's integrated co-teaching social studies class (Dist. Ex. 25 at p. 7). The CSE elected to keep the student in her current social studies class as she was "doing well in both science and social studies" (Dist. Ex. 25 at p. 7). The December 2008 CSE also removed the 30-minute small group mathematics sessions from the IEP, as it determined that amount of mathematics instruction in addition to the services provided in the integrated co-teaching mathematics class would have been "overwhelming" to the student (compare Dist. Ex. 17 at p. 2, with Dist. Ex. 25 at p. 7).

minutes of the student's daily 70-minute integrated co-teaching mathematics class to target the student's areas of weakness (*id.* at pp. 2, 7). To provide the student with "more intensive support" in ELA, the CSE recommended placement of the student in the "C[ORE]" ELA program, which consisted of twice weekly 60-minute periods of 12:1 special class ELA instruction, and three 90-minute periods of 12:1 special class ELA instruction per week (*id.* at pp. 1, 7).<sup>9</sup> The CSE also recommended adding to the student's special education program one weekly session of individual counseling to address her anxiety, self esteem, and problem solving difficulties in the school setting (*id.* at pp. 2, 7). According to the December 2008 IEP, the CSE changed the student's speech-language therapy services to two individual sessions per week to "intensify" those services (*id.* at p. 7). The December 2008 CSE added to the student's IEP program modifications including using a graphic organizer for writing, incorporating the use of visuals as part of multisensory instruction, simplifying homework in all subject areas, incorporating sequential steps in tasks, and that the student would rephrase information to allow the teacher to check for understanding (*compare* Dist Ex. 17 at p. 2, *with* Dist. Ex. 25 at p. 2). CSE meeting information indicated that the student's parents were "looking at other schools for the upcoming school year" (Dist. Ex. 25 at p. 6).

A January 2009 progress report prepared by one of the student's special education teachers indicated that the student had been attending CORE ELA classes and had started working with a teaching assistant, focusing on basic addition and subtraction facts and place value concepts (Dist. Ex. 26 at p. 1). According to the DRA, the student was reading at a Level 14, and the special education teacher reported that the student forgot what she had read, exhibited word retrieval problems, rushed through books missing key information, and needed support to use details from a story to understand the main idea (*id.*). The student enjoyed writing stories about her family and friends, and the special education teacher expressed that the student's thoughts were becoming more sequential and focused (*id.*). The progress report indicated that the student had "lost" many of the mathematical concepts she appeared to have had before the December 2008 vacation (*id.*). The special education teacher reported that the student's attention wandered and she was "always" getting up to sharpen her pencil or get a drink, and that she was provided with frequent breaks (*id.* at p. 2).

On February 21, 2009, the parents signed an agreement with Stephen Gaynor for their daughter's enrollment for the 2009-10 school year (Parent Ex. C).

On February 27, 2009, the CSE convened for the student's annual review and to develop her IEP for the 2009-10 school year (Dist. Ex. 27). Meeting information included in the February 2009 IEP indicated that the student's teachers, speech-language pathologist, and school psychologist provided updated information about the student's needs, program modifications and supports used with the student, and the progress she had exhibited since the December 2008 CSE meeting (*id.* at p. 6). The IEP also indicated that the student continued to receive private counseling that focused on improving her memory skills, and that the parents were in the process of obtaining a neuropsychological evaluation to examine their daughter's planning and

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<sup>9</sup> The director of pupil personnel stated that the CORE program was previously named the PASS program (Tr. p. 28).

organizational skills (*id.*). For the 2009-10 school year, the February 2009 CSE recommended that the student receive daily 12:1 special classes in both ELA and mathematics (CORE), which the IEP described as "small structured group setting[s] that allow[] for individualized support and modified curriculum as needed" (*id.* at pp. 1-2, 6-7).<sup>10</sup> Related service recommendations included one 30-minute individual session of counseling per week, and two 30-minute individual sessions per week of speech-language therapy (*id.* at p. 1). The February 2009 CSE determined that the student was eligible to receive extended school year (ESY) services in summer 2009, and recommended two 60-minute sessions of both 5:1 specialized ELA and 5:1 specialized mathematics instruction (Dist. Ex. 27 at p. 2; *see* Dist. Ex. 28). The February 2009 IEP continued to offer the student the same program modifications and testing accommodations recommended in her December 2008 IEP (*compare* Dist. Ex. 25 at p. 2, *with* Dist. Ex. 27 at p. 2). The hearing record reflects that on February 27, 2009, the parents provided Stephen Gaynor with its required non-refundable registration fee (Parent Exs. B; C at p. 1).

In April and May 2009, the parents and the director of pupil personnel corresponded regarding the district's responsibility to provide the student's transportation to Stephen Gaynor should the parents decide to place her there (Dist. Exs. 29; 30; 31). By letter dated June 22, 2009, the parents thanked the district for agreeing to provide their daughter with transportation to Stephen Gaynor, and informed the director of pupil personnel that they were placing the student at Stephen Gaynor for the 2009-10 school year (Dist. Ex. 32). The parents indicated that the district's recommendations were not appropriate to meet the student's needs and that they "dispute[d] the [d]istrict's conclusions" (*id.*). The parents further informed that "at the appropriate time" their counsel would file "for reimbursement for the cost of the tuition to the Stephen Gaynor School" (*id.*).

According to a June 2009 administration of the DRA, the student was reading at a Level 18/20, and the final marking period of her 2008-09 report card reflected that she was continuing to "build her fluency and comprehension with texts on her level" (Dist. Exs. 48; 49). The student's report card indicated that the student "[n]eed[ed] [i]mprovement" in the areas of reading comprehension and using strategies to construct meaning from print, and that her writing skills were "[p]rogressing [t]owards [c]urriculum [o]bjectives" (Dist. Ex. 48). The student's teacher reported that the student needed 1:1 support to formulate clearly written paragraphs, and that she was eager to share her thoughts in written form (*id.*). In mathematics, the student's report card reflected that she needed improvement in understanding concepts, solving word problems, and communicating strategies effectively (*id.*). The teacher reported that the student demonstrated effort, was working on computing accurately, and that she enjoyed working in small groups with teacher support and completing hands-on mathematics activities (*id.*). The student "[met] [c]urriculum [o]bjectives" in the areas of science, social studies, health, personal and social growth, art, music, physical education, and in the majority of areas comprising work and study habits (*id.*).<sup>11</sup> The report of the student's progress toward her IEP annual goals indicated that she

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<sup>10</sup> The student's February 2009 IEP noted that she would participate in "mainstream" science and social studies classes (Dist. Ex. 27 at p. 7).

<sup>11</sup> The student was progressing toward curriculum objectives in her ability to listen attentively and work independently, and she exceeded curriculum objectives in her science effort and positive attitude in art (Dist. Ex. 48).

had made "some progress" toward all of her reading, writing, and mathematics annual goals, and in one speech-language annual goal related to recall and comprehension of a sequence of events from a story (Dist. Ex. 50). She was "progressing satisfactorily" toward all of her social emotional annual goals, and toward two of three speech-language annual goals (id. at p. 3).

In a letter dated June 29, 2009 the director of pupil personnel indicated that she wanted to convene a CSE meeting to address the parents' June 22, 2009 letter and to review all program options (Dist. Ex. 33). The director of pupil personnel noted that the district had convened an early annual review of the student at the parents' request, which was prior to formalizing all of the programs for the 2009-10 school year, and that the new meeting would provide the opportunity to more fully discuss all options (id.).

By letter dated July 7, 2009, the parents rejected a revised IEP<sup>12</sup> stating that the district had recommended "specific specialized instruction in ELA and math" during the months of July and August, and due to their work schedules, transportation "was an issue" (Dist. Ex. 35). The parents advised the district that they had enrolled their daughter in a full-time summer camp, and inquired whether the district would provide the ESY services after the conclusion of summer camp (Dist. Ex. 33). By letter dated July 8, 2009, the district responded that it does not provide services beyond the school day (Dist. Ex. 36).

On July 8, 2009 the CSE reconvened (Dist. Ex. 37). Attendees included the district director of pupil personnel, the district school psychologist, a regular education teacher, the student's third grade CORE ELA special education teacher, the student's speech-language pathologist, and the student's father (Tr. pp. 265-66, 335; Dist. Ex. 37 at p. 6). According to the resultant IEP, the CSE discussed the continuum of support services, the provision of additional support to the student in science and social studies classes, and reviewed the student's annual goals (Dist. Ex. 37 at p. 7). For the 2009-10 school year, the July 2009 CSE continued to recommend that the student receive daily 12:1 special classes in both ELA and mathematics (CORE), and the related services that had been recommended in the February 2009 IEP (compare Dist. Ex. 27 at pp. 1-2, with Dist. Ex. 37 at pp. 1-2). In addition to the special education programs offered in February 2009, the July 2009 CSE recommended that the student receive three periods per week of resource room services, primarily to support the student's social studies and science instruction via reinforcement of concepts, assignments, and skills (Dist. Ex. 37 at pp. 2, 7). Additionally, the CSE recommended one period per week of direct consultant teacher services to be provided in the student's general education social studies class, noting that when the special education teacher was not present, a classroom teaching assistant would support the student in her social studies class (id.). The July 2009 IEP provided one 20-minute session of indirect consultant teacher services, whereby the special education teacher would consult with the regular education teacher regarding the student's performance in science and social studies (id.). The IEP further indicated that a classroom teaching assistant would support the student in her general education science class (id.). The July 2009 CSE continued the student's February 2009 recommendations regarding ESY services, program modifications, and testing accommodations (compare Dist. Ex. 27 at p. 2, with Dist. Ex. 37 at pp. 2-3).

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<sup>12</sup> The parents' letter indicated that the revised IEP they received included changes to the dates that special education services were to be provided (Dist. Ex. 35).

At the end of July and during August 2009, the parents and the director of pupil personnel corresponded about the parents' request to visit the recommended program on the first day of school, prior to making a final decision regarding the student's placement (Dist. Exs. 38; 39; 40).

At the commencement of the 2009-10 school year, the student attended Stephen Gaynor and received instruction in reading, spelling, writing, mathematics, and social studies (Parent Ex. A). She also received three sessions of language therapy per week in the classroom, and one weekly session each of individual and group language therapy (Tr. pp. 581, 583; Parent Ex. F). The student's 2009-10 Stephen Gaynor teacher described the school as consisting of approximately 150 students of elementary school age through the equivalent of eighth grade (Tr. pp. 505-506). During the 2009-10 school year, the student's class consisted of ten 10 and 11 year old students and two special education teachers (id.).

In a due process complaint notice dated September 30, 2009, the parents provided the district with notice that they were rejecting the July 2009 IEP, requesting an impartial hearing, and requesting reimbursement for tuition and related costs for their daughter's attendance at Stephen Gaynor for the 2009-10 school year (IHO Ex. 1). The parents asserted that the district, through its IEP, failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year. (id. at p. 2). Among other things, the parents asserted that the district's recommended program: (1) did not provide the sufficient level of integrated special education support and services for the student; (2) should have been more restrictive than the proposed regular education setting; (3) did not provide for a proper functional grouping based on the student's language-based deficits and needs; (4) provided goals and objectives that were vague and insufficient; (5) provided inappropriate ESY services; and (6) was not specially designed to provided the student with educational benefit, since the recommended program was almost identical to the prior year's IEP, in which the student did not make progress.

By letter dated October 2, 2009, the district notified the parents of a scheduled resolution session (Dist. Ex. 41 at p. 1). On October 9, 2009, the district and parents participated in a resolution session, but the parties did not successfully reach a resolution (Dist. Ex. 42).

In a January 6, 2010 e-mail to the director of pupil personnel, the parents indicated that, after observing the recommend program, they remained "wary" of the program's appropriateness (Dist. Ex. 47). The parents informed the district that "[g]iven the above reasons, concerns, and time of year, [the student] must remain enrolled in her current placement" and indicated that they were "open to discussing this further" (id.).

An impartial hearing commenced on March 8, 2010 and, after four days of hearing, concluded on May 17, 2010 (Tr. pp. 1-709; see IHO Decision pp. 26-27). In a decision dated August 23, 2010, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2009-10 school year, that the parents met their burden in demonstrating that Stephen Gaynor was an appropriate unilateral placement for the student, and that equitable considerations favored an award of tuition reimbursement.

In determining that the district failed to show that it offered the student a FAPE, the impartial hearing officer found that the district failed to adequately address the student's social/emotional issues (id.). The impartial hearing officer further found that, given the student's social/emotional needs, the district should have conducted a functional behavioral assessment (FBA) of the student (id. at p. 18). The impartial hearing officer also found that the district should have developed a "behavior plan" in order to address the student's anxiety, encopresis, and enuresis (id. at pp. 18-19).<sup>13</sup> Furthermore, the impartial hearing officer found that the student's social/emotional issues were such that she required a more restrictive placement rather than the district's offered general education setting supplemented with special education supports (id. at pp. 19, 21).<sup>14</sup>

With regard to his determination that the parents had met their burden of proving that Stephen Gaynor was an appropriate placement for their daughter, the impartial hearing officer found that the Stephen Gaynor program provided the student with a small student-to-teacher ratio; special education tools and strategies designed to deal with the student's communication needs; repetition of material and reinforcement to address the student's memory issues; and modified materials and the use of manipulatives (IHO Decision at p. 22). The impartial hearing officer also found that the student's anxiety issues were addressed by Stephen Gaynor through the small class setting and the minimizing of transitions (id.). The impartial hearing officer determined that the small class setting at Stephen Gaynor was the least restrictive environment (LRE) for the student, given that the small class setting addressed the student's significant school anxiety, receptive language, memory, and mathematics difficulties (id. at p. 23). Finally, the impartial hearing officer noted that although not dispositive, the student had made significant progress at Stephen Gaynor (id.).

With regard to his determination that equitable considerations favored an award of tuition reimbursement, the impartial hearing officer determined that absent the parents' failure to cooperate with the development of the IEP or interference with the placement process, their pursuit of a private placement was not a sufficient basis for denying reimbursement (IHO Decision at p. 24). Specifically, the impartial hearing officer determined that the parents had cooperated with the CSE, as evidenced by their attending multiple CSE meetings, providing the CSE with privately obtained evaluation reports, and consenting to all of the district's recommendations (id.). The impartial hearing officer also determined that the cost of Stephen Gaynor, after financial aid, was not unreasonable (id.). For relief, the impartial hearing officer directed the district to reimburse the parents for the costs of student's tuition at Stephen Gaynor for the 2009-10 school year, not including the amount attributable to the student's financial aid (id. at p. 25).

The district appeals, asserting that the impartial hearing officer erred when he determined that the district failed to offer the student a FAPE for the 2009-10 school year. The district argues that the impartial hearing officer erred when he determined: that the district failed

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<sup>13</sup> Although undefined by the impartial hearing officer, the "behavior plan" he referenced is presumed to be a behavioral intervention plan (BIP) (see 8 NYCRR 200.22 et seq.).

<sup>14</sup> The impartial hearing officer declined to find that the student's 2009-10 annual goals were inappropriate (IHO Decision at p. 17).

to adequately address and recognize the student's social/emotional needs; that the district should have conducted an FBA of the student; that the district should have created a behavior plan; that the district recommended an insufficient amount of counseling sessions per week for the student; and that the recommended program was not in the LRE.

The district also contends that the parents failed to meet their burden to show that Stephen Gaynor was an appropriate placement that met the student's educational needs in the LRE. The district also asserts that the impartial hearing officer improperly determined that the equities favored the parents because the parents paid a deposit for Stephen Gaynor prior to the finalization of the student's IEP but did not inform the district, and therefore the parents demonstrated that they had no intention of placing their daughter in the district's schools.

Additionally, the district asserts that the impartial hearing officer's decision should be reversed because it was "unfounded and arbitrary," and that his history as a "long practicing disabilities attorney" may have "impacted" his decision. Specifically, the district asserts that the conclusions reached by the impartial hearing officer regarding the student's social/emotional needs were speculative in nature. For relief, the district requests that the impartial hearing officer's determinations be reversed, and that the recommendations of the July 2009 CSE be upheld.

In their answer, the parents deny many of the district's allegations and assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2009-10 school year, that they had met their burden in demonstrating the appropriateness of Stephen Gaynor, and that equitable considerations favored an award of tuition reimbursement. The parents urge that the impartial hearing officer's decision be upheld in its entirety.

In a reply to the parents' answer, the district asserts that the parents' answer should not be considered because it raised new material and did not respond to material found in the petition.<sup>15</sup>

I will first address the district's assertion that the impartial hearing officer's judgment may have been affected by his prior experience as a disability rights attorney. I note that although, as the district contends, the impartial hearing officer was a "long practicing disability rights attorney," State regulations require that an impartial hearing officer must have had at least two years of practice and/or experience in the areas of education, special education, disability rights or civil rights prior to his or her appointment as a hearing officer (8 NYCRR 200.1[x][1]). Therefore, a finding of bias based solely on an allegation that an impartial hearing officer's prior or continued practice in the area of disability law would effectively render most, if not all, impartial hearing officers presumptively biased, and I decline to do so. It is also well settled that an impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ.,

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<sup>15</sup> The district did not identify the material in the answer to which it objects. I decline to reject the parents' answer, which responds to the allegations in the petition through admissions and denials and sets forth written argument together with citations to the hearing record, none of which is inconsistent with State regulations (8 NYCRR 279.5; 279.8).

Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

The hearing record evidences that the impartial hearing officer expressed a willingness to accommodate the schedules of both parties counsel and witnesses (see Tr. pp. 374, 383-84, 493-94), allowed both sides to fully develop testimony through extensive direct and cross-examinations of witnesses (see Tr. pp. 227, 376, 495, 708), made rulings on objections favorable to both parties (see e.g., Tr. pp. 24, 36, 118-19, 240, 273, 275-75), and he also actively questioned witnesses produced by both parties, and sought clarification from both witnesses and counsel when the questions or testimony appeared to be contradictory or confusing (see e.g., Tr. pp. 24-26, 35, 39-44, 74-75, 89, 240, 273). After reviewing the entire hearing record, I find that the evidence does not support the district's contention that the impartial hearing officer was not impartial or acted in a manner that was inconsistent with the requirements of due process (34 C.F.R. §300.510[b][2]; Educ. Law §4404[2]). Under the circumstances in this case, while the district disagrees with the conclusions reached by the impartial hearing officer, its disagreement does not provide a basis for finding that the impartial hearing officer acted with bias or incompetence (Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75). Having determined that the impartial hearing officer was neither biased nor incompetent, I will now focus my attention on the primary issues, the first being whether the district offered the student a FAPE for the 2009-10 school year.

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

§ 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

At the outset I note that the hearing record shows that the CSE convened in February and July 2009 to develop the student's 2009-10 special education program. The present levels of performance in the July 2009 IEP accurately reflect information from evaluations conducted and progress reports generated during the 2008-09 school year (compare Dist. Ex. 37 at pp. 3-6, with Dist. Exs. 13; 16; 18; 20; 22; 24), and are consistent with testimony from the student's 2008-09 special education teachers and the school psychologist regarding the student's needs in the areas of mathematics, reading, writing, memory, and social/emotional functioning (Tr. pp. 234, 236-36, 239, 333, 335, 357, 387, 339, 402-03, 407-11; see Tr. pp. 338-39, 343-45).<sup>16</sup> The July 2009 IEP annual goals are consistent with the annual goals that the February 2009 CSE had developed

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<sup>16</sup> At the impartial hearing the student's mother testified that the February 2009 CSE discussed the recommended program modifications, which she agreed were appropriate for the student and are consistent with those included in the July 2009 IEP (Tr. pp. 677, 680; compare Dist. Ex. 27 at p. 2, with Dist. Ex. 37 at p. 2).

following its discussion about the student's "levels, abilities and needs" (Tr. pp. 88-89, compare Dist. Ex. 27 at pp. 7-10, with Dist. Ex. 37 at pp. 8-11). The impartial hearing officer rejected the parents' arguments regarding alleged inadequacy of the goals and objectives in the July 2009 IEP (IHO Decision at p. 17). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). I note the parents did not cross-appeal any adverse findings in the impartial hearing officer's decision; therefore, the determination regarding the student's goals and objectives has become final and binding upon the parties.

Turning to the special education program recommended for the 2009-10 school year, the special education teacher who provided the student's CORE ELA instruction during the 2008-09 school year testified that based upon the student's performance during third grade, it was appropriate to continue to offer the student CORE ELA for fourth grade (Tr. pp. 335). The special education teacher stated that the student made progress during third grade, in that she added to her learning, gained skills, and exhibited comfort in the school setting (Tr. pp. 338-39, 345; Dist. Ex. 50). The July 2009 IEP indicated that the student had done a "fine job" transitioning to the CORE ELA class and that she stayed "connected with the flow of the classroom activity and like[d] to contribute" (Tr. pp. 211-12; Dist. Ex. 37 at p. 4). I note that following the student's placement in the CORE ELA class after December 2008, her DRA reading level rose from Level 14 to Level 18/20 by June 2009, which, according to her integrated co-teaching special education teacher, represented approximately six months of growth in reading (Tr. p. 329; Dist. Ex. 49). The hearing record reflects that the student benefited from small group instruction, which helped her improve her academic skills, build confidence, and retain information (Tr. pp. 242, 256-57, 358; Dist. Exs. 24; 48). During the 2008-09 and 2009-10 school year the CORE ELA program consisted of the special education teacher, eight or nine students, and on "most days," a teaching assistant (Tr. pp. 335-37, 342-43, 346). The special education teacher testified that the presence of the teaching assistant provided opportunities to provide students with instruction in smaller groups (Tr. pp. 336-37).<sup>17</sup>

Regarding mathematics, the evidence shows that during the 2008-09 school year the student exhibited some difficulty keeping up with the pace of the district's mathematics program and retaining some of the information provided in the integrated co-teaching math class (Tr. p. 244). The special education teacher of the student's third grade integrated co-teaching class testified that although the student had demonstrated "some progress in her ability to compute more accurately," and was beginning to recognize basic facts to ten and master some strategies regarding the math facts, she recommended the student receive CORE mathematics instruction during the 2009-10 school year because it would have provided her with "small group intensive support" (Tr. pp. 253-54, 261-62).<sup>18</sup>

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<sup>17</sup> The hearing record reflects that during the 2009-10 school year a teaching assistant was present in the CORE ELA class for 50 minutes out of the 90 minute class (Tr. pp. 345-46; Dist. Ex. 37 at p. 2).

<sup>18</sup> During the 2009-10 school year, the student's daily 60-minute CORE mathematics class would have consisted of a special education teacher and six students, and for 15-20 minutes per day, a teaching assistant (Tr. pp. 345-46).

The hearing record reflected that during the 2009-10 school year the student's general education science and social studies instruction would have been supported by both direct and indirect consultant teacher services, and resource room (Dist. Ex. 37 at pp. 1-2). The direct consultant teacher services consisted of a special education teacher providing support to the student during one out of three periods of social studies instruction per week (Tr. p. 99; Dist. Ex. 46). The director of pupil personnel testified that the consultant teacher services listed on the student's IEP permits modification, differentiation and reteaching of the content delivered in the classroom (Tr. pp. 99-100; see Dist. Ex. 37 at p. 1). Also, the consultant teacher services were designed to permit a teacher to pull the student aside as needed to reinforce vocabulary and check for understanding (Tr. p. 100). The director of pupil personnel testified that during the other two social studies periods per week, the teaching assistant called for in the student's July 2009 IEP had the purpose of providing the student with support in the classroom at the direction of the consultant teacher (Tr. pp. 100-01; Dist. Ex. 37 at p. 2). Another purpose of the teaching assistant services described in the student's July 2009 IEP was to provide the student support during one half of her "block" general education science class, which according to her 2009-10 schedule, met once per week (Tr. pp. 122-23, 267; Dist. Exs. 37 at p. 2; 46). The student's third grade special education teachers testified that teaching assistants were "licensed," and trained by district special education teachers and through district in-service training (Tr. pp. 294, 358-59)<sup>19</sup>. Additionally, the student's CORE ELA special education teacher testified that she was "[a]bsolutely" comfortable that the teaching assistants had enough background in special education to "handle" the program outlined in the student's 2009-10 schedule (Tr. pp. 367-68; Dist. Ex. 46).

In addition to direct consultant teacher services and teaching assistant support, the student's July 2009 IEP recommended one 20-minute session per week of indirect consultant teacher services, described as the special education teacher consulting with the student's regular education science and social studies teacher, in order to modify her work appropriately (Tr. p. 268; Dist. Ex. 37 at p. 2). To further support the student's social studies and science classes, the July 2009 CSE recommended that the student receive three periods of 5:1 resource room per week "primarily" to reinforce concepts, assignments and skills needed in those classes (Dist. Ex. 37 at p. 2). The hearing record reflects that the student's 2009-10 consultant teacher was also the special education teacher who would have provided her resource room services (Dist. Ex. 46).

According to the evidence in the hearing record, during the 2008-09 school year, the district staff reported that the student was successful in both her integrated co-teaching social studies and general education science classes (Tr. pp. 70, 73-75, 93, 238, 254-57; Dist. Exs. 25 at p. 7; 48). The special education teacher of the student's third grade integrated co-teaching class testified that she spoke with the student's third grade science teacher, who described the student as "following along with the rest of the class and . . . able to participate in the curriculum" (Tr. pp. 254-55). The special education teacher further indicated that she provided the student's third grade social studies instruction within the integrated co-teaching classroom; and notwithstanding the student's preference for small group instruction and need for support, the special education teacher stated that the student "appeared to enjoy being part of the mainstream class" (Tr. pp.

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<sup>19</sup> I note that teaching assistants employed by school districts must be certified (see 8 NYCRR § 80-5.6[b][2]).

256-57). Notably, the student's third grade report card reflected that throughout the 2008-09 school year, the student consistently met the curriculum objectives in science and social studies according to the district's rubric, which was used for students in both general and special education (Tr. pp. 307-08; Dist. Ex. 48). The special education teacher testified that it was important for the student to participate in general education classes as much as possible, because of the opportunity to model other students (Tr. pp. 257-58).<sup>20</sup>

With regard to the student's social/emotional needs, the hearing record reflects that district staff were aware of the student's difficulties with anxiety, self-esteem, concerns about acceptance and her ability to meet expectations, and social interactions (Tr. pp. 48-49, 59-63, 111-12, 125-29, 137-38, 142-45, 314-16, 397-403, 408-11, 422-23, 433-35; Dist. Exs. 6 at p. 3; 11; 12; 15 at p. 4; 16; 17 at p. 4; 18 at p. 5; 19; 21; 22; 24 at p. 2; 25 at pp. 3, 5; 27 at pp. 3, 5-6; 37 at pp. 3, 5-7). At the beginning of the 2008-09 school year, the student received building level counseling services and participated in a lunchtime group facilitated by the school psychologist that focused on developing social skills (Tr. pp. 399-401). In December 2008, the CSE added one individual session per week of counseling as a related service to the student's IEP to address her anxiety, self esteem and problem solving skills in the school setting; a recommendation that continued in subsequent IEPs (compare Dist. Ex. 25 at pp. 2, 7, with Dist. Exs. 27 at p. 2, 37 at p. 2). The 2008-09 special education teachers described the student's in-school demeanor as "pleasant and friendly" and "social" (Tr. pp. 251, 340, 372). The third grade integrated co-teaching special education teacher testified that the student did not present with social "issues" in the classroom, that children gravitated toward the student, and that she was able to engage appropriately under adult supervision (Tr. p. 251). The third grade CORE ELA special education teacher testified that the student was "well liked" and "very warm with the other kids" (Tr. p. 340). The CORE ELA special education teacher added that the student's self esteem "was certainly where it needed to be to be successful" and that she saw an improvement in the student's self esteem as the student became more comfortable with the CORE ELA program (Tr. pp. 339-40). To address the student's social/emotional needs, the July 2009 IEP offered the related service of one individual counseling session per week, and counseling annual goals designed to improve the student's ability to cope with frustrations, identify examples of how her feelings influence behavior, and seek out appropriate people to help her when she was under stress (Dist. Ex. 37 at pp. 2, 10-11). The school psychologist who provided a portion of the student's counseling services during the 2009-10 school year testified that the student's difficulty with anxiety was "rather longstanding" and that she would have continued to work towards the annual goals included in the student's July 2009 IEP (Tr. pp. 457-58, 461-62).<sup>21</sup>

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<sup>20</sup> The student's 2008-09 special education teachers testified that the art, music, and physical education teachers did not report concerns about the student, and the special education teachers did not believe that she required special education support during those and other non-academic classes (Tr. pp. 262-63, 319-21, 368; see Tr. p. 110).

<sup>21</sup> The student's July 2009 IEP also provided for the related service of two individual 30-minute sessions of speech-language therapy per week (Dist. Ex. 37 at p. 2). The July 2009 speech-language annual goals addressed the student's difficulties with word retrieval, retention and completion of orally presented directions, and listening comprehension skills; needs that were identified in the most recent speech-language documentation (Dist. Exs. 13; 14; 37 at p. 10).

I note that the evidence in the hearing record is inconsistent regarding the frequency with which the student's anxiety manifested in episodes of encopresis and/or enuresis during the 2008-09 school year (Tr. pp. 251-53, Tr. pp. 639-40; see Tr. p. 462); however, the evidence does not support the conclusion that the student's anxiety prohibited her from making some academic and social progress as noted above (Tr. pp. 247, 249, 258-62, 329, 338-40, 350-51, 356; Dist. Exs. 48; 49; 50). I further note that although the parents raised concerns about the number of transitions the student would undertake according to her 2009-10 schedule, the hearing record does not reflect that the student displayed difficulty with transitions at school during the 2008-09 school year (Tr. pp. 192-93, 246-48, 291-93, 463-64; Dist. Ex. 23).

With regard to the district's assertions that the impartial hearing officer erred in finding that the district should have conducted an FBA and developed a BIP for the student, I note that this issue was not identified in the due process complaint notice (see IHO Ex. 1). Both the IDEA and State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). Here, I find that the hearing record demonstrates that the parents failed to assert in their due process complaint notice any claim relating to the evaluation of the student such as the need to conduct an FBA in order to develop an appropriate special education services recommendation (see IHO Ex. 1), and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include this issue or that the parents sought to amend their complaint. Accordingly, the issue of whether the student required an FBA was raised for the first time on appeal and must be dismissed.<sup>22</sup>

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<sup>22</sup> I note that when a student's behavior impedes his or her learning or that of others, the CSE must consider positive behavioral interventions and supports, and other strategies, to address such 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 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). Even if this issue had been properly raised, in this instance, the evidence does not show that the student's anxiety, encopresis and/or enuresis interfered with her learning, or that of the other students to the extent that she required an FBA or a behavior intervention plan (see 8 NYCRR 200.1[r] & [mmm], 200.22[a], [b]).

The hearing record demonstrates that the district's recommended program accurately reflected the results of the many evaluations of the student, noting the student's deficits and needs in the areas of mathematics, ELA, language, memory and social/emotional development, and it provided for annual goals which were related to those needs (34 C.F.R. § 300.320[a]; 8 NYCRR 200.4[d][2]; 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). I find that the district's program as developed in the July 2009 IEP was tailored to meet the student's individual needs and was reasonably calculated to enable the student to receive educational benefit (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The only issue remaining is determining if the district's offered program was offered in the LRE.

A 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. Clementon School District, 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 v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; 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 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. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir.1989]). 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).

Upon consideration of the Newington test, the parties agree that the student could not be satisfactorily educated entirely in a general education classroom, even with supplemental aids and services. However, the parties do not agree regarding the extent to which the student should receive academic instruction in a segregated special class setting. The parents contend that the student's deficits and needs are such that she requires all of her education to be delivered in a segregated special class setting, while the district contends that the student can receive some of her education in a general education setting. Therefore, I will turn to whether the district mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see Oberti, 995 F.2d at 1218).

After a careful review of the hearing record, I find that the district recommended a program that included the student with nondisabled students to the maximum extent appropriate. As previously stated, the district recommended that the student be placed in general education for some academic classes and in special education for mathematics and ELA (see Dist. Ex. 37). The director of pupil personnel testified that the goal of the student's special education program was to provide her with services in the LRE (Tr. p. 74). According to the director of pupil personnel, the CSE recognized that the student could "be successful in a general ed[ucation] class for science and social studies with appropriate supports and accommodations, but required a more restrictive setting and supports for mathematics and ELA due to deficits in those subjects (Tr. pp. 74-75). The director of pupil personnel opined that participation in general education classes for science and social studies would benefit the student because she would remain connected with her school community, which was important for her social/emotional well-being (Tr. pp. 94-95). She opined that the student's recommended program "encompassed the best of both worlds, in terms of being highly individualized and having a low class ratio and then giving [the student] opportunities to also participate in the mainstream in those classes where she was successful, such as [the] content areas of science and social studies" (id.).

The special education teacher of the student's third grade integrated co-teaching classes testified that district staff "work[ed] together as an instructional team to ensure that children fe[lt] like they [were] accepted members of their school community and classroom community . . ." and that the student's classmates "absolutely" considered her to be part of their classroom (Tr. pp. 327-28). The student's third grade CORE ELA special education teacher testified that even if the district had offered the student self-contained science and social studies classes, it would not have been a "good idea" for the student because she would have lost "some of the richness of the

full class experiences" (Tr. pp. 363-64). Additionally, the CORE ELA teacher opined that the student did not need the intervention of a special education teacher in fourth grade science and social studies classes (Tr. pp. 365-67).

Based on the foregoing, the hearing record demonstrates that the student could be adequately educated in a general education setting for classes such as art, social studies, music, and science (see e.g., Dist. Ex. 48 [showing that the student met academic standards in a general education setting in those subjects during third grade]); however, due to her deficits in mathematics and ELA, she required a segregated special class for those subjects (Dist. Exs. 12; 49). The district created an IEP tailored to the student's needs that included the student in general education classes to the maximum extent appropriate. Thus, I find that the district satisfied the two-pronged Newington test and recommended an IEP that placed the student in the LRE (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).

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated August 23, 2010 is hereby annulled to the extent indicated.

**Dated:** Albany, New York  
December 13, 2010

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**