



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-025

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

### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondent, Gregory Cangiano, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Mary McDowell Center for Learning (MMCL) for the 2009-10 school year.<sup>1</sup> The appeal must be sustained.

At the time the impartial hearing convened in February 2010, the student was attending MMCL (Dist. Ex. 1 at p. 1). MMCL 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 and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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<sup>1</sup> The hearing record interchangeably refers to the private school the student attended during the 2009-10 school year as both the Mary McDowell Center for Learning (MMCL) and the "Mary McDowell Friends School" (see, e.g., Tr. pp. 110-11; Dist. Ex. 3 at p.1; Parent Ex. A at p. 1). In this decision, for ease of reference the private school will be referred to as MMCL.

## Background

According to the parent, the student began receiving speech-language therapy at 22 months, and continued to do so until she aged out of the Early Intervention Program (EIP) (Tr. p. 190). Although the hearing record is sparse in regard to the student's early educational history, it reflects that by the time the student was between two and three years old, she attended a preschool program until she began kindergarten at a district elementary school (Tr. p. 191). The student attended a district elementary school through third grade (id.). She began attending MMCL for fourth grade and continued there through the 2009-10 school year when she was in eighth grade (Tr. pp. 191, 195).

The district conducted a psychoeducational evaluation update as part of the student's three-year reevaluation on December 7, 2007, when the student was 11.9 years old and in sixth grade at MMCL (Dist. Ex. 4 at p. 1). The resultant psychoeducational update report indicated that the student's cognitive ability, based on an abbreviated IQ score, was in the low average range (id. at pp. 3-4). At that time, measures of academic achievement, as evaluated by selected subtests of the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III ACH), suggested the student demonstrated deficits in broad reading, spelling, writing fluency, and math fluency (id. at p. 5). All other math related scores were above age and grade level expectations (id.). Formal measures of language indicated that the student demonstrated weakness in phonological processing which fell below age and grade level expectations (id.). The student also demonstrated weakness on a measure of visual attention (id.). According to information provided by the parent's completion of a questionnaire that assessed executive functions, the student demonstrated deficits in working memory (id. at pp. 2-3, 5). Objective measures of behavior completed by the parent suggested the student did not demonstrate emotional or behavioral distress at that time (id. at pp. 2, 4-5). Results subsequent to the parent's completion of a behavior rating scale suggested the student demonstrated age appropriate behavior (id.). The psychological evaluation update report also included multiple recommendations specific to instructional strategies for language, reading comprehension/fluency, writing, and mathematics (id. at pp. 5-6).

The district conducted a classroom observation of the student during a group (four students) literacy lesson at MMCL on October 28, 2008, when the student was 12.8 years old (Dist. Ex. 7). According to the classroom observation report, the lesson was conducted in the gym, where four other literacy groups concurrently participated in their own instruction (id.). The classroom observation report indicated the student participated in reading "round-robin" with the group (id.). The student reportedly answered comprehension questions posed by the teacher, read with minimal prompts from the teacher for unfamiliar words, remembered details in the story that was discussed several days prior, and was able to comment about the story and locate a simile in the passage (id.). The classroom observation report further indicated the student was able to follow along during the lesson, and although exhibiting fatigue, she was able to answer teacher questions pertaining to comprehension and vocabulary (id.). The observation report also indicated that the student came to class prepared with her binder and daily planner, appeared to interact well with her classmates and teacher, and no behavior problems were noted during the observation (id.).

A 24-page MMCL middle school first trimester report dated "September 2008 – June 2009" was prepared for the student during fall 2008 and was divided into sections by subject area (Dist Ex. 3). The "Homeroom" subsection indicated the student was in a homeroom with 13 students and two teachers and that the student traveled with her homeroom group to American history, science, Spanish, "Healthy Choices," current events, woodworking, gym, and media literacy classes (id. at p. 2). The student was in a reading group with three other students and one teacher; and a math group with six other students and one teacher (id.). In homeroom, the student "demonstrate[d] successfully" all skills contained in a rubric specific to organization, behaviors and social interactions, as well as work habits; except for following multi-step directions, where the student was rated as "demonstrat[ing] successfully in a structured setting" (id. at p. 3).

The literacy subsection indicated, among other things, that the student continued to strengthen her decoding skills and that spelling, grammar, and punctuation continued to be challenging for the student (Dist. Ex. 3 at p. 6). The report indicated that to increase the complexity of her written responses, the student would move toward writing essays with the assistance of graphic organizers and 1:1 writing conferences and that a primary goal for the student for the 2008-09 school year would be to increase fluency when reading aloud (id.). The report further indicated that with teacher support the student was decoding at the time on a high fifth grade level and comprehending on a beginning sixth grade level (id.). In literacy class, the student had "independently mastered" all skills contained in a rubric related to behaviors and social interactions and most skills related to organization and work habits, except for keeping track of belongings, bringing necessary materials to class, and following multi-step directions in which she was rated as "demonstrat[ing] successfully" (id. at pp. 4-5).

The math subsection of the first trimester report revealed that the student was working at a pre-algebra level, listened intently when a new topic was introduced, usually used teacher notes to help her complete work and remain focused when working on new skills, and that when using notes to complete her work the student often got confused during multi-step procedures and needed more practice and reinforcement, as well as repeated instructions and teacher check-ins (Dist. Ex. 3 at p. 9). The math report indicated the student was usually one of the first students to complete her classwork because she often rushed, and as a result, made mistakes following the procedure or solving calculations (id.). The math report also indicated that a goal for the student was to help her learn to take her time and check her work to identify errors (id.). On the rubric specific to math class, the student was rated as "demonstrate[ing] successfully" all skills related to organization, behaviors and social interactions, and work habits, including "follow[ing] multi[-]step directions" (id. at p. 8).

Additional information in the MMCL first trimester report reflected that the student participated in class discussions in American history class when called on by the teacher, but rarely volunteered to share her opinions during whole group discussions (Dist. Ex. 3 at p. 11). The student was most likely to participate if she had a question she was interested in knowing more about, or if she could read and answer a previously completed question (id.). The history subsection also indicated the student benefited from teachers previewing her written work so that she could participate with confidence if she knew her response was correct before sharing it with a whole group (id.). The history subsection also noted that when the student did participate in

class discussions, she demonstrated good understanding of the topics discussed (id.). A goal for the student at that time was to become a more active participant during class discussions by volunteering to share rather than waiting to be called on by the teacher (id.).

The science subsection of the report indicated "continued practice w/supports still needed" for "makes reasonable hypotheses" and "understands the importance of variables within an experiment" (Dist. Ex. 3 at p. 12). For all other skills rated in regard to science process skills, conceptual understanding, classroom and work skills, independent research project, work habits/organization, and behaviors and social interactions, the student "demonstrate[d] successfully in structured setting" (id. at pp. 12-13). The student's science teacher indicated that at the beginning of the trimester the student often needed teacher prompts to help maintain her attention during class lectures, but as the trimester progressed the student showed more active interest and attention in the topic (id. at p. 14). The report reflected that the student turned in a constructed model project late because she had not checked her materials list in order to confirm the requirements of the project, and left some labels off the final project (id.). The science teacher indicated that the project demonstrated the effort the student put into the project and exposed the amount of help she required in planning the steps and reviewing the instructions in order to be successful (id.).

The current events subsection noted that reading and understanding news stories not directly related to the student's life was challenging for her due to the abstract nature of many of the concepts explored, including events in foreign countries with which the student was unfamiliar (Dist. Ex. 3 at p. 16). The student's comprehension in current events was aided by pictures and videos showing the events, and by using a map to locate the countries being discussed (id.). The current events teachers indicated that generally the student did not participate voluntarily in class discussions but she did so when asked to share her homework in class (id.). The teachers noted that the student struggled to recognize when she needed assistance and that they were working with the student to assist her to express her needs (id.).

In the "media literacy" subsection of the first trimester report, the student was described as an active participant in some of the team-based class projects but in later projects was less engaged, struggled to stay connected, and was more easily distracted and likely to engage in social conversations instead of working (Dist. Ex. 3 at pp. 18-19). The student's media literacy teachers reported that the student struggled with conversations involving authorship and information trustworthiness (id. at p. 19). During the first trimester, the student chose not to participate in class discussions, she was resistant to prompting by a teacher to get involved, and her homework consistently revealed she was confused and found abstract concepts difficult (id.). According to the student's teachers, the student dealt with her confusion by disengaging from the class and was resistant to attempts from her teachers to reengage her (id.). The report indicated the student completed all homework assignments in literacy class, math class, American history class and media literacy class, and that she had one late assignment for science class, and three missed homework assignments in current events class (id. at pp. 5, 8, 11, 13, 16, 19).

The MMCL first trimester report also included a speech and language subsection noting that the student participated in a discourse program designed to help students develop tools and strategies necessary for effective communication (Dist. Ex. 3 at p. 23). According to the

student's speech-language pathologist, the discourse program was taught throughout the school year and provided students with the opportunity to develop speaking and listening skills in a small group setting, to practice public speaking and active listening, to learn how to organize and use sequential and clear language, and to practice responding to questions about a specific topic in a related and coherent manner (id.). The speech-language pathologist indicated that the student received language therapy one time per week for 40 minutes in a group of three students, that she worked well within the group, that she was engaged and cooperative, and that she participated in tasks throughout the session (id. at p. 24). The goals of the speech-language therapy sessions were for students to increase expressive language and develop patterning skills to improve fluency of conversational speech, to practice word retrieval skills, to improve organizing and sequencing of directions, and to give accurate information (id.). According to the first trimester report, the student was able to give instructions to the group in the proper sequence, and was able to provide relevant and accurate information with some prompting from the speech-language pathologist (id.). The student needed continued practice to feel comfortable presenting information to adults and talking with peers (id.).

In accordance with a rubric set forth in the fall trimester 2008 speech and language subsection of the first trimester report, the student had "independently mastered" the following pragmatics skills: making appropriate eye contact, reading and using appropriate body language, and distinguishing among different tones of voice (Dist. Ex. 3 at pp. 23-24). Additionally, the report indicated that the student "demonstrate[d] successfully in structured setting" the following receptive language skills: comprehending single and multi-step directions, comprehending spoken goals, self-monitoring auditory comprehension, knowing when information had been misunderstood, knowing when to show appreciation; as well as the following pragmatics skills: switching language according to audience, switching demeanor according to audience, assessing audience comprehension, and requesting information in person (id.). The report noted "continued practice w/supports still needed" for all expressive language skills listed in the rubric as well as the pragmatics skill of engaging in conversational turn taking and modulating her own voice (id. at p. 23).

A winter 2009 three-page MMCL homeroom report<sup>2</sup> indicated that although the student struggled with focusing her attention during portions of the day, her "excellent comprehension strategies" helped her stay on topic in class (Dist. Ex. 5 at p. 1). The student was able to work effectively during group classwork as well as independently on short-term and long-term projects (id.). The report further noted that although the student struggled with encoding and auditory processing, she had developed effective strategies for compensation and relied "heavily" on following written procedures to complete her work (id.). According to the winter 2009 homeroom report, all of the student's teachers indicated that she was more willing to participate verbally by sharing her opinions and volunteering to read, that the student's success while working independently showed in the thoroughness of homework, and that the student began to integrate her strengths in writing into her academic work as a whole (id.).

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<sup>2</sup> The district's school psychologist who was a member of the March 2009 Committee on Special Education (CSE) testified that the CSE obtained "school reports" from MMCL and reviewed them in drafting the student's individualized education program (IEP), but it is unclear if a copy of the winter 2009 MMCL homeroom report was among the available reports (Tr. pp. 71-72).

On March 3, 2009, the Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2009-10 school year (eighth grade) (Dist. Ex. 2 at pp. 1-2). Meeting attendees included a school psychologist (who also acted as district representative), a district regular education teacher, the parent, an additional parent member, and by telephone, the student's special education teacher from MMCL (id. at p. 2). The resultant March 2009 IEP reflected that the CSE considered a 12:1 class, but determined that such a placement was not appropriate based on current teacher information regarding the student's difficulties with attention, focus, and language processing, and that she continued to require additional adult support throughout the day (id. at p. 9). The CSE also considered what it described as a "more restrictive setting (12-month)," but determined that setting was not warranted at the time because current teacher information indicated that the student had made academic progress during the past school year (id.). The CSE recommended placement for the student in a 12:1+1 special class in a community school together with speech-language therapy in a group of three in a separate location, two times per week for 30 minutes (id. at pp. 1, 8). In addition, the CSE recommended testing accommodations of extended time by 50 percent, a separate location, directions read and reread, and questions read aloud (id. at p. 10).<sup>3</sup> Furthermore, the CSE recommended modification of the criteria for promotion to the ninth grade to 75 percent of the eighth grade standards for both ELA and math, as evidenced by grades, assessments, student work and teacher observation (id. at p. 10).

The district issued a final notice of recommendation (FNR) to the parent dated June 4, 2009 (Dist. Ex. 6). The June 2009 FNR reflected the student's classification and summarized the program recommendation made in the March 2009 IEP (id.). The notice also identified the name of the student's assigned school (id.).

After attempting to schedule a time to visit the assigned school, the parent visited the assigned school without an appointment on June 16, 2009 (Tr. p. 202). The parent further indicated that she met with a guidance counselor at the assigned school whom she characterized as "either unwilling or unable" to provide her with information about the assigned class and she did not have the opportunity to observe any classes in session because the students were undergoing testing (Tr. pp. 202-03).<sup>4</sup> According to the parent, on June 17, 2009, she sent the FNR back to the district indicating that she would not accept the recommendation but that she would be willing to consider a different recommendation (Tr. p. 207; Parent Ex. H). The parent testified that she received no response from the district (Tr. p. 207).

### **Due Process Complaint Notice**

In a due process complaint notice dated February 2, 2010 the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2009-10 school year and requested reimbursement for the student's tuition at

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<sup>3</sup> Although the testing accommodations were listed in the March 2009 IEP, none of the boxes in regard to the student's participation in State or local assessments with or without accommodations were checked (see Dist. Ex. 2 at p. 10).

<sup>4</sup> The hearing record reflects the parent had visited the same school previously when the CSE recommended it for the student for the 2008-09 school year (Tr. pp. 212-13).

MMCL (Dist. Ex. 1 at pp. 1-4). The parent argued that the CSE was not properly composed because the regular education teacher who attended the meeting had not been a regular education teacher "in well over a decade" (*id.* at pp. 2-3). Therefore, the teacher had "no knowledge of current grade curriculum and whether [the student] would be able to meet [the curriculum] and with what types of accommodations" (*id.* at p. 3). The parent further argued that the student's IEP was developed without objective measures of the student's academic performance because it relied on teacher estimates only (*id.* at p. 3). The parent also argued that the goals and objectives in the IEP were not specific to the student and did not reflect her "current levels or needs" (*id.*). The parent contended that the IEP inappropriately lowered the promotional criteria for the student because the student had strong enough cognitive capability and motivation to reach standard criteria (*id.* at p. 4). With regard to the school identified in the June 2009 FNR, the parent argued that the classroom would not have provided the student with a "suitable and functional peer group for instructional and [sic] or social/emotional purposes" (*id.*). Lastly, the parent argued that the district failed to offer the student a FAPE, that the parent's unilateral placement at MMCL was appropriate, and that no equitable considerations barred reimbursement of the tuition costs at MMCL (*id.*).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on May 28, 2010, and concluded on December 15, 2010, after five days of testimony (Tr. pp. 1, 29, 97, 178, 243). During the impartial hearing, the district called two witnesses and entered ten documents into evidence (Tr. pp. 44, 65; Dist. Exs. 1-10). The parent called 3 witnesses and entered 14 documents into evidence (Tr. pp. 109, 189, 221; Parent Exs. A-N).

The impartial hearing officer's decision was originally issued on January 28, 2011 (IHO Decision at p. 19).<sup>5</sup> In the decision, the impartial hearing officer summarized the testimony of the witnesses and evidence entered into the hearing record (*id.* at pp. 1-12). The impartial hearing officer decided that the district failed to offer the student a FAPE for four reasons: (1) the district failed to show that the CSE included the participation of a regular education teacher "of the student," a procedural flaw that "cannot be dismissed as a mere technical violation" because the district maintained that the student needed to be "mainstreamed, i.e., placed with a general education population with a general education teacher for part of the day;" (2) the CSE did not review any "formal testing" of the student, including the most recent psychoeducational evaluation of the student that was conducted by the district; (3) the IEP was inappropriate because there was no goal relating to language processing or receptive language, there was only one goal related to speech-language therapy, and there were no goals related to the student's challenges in expressing her feelings in larger groups; and (4) the district did not show that the student would be appropriately grouped because the age range in the proposed classroom exceeded 36 months and two of the students in the assigned classroom had behavioral problems that would distract the student and impair her "self identity" (*id.* at pp. 11-15).

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<sup>5</sup> The impartial hearing officer's decision provided on appeal is marked on the cover page as the "2<sup>nd</sup> corrected" decision (IHO Decision). The decision was originally dated January 28, 2011 and bears two "corrected" dates: February 4, 2011 and February 28, 2011 (*id.* at p. 19).

The impartial hearing officer next found that the parent's unilateral placement at MMCL was appropriate because it provided the student with a small class size and multi-sensory individualized instruction (IHO Decision at pp. 15-16). According to the impartial hearing officer, MMCL addressed the student's tendency to conceal when she failed to comprehend what was being taught to her by having a second teacher "check in" on her during lessons (*id.* at p. 16). The impartial hearing officer also determined that the student made progress at MMCL and rejected the district's contentions that the school was inappropriate because it was overly restrictive, that certain MMCL teachers lacked certifications, and that MMCL failed to address the student's transition needs (*id.* at pp. 16-17).

Lastly, the impartial hearing officer addressed equitable considerations and rejected the district's argument that tuition reimbursement should be denied because the parent did not seriously consider the program offered by the district, noting that the parent indicated she was open to a public school placement (IHO Decision at pp. 17-18). Additionally, the impartial hearing officer found that the parent's 10-day written notice of unilateral placement to the district was not defective because the notice sufficiently identified the areas of concern that the parent had with the proposed IEP (*id.* at pp. 18-19). Based on the above, the impartial hearing officer awarded tuition reimbursement for MMCL for the 2009-10 school year (*id.* at p. 19).

### **Appeal for State-Level Review**

The district appeals, arguing that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because that decision is not supported by the hearing record. Specifically, the district argues that a regular education teacher was not required at the CSE meeting because, contrary to the impartial hearing officer's determination, the CSE never considered a general education environment for the student and placed the student in a self-contained 12:1+1 class and, in any event, a regular education teacher did attend the CSE meeting. The district also argues that it was not required to conduct a new psychoeducational evaluation of the student because only two years had elapsed since the previous evaluation, and the CSE properly relied upon the district's observation of the student and MMCL's written and oral evaluations of the student because that information was more current and allowed the CSE to comply with the requirement that it consider the "most recent evaluation" of the student. The district further contends that the failure to include expressive or receptive language goals on the IEP did not rise to the level of denying the student a FAPE and, contrary to the impartial hearing officer's finding, the IEP contained goals addressing the student's challenges with expressing her feelings in large groups. The district maintains that the student would have been appropriately grouped in the assigned class because a finding to the contrary is speculative as the student never attended the assigned class and, in any event, the student was in the middle of the age range in the assigned classroom. Additionally, the district argues that exceeding the allowable age range does not lead to a finding that the district failed to offer the student a FAPE if, as is the case here, the student would have been grouped appropriately in terms of functional needs.

Next, the district argues that the parent's unilateral placement of the student at MMCL was not reasonably calculated to enable the student to receive educational benefits because it did not provide sufficient opportunities for mainstreaming and was overly restrictive. Lastly, the district argues that equitable considerations favor the district because the parent's 10-day notice

of unilateral placement to the district was defective in that it did not identify her concerns with the recommended program or her intention to re-enroll the student at MMCL. Furthermore, the district contends that the parent did not truly consider a public school placement for the student because the parent paid a deposit and signed a contract with MMCL prior to the March 2009 CSE meeting and did not opt to participate in MMCL's tuition refund program.

In her answer, the parent argues that the impartial hearing officer properly found that the district failed to offer the student a FAPE for the reasons identified in his decision, and additionally because: (1) the assigned school was too noisy and disruptive for the student; (2) the parent was not afforded an opportunity to discuss the goals with the CSE; (3) the IEP did not contain any goals addressing the student's impulsivity and anxiety; and (4) the parent and the student's MMCL teacher informed the CSE that the 12:1+1 placement did not provide enough support for the student.

The parent next argues that the impartial hearing officer properly determined that MMCL was an appropriate placement because MMCL offered a program that was reasonably calculated to enable the student to receive educational benefits, that it addressed the student's unique needs, and that the student made progress there. The parent also argues that the impartial hearing officer's decision to award tuition reimbursement to the parent should be affirmed because the equitable considerations favor the parent insofar as she cooperated with the CSE, she visited the assigned school, and her 10-day notice of unilateral placement to the district was appropriate. Additionally, the parent argues that contracting with MMCL before the student's IEP was finalized does not disqualify the parent from receiving reimbursement. The parent further argues that in light of the fact that the district failed to offer the student a FAPE during the 2008-09 school year, she was obliged to ensure the student had an appropriate placement for the 2009-10 school year.

### **Applicable Standards**

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

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

## **Discussion**

### **Composition of the March 2009 CSE**

I will first address the impartial hearing officer's finding that the March 2009 CSE was inappropriately constituted because it did not include a regular education teacher "of the student" and that a regular education teacher was required because the district asserted that the student needed to be mainstreamed and placed with regular education students and a regular education teacher for part of the day (IHO Decision at pp. 12-13).

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be attending a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

Here, although the evidence does not show that the regular education teacher who attended the March 2009 CSE meeting may have been a teacher "of the student," I disagree with the impartial hearing officer's conclusion that a regular education teacher was required at the CSE meeting, because the hearing record does not show that the CSE considered placing the student in a general education classroom for the 2009-10 school year.<sup>6</sup> Additionally, the evidence does not support the impartial hearing officer's determination that the district failed to offer the student a FAPE because the regular education teacher who attended the CSE meeting was not a teacher of the student. The hearing record shows that the district recommended a

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<sup>6</sup> The hearing record shows that the students in the district's assigned 12:1+1 special class had opportunities to attend gym and lunch with regular education students (Tr. pp. 60-61).

12:1+1 placement in a self-contained special education setting (8 NYCRR 200.6[h][4][i]; Dist. Ex. 2 at p. 1), and the parent's unilateral placement at MMCL admits only students with special education needs (Tr. pp. 232-33). Neither party in this case argues that the district should have offered the student additional opportunities for mainstreaming or that she should have been placed in a general education setting for the 2009-10 school year (see Tr. p. 199). Additionally, the March 2009 IEP states that the CSE considered two other programs for the student, neither of which was in a general education setting (Dist. Ex. 2 at p. 9). Therefore, I find that a regular education teacher of the student was not required at the March 2009 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been assigned to such a teacher (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., Region 9 (Dist. 2), 700 F. Supp. 2d 356, 365-366 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at \*5-\*6; see Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-076).

### **March 2009 IEP**

#### **Evaluative Data and Present Levels of Performance**

The district contends that the impartial hearing officer erred in finding that it did not offer the student a FAPE during the 2009-10 school year in part because the CSE did not review any formal testing of the student, including the most recent psychoeducational evaluation conducted by the district. The district alleges that it was not required to conduct a new psychoeducational evaluation because only two years had elapsed since its previous evaluation of the student. Additionally, the district contends that the CSE properly relied upon the district's observation of the student and MMCL's written and oral teacher evaluations of the student because that information was more current and allowed the CSE to comply with the requirement that it consider the "most recent evaluation" of the student (8 NYCRR 200.4[d][2]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including,

where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dept of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the school psychologist attending the March 2009 CSE meeting testified that the CSE conducted a classroom observation of the student in October 2008 as part of the student's annual review (Tr. pp. 82-83; Dist. Ex. 7). She also indicated that the March 2009 CSE did not rely on the December 2007 district psychoeducational evaluation report for the March 2009 IEP because the CSE considered current information provided by the student's teacher from MMCL who participated in the meeting (Tr. p. 83). The school psychologist testified that the CSE had available, and considered, school reports from MMCL that the district had requested and current teacher estimates of the student's performance (Tr. pp. 71-72, 83). In addition, the school psychologist testified that everyone present at the March 2009 CSE meeting participated in the review for the entire meeting and that the student's special education teacher from MMCL provided information about the student that the CSE used in developing the student's IEP for the 2009-10 school year (Tr. pp. 71, 73; Dist. Ex. 2 at p. 2).<sup>7</sup>

Review of documentary evidence included in the hearing record reveals that the March 2009 IEP reflected the student's present levels of performance consistent with the 24-page MMCL first trimester report, a document which, according to the school psychologist, was available to and was used by the CSE, as well as teacher estimates provided by the student's teacher from MMCL during the March 2009 CSE meeting (Tr. pp. 71-73, 81, 211; see Dist. Ex. 3 at pp. 1-24). Consistent with the MMCL report, the March 2009 IEP described the student's present levels of academic performance and learning characteristics (compare Dist. Ex. 2 at pp. 3-4, with Dist. Ex. 3 at pp. 4-6, 7, 9). The March 2009 IEP indicated that the student's literal comprehension skills were well developed, that teacher reports indicated inferential skills were improving, and that the student demonstrated strength in her ability to recall and connect previously learned material (Dist. Exs. 2 at p. 3; 3 at p. 5). In addition, the IEP indicated that the

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<sup>7</sup> The parent testified that the student's teacher from MMCL provided the March 2009 CSE with an overview of the student's academic functioning and needs (Tr. p. 197). She also indicated that she participated in the CSE meeting "largely as a listener" and that she and the MMCL teacher opposed a 12:1+1 special class placement (Tr. pp. 196-97, 200). The school psychologist testified that the grade levels on the IEP came from the MMCL participant and that no one at the CSE objected to any part of the IEP (Tr. pp. 80-81).

student was able to write a five-sentence paragraph with the use of graphic organizers and that she used class notes to complete math homework as she could often become confused during multi-step procedures and needed more practice and reinforcement (Dist. Exs. 2 at p. 3; 3 at pp. 6, 9). The IEP further noted that at times the student rushed to finish her work, something that resulted in mistakes when solving calculations and following procedures (Dist. Exs. 2 at p. 3; 3 at p. 9). The IEP included teacher estimates provided by the student's teacher from MMCL, that the student's reading decoding was at the fifth grade instructional level, that her reading comprehension was at a beginning sixth grade instructional level, and that her writing was at the sixth grade instructional level (Tr. p. 81; Dist. Exs. 2 at p. 3; 3 at p. 6). Teacher estimates in math were at the high sixth grade instructional level for computation and at the sixth grade instructional level for problem solving (Tr. p. 81; Dist. Ex. 2 at p. 3). Consistent with the information about the student's academic present levels of performance included in the IEP, testimony by the district school psychologist in attendance at the CSE meeting revealed that despite the student's academic strengths, the CSE determined that the student still needed to work on higher level critical thinking skills, such as making inferences and comparisons, increasing content vocabulary, writing longer strings in her written compositions, and on multi-step work in mathematics (Tr. pp. 74-75). The school psychologist also testified that the student's language deficits affected her self-expression and participation, as well as in her ability to hear and interpret information (Tr. p. 75).

The March 2009 IEP is also in accord with the MMCL first trimester report regarding the student's social/emotional present level of performance. For example, the IEP notes that according to the student's classroom teacher from MMCL, the student was "very friendly" and well liked by her peers, willing to share her ideas, and still learning how to self-advocate (Dist. Exs. 2 at p. 4; 3 at p. 16). The IEP described the student's interaction with adults as respectful and compliant with school rules (Tr. p. 76; Dist. Ex. 2 at p. 4). In regard to the student's attention, although improvement was noted, the student tended to fatigue and appeared "physically exhausted" (*id.*). The IEP indicated the student's behavior was age appropriate but that she might require repetition of what was expected of her throughout the day (*id.*).

In regard to the student's health and physical development, the March 2009 IEP is also in accord with the MMCL first trimester report, in that the IEP indicated that the student was reported to be in general good health, and that she should wear her glasses when reading (Dist. Exs. 2 at p. 5; 3 at p. 3).

To address the student's academic management needs, the March 2009 IEP reflected strategies that the school psychologist indicated were consistent with information provided by the student's teacher from MMCL at the CSE meeting, as well as with the written report provided by MMCL to the CSE (Tr. p. 75; Dist Ex. 3 at p. 2). Recommended academic management needs were for the student's use of graphic organizers/planners/personal binder; visual aids such as charts, books, class notes, and templates; and breaks, teacher check-ins, and teacher redirection, all as needed (Tr. p. 75; Dist Ex. 2 at p. 3). To address the student's social/emotional management needs, the IEP indicated that the CSE recommended teacher redirection as needed (Tr. pp. 75-76; Dist. Exs. 2 at p. 4). According to the school psychologist, the information specific to the student's social/emotional performance and needs included in the IEP "was taken from statements that her classroom teacher made during the course of the meeting," and that the

information in quotation marks on the IEP were words used by the student's teacher at the meeting (Tr. p. 76; see Dist. Ex. 2 at p. 4). In addition, the MMCL first trimester report indicated the student often required repetition, redirection, and teacher check-ins to determine if the student is on the right track (Tr. p. 76; Dist. Ex. 3 at p. 9).

In light of the evidence described above regarding evaluative information in the hearing record and the statement of the student's present levels of performance, I find that the CSE had a substantial amount of appropriate current evaluative information available at the time of the March 2009 CSE meeting and accurately set forth a written statement of the student's needs on the March 2009 IEP. In addition, the more recent evaluative information available to the March 2009 CSE was consistent with the 2007 psychoeducational evaluation update in regard to the student's area of strength in math and her needs in the areas of abstract comprehension skills, spelling, writing and auditory processing and auditory comprehension (Tr. p. 190; see Dist. Ex. 4 at pp. 4-5; see also Dist. Ex. 3 at pp. 5-6, 8-9). The academic goals and classroom management strategies included in the March 2009 IEP per recent evaluative information were consistent with the recommendations included in the 2007 psychoeducational update (see Dist. Exs. 2 at pp. 3, 5-6; 4 at pp. 5-6). Accordingly, even if the hearing record showed that the CSE failed to consider the 2007 psychoeducational update report, upon reviewing the contents of that report together with the more recent evaluative information available to the March 2009 CSE, the hearing record does not support the conclusion that the March 2009 IEP was inappropriate for the student (Dist. Exs. 2-5; 7).

### **Annuals Goals and Short Term Objectives**

With regard to the parties' dispute over the adequacy of the annual goals and short-term objectives on the March 2009 IEP, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

Here, in regard to the goals included in the March 2009 IEP, the district's school psychologist testified that all of the goals were developed based on information provided by the student's classroom teacher at MMCL, from reports submitted by MMCL to the CSE, and from discussion at the CSE meeting about what would help address the student's deficits and strengths throughout the school year (Tr. p. 77). Although the IEP annual goals were developed subsequent to the CSE meeting, the school psychologist testified that the parent and the student's teacher at MMCL had an opportunity to, and did participate in, the March 2009 CSE meeting (Tr. pp. 80-81). I find that the hearing record, viewed as a whole, shows that the parent had a meaningful opportunity to participate in the development of the student's IEP (see E.G., 606 F.

Supp. 2d at 388-89 [holding that the IDEA does not require districts to draft annual goals in the presence of parents]).

Moreover, a review of the goals in the March 2009 IEP as further explained by the school psychologist, shows that the goals that were developed were aligned to the student's academic needs for decoding content related vocabulary while incorporating her need to be a more active participant and share information in class; incorporated her good comprehension skills with her need to answer wh-questions, make inferences, sequence a series of events, and recall facts during class activities, small group discussion, and oral presentations to the class; develop writing skills to a seventh grade level with appropriate writing mechanics (correct punctuation, grammar, capitalization) using content related vocabulary words and use of an outline and thesis; develop calculation skills to a seventh grade level by completing advanced calculations involving multi-step algorithms, fractions, decimals and percentages in class assignments, homework, and quizzes; and to use mathematical reasoning to analyze multi-step word problems involving mixed operations, to gather evidence, and to construct/solve a number sentence to a seventh-grade level (Tr. pp. 78-9; Dist. Ex. 2 at pp. 6-7). I also note that the academic goals included in the March 2009 IEP were measurable insofar as they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress several times during the school year or gauge the need for continuation or revision, and contained adequate evaluation criteria and procedures to facilitate measuring progress (Dist. Ex. 2 at pp. 6-7; see 8 NYCRR 200.4[d][2][iii][b]).

I also disagree with the impartial hearing officer's determination that the IEP lacked required goals and thereby denied the student a FAPE. In regard to the language goal included in the March 2009 IEP to address age-appropriate pragmatics specific to initiating conversations and maintaining eye contact and conversational topic, although the rubric in the speech and language subsection of the MMCL first trimester report indicated that the student "independently mastered" "mak[ing] appropriate eye contact," the same rubric noted that "continued practice with supports [was] still needed" for "engage[ing] in conversational turn taking" (Dist. Exs. 2 at p. 7; 3 at p. 23). Although the inclusion of "mak[ing] appropriate eye contact" in the student's pragmatic language goal appeared to be unnecessary, including it in the IEP was not harmful to the student, nor did it preclude the IEP from addressing her need to improve her conversational turn-taking skills, or any other pragmatic language skill that possibly became apparent during the 2009-10 school year. In addition, I note that although the district did not specifically label an annual goal as an expressive or receptive language goal, the IEP adequately addressed the student's receptive and expressive language needs by including a goal that targeted content related vocabulary, the student's need to improve her ability to answer wh-questions, make inferences, sequence a series of events, and recall facts (see Dist. Ex. 2 at p. 6). In regard to auditory processing, although there was no annual goal included in the March 2009 IEP directly referencing the term, "auditory processing," the IEP's recommendations for graphic organizers/planners/personal binder, visual aids such as charts, books, class notes, and templates, as well as breaks, teacher check-ins, and teacher redirection, all as needed, nevertheless sufficiently addressed the student's auditory processing needs for repetition and teacher check-ins (Tr. pp. 75, 89, 1990; Dist Exs. 2 at p. 3; 3 at p. 9).

Regarding the parent's claim on appeal that the IEP should have included annual goals to address the student's "impulsivity and anxiety," I note that the evaluative material available to the March 2009 CSE did not show that impulsivity or anxiety were difficulties for the student such that a specific goal, in addition to the other goals and accommodations in the IEP, was necessary to offer the student a FAPE. Moreover, the academic management recommendations in the IEP for breaks, teacher check-ins, repetition, and teacher redirection as needed, and the social/emotional management recommendation for teacher redirection as needed appropriately addressed such concerns (see Dist. Ex. 2 at pp. 3-4).

Upon review of the hearing record, I find that the March 2009 CSE addressed the student's needs through appropriate measurable annual goals and program accommodations listed on the March 2009 IEP. Additionally, based on the speech-language subsection of the 2009 MMCL first trimester report that the March 2009 CSE used in developing the student's IEP, the CSE's recommendation for continued speech-language therapy was designed to address the student's receptive, expressive, and pragmatic language needs.

Based upon a careful review of the evidence contained in the hearing record, I conclude that the March 2009 IEP proposed for the 2009-10 school year was reasonably calculated to enable the student to receive educational benefits in the LRE and that the student was offered a FAPE (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

### **Assigned School**

Turning next to the parties' dispute regarding the assigned school identified in the June 2009 FNR, 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 district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088).

In addition to challenging the IEP developed by the district, the parent contends that the 12:1+1 special class at the assigned district school contained students that exceeded the 36-month age range set forth in the regulations, that the student would not be suitably grouped for instructional purposes, and that the school building to which the district assigned the student in a 12:1+1 special class was too large. The impartial hearing officer agreed with these assertions and found that the district failed to offer the student a FAPE as a result (IHO Decision at pp. 14-15). Prior to addressing each one of these points, I note that in this case, the parent decided to unilaterally place the student at MMCL prior to the time that the district was required to implement the IEP in September 2009. A meaningful analysis of the parent's claims with regard to grouping in accordance with age range, functional grouping, and the effect of the school building size on the student's educational program would require me to determine what might have happened had the district been required to implement the student's IEP. However, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The

Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). Additionally, while statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that the IEP must identify the "bricks and mortar" related to the specific school site (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. March 30, 2010]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case the issues regarding the age range, functional levels, and the size of the school identified in the June 2009 FNR are in part speculative because in August 2009 it became clear that the parent would not accept the services recommended by the district in the IEP and that she intended to enroll the student at MMCL (Dist. Ex. 8). If the student had attended the school identified in the June 2009 FNR, it is unclear whether the district would have attempted to adjust classroom assignments to comply with the age range or functional grouping requirements, sought a variance to the requirements in accordance with State regulations, or done nothing. Insofar as the parent did not accept the recommendations of the CSE or the program offered by the district, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

### **36-Month Age Range**

Further to the issue of age range in the proposed classroom, upon the implementation of an IEP, the IDEA does not expressly require students to be grouped in accordance with age; however, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than sixteen years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). In order to establish that a student has been properly grouped, it is permissible to demonstrate age ranges or similarity of abilities and needs through the use of a class profile or by the testimony of a witness who is familiar with the children in the classroom in question (see Application of the Bd. of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068).

Even assuming, for the sake of argument, that the district would have failed to achieve compliance with the age range requirements, I note that the teacher testified that the age range of the students in the classroom was 11 through 15 years of age (Tr. pp. 48, 64). The student's IEP shows that that she fell within the middle of this age range, less than 36 months from either end of the potential range (Dist. Ex. 2 at p. 1). Therefore, while the evidence in the hearing record shows that one of the other students in the class may have been grouped with students who were more than 36 months different in age, the same cannot be said for the student in this case, and under these circumstances I decline to find that the student was denied a FAPE due to the age range of the students in the class identified in the June 2009 FNR (see M.P.G., 2010 WL 3398256, at \*10 [holding that exceeding the 36-month age range requirement in State regulations is not fatal, particularly when the student falls within 36 months from the other students in the class]).

### **Functional Grouping**

Turning to the issue of functional grouping in the proposed district class, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Here, I note that similar to grouping in accordance with age ranges, neither the IDEA nor State regulations require a functional grouping to be set forth on a student's IEP. Once again,

assuming for the sake of argument that the district would have failed to achieve compliance with State regulations, the evidence in the hearing record relevant to this issue shows that the school psychologist testified that the student's teacher from MMCL told the March 2009 CSE that the student required a smaller class size with additional adult support throughout the day due to her academic and language difficulties (Tr. pp. 76-77). Based "very much" on the information presented at the CSE meeting that the student would not have a successful year without additional adult support, the CSE recommended a 12:1+1 class for the student for 2009-10 (*id.*). The psychologist indicated that although she was not familiar with all 12:1+1 classes in the district, she opined that the CSE's recommendation for a 12:1+1 class was appropriate for the student because there would be no more than 12 students in that type of class and there would be two adults in the classroom full-time who were mandated to provide differentiated instruction throughout the day to students, first in whole groups and then in smaller groups (Tr. p. 92). She also testified that there could be a span of up to three grades in the class (Tr. p. 93).

Testimony by the special education teacher of the 12:1+1 special class at the assigned district school revealed that on the first day of school for the 2009-10 school year, there were seven students in the class and that it was a "bridge" class consisting of seventh and eighth grade students (Tr. pp. 47-48, 59, 63). The teacher testified that the students' functional levels for both math and reading were between third and sixth grade (Tr. pp. 48-49).<sup>8</sup> According to the student's IEP, her instructional levels in reading and math ranged from fifth to sixth grade, placing her within the range of functional ability of the students in the class. The teacher indicated that for 2009-10 she had more eighth grade students than seventh grade students in the class (Tr. p. 60). The teacher testified that she used a State curriculum as a guide for all subjects and that she individualized for all students according to their needs as noted on their IEPs (Tr. pp. 49-50; *see* Tr. pp. 51-53).

Specific to the student in the instant case, when asked about the student's academic management needs as noted on the March 2009 IEP, the teacher of the 12:1+1 special class indicated she would "absolutely" have been able to meet the student's needs for planning, personal binder, breaks as needed, visual aids, charts, books, and class notes (Tr. p. 55). The teacher also affirmed that she would have been "absolutely" able to address the student's goals (Tr. p. 56). In addition, the assigned district school would have provided the student with speech-language therapy (Tr. pp. 56-57). Based on her review of the March 2009 IEP, the teacher of the 12:1+1 special class at the assigned district school indicated that she had students with similar needs to the student in this case and that the student would have been appropriate for the class (Tr. p. 57).

Based on the evidence in the hearing record, including the district school psychologist's and the teacher's testimony, I am not persuaded that the district was unable to suitably group the student for instructional purposes within the recommended 12:1+1 special class recommended on the IEP (*see* M.P.G., 2010 WL 3398256, at \*10-\*11 [noting that student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional

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<sup>8</sup> Four redacted IEPs of other students who attended the assigned class during the 2009-10 school year are contained in the hearing record (Tr. p. 36; Parent Exs. K-N). According to these IEPs, some of the students had academic management needs similar to the student in this case (compare Dist. Ex. 2 at p. 3, with Parent Exs. L at p. 3; M at p. 3; N at p. 3).

purposes]; W.T., 716 F. Supp. 2d at 290-292 [holding that a district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

### **Proposed School Building**

Turning to the parent's allegation that the size of the school building would have been inappropriate for the student because it was too noisy and disruptive, I note that this claim too is not sufficiently supported by the evidence in the hearing record. The hearing record reveals that the 12:1+1 special class in the community school assigned by the district shared the building with a high school and that the assigned middle school contained roughly 200 students (Tr. pp. 61-62). Other than conclusory statements, the parent does not cite any evidence in the hearing record which establishes that the size of the assigned school would have prevented the student from being offered a FAPE (Tr. p. 205). According to the homeroom subsection of the MMCL middle school first trimester report dated "September 2008 – June 2009" the student had "demonstrat[ed] successfully" a variety of organizational skills including timely arrival to class, transition from one class to another and keeping track of her belongings and class materials (Dist. Ex. 3 at p. 3). In view of the forgoing, I find the parent's concerns regarding the size of the assigned school building, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record.

### **Conclusion**

Although the parent has understandably taken a position that the district could have offered a superior IEP or environment to the student, "the IDEA does not require 'everything that might be thought desirable by loving parents'" (E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at \*9 [S.D.N.Y. Mar. 14, 2011] quoting Walczak, 142 F.3d at 131-32; see E.H., 2009 WL 3326627, at \*3; Grim, 346 F.3d at 379; Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]).<sup>9</sup> Having determined that the district met its obligation to offer the student a FAPE for the 2009-10 school year, it is not necessary to reach the issue of whether MMCL was appropriate for the student or whether equitable considerations support the parent's claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.M., 2011 WL 1044905, at \*10; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

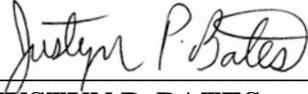
### **THE APPEAL IS SUSTAINED.**

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<sup>9</sup> Although the program offered by the district in June 2009 did not meet with the parent's approval, I note that the parent thereafter visited the school identified in the June 2009 FNR (Tr. pp. 202, 213-213). The IDEA encourages district's and parents to work collaboratively and reconvene to modify a student's IEP when appropriate (34 C.F.R. § 300.324[a][6]).

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated January 28, 2011 which determined that the district failed to offer the student a FAPE for the 2009-10 school year and ordered the district to pay for the student's tuition costs at MMCL are annulled.

**Dated:** Albany, New York  
April 7, 2011



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