



The University of the State of New York
The State Education Department
State Review Officer

No. 07-018

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION, for review of a determination of a hearing officer
relating to the provision of educational services to a child with a
disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida M. Alvy, Esq., of counsel

Melvyn Hoffman, Esq., attorney for respondents

DECISION

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer, which found that petitioner failed to offer the student a free appropriate public education (FAPE)¹ for the 2006-07 school year and ordered petitioner to reimburse respondents for the costs of their son's tuition at the Mary McDowell Center for Learning (MMCL) and provide transportation to MMCL for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing on October 12, 2006, the student was ten years old and attending an ungraded class at MMCL (Tr. pp. 10, 27, 40, 339). The Commissioner of Education has not approved MMCL as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). MMCL is a private, full-time

¹ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

special education school serving students with learning disabilities through the eighth grade, who have average to above average intelligence and who do not have severe behavioral management issues (Tr. pp. 26, 249, 275). The student currently attends a 12:2 classroom at MMCL and receives occupational therapy (OT) at MMCL (Tr. pp. 40, 253-54). The student's classification and eligibility for special education programs and services as a student with a learning disability (LD) are not in dispute in this appeal (8 NYCRR 200.1[zz][6]).

Respondents initially referred their son to petitioner's Committee on Special Education (CSE) by letter of June 8, 2006 (Parent Ex. G). Respondents requested that petitioner evaluate their son and prepare an individualized education program (IEP) because he needed "full-time special education in a small nurturing environment" (id.). At that time, the student attended a private, general education parochial school and had never attended public school (Tr. pp. 88, 117-18; 348-50; Parent Ex. H at p. 1).

Over five days throughout June 2006, the student underwent a private neuropsychological evaluation (Parent Ex. H at p. 1). Respondents referred their son for evaluation due to concerns about his "difficulty remaining focused and working independently" and to determine the "cognitive and/or emotional factors" contributing to his academic difficulties (id.). To assess the student, the evaluator interviewed respondents, reviewed school data and previous evaluations, administered a battery of standardized tests, and observed the student (id. at pp. 1-13).

According to the report, respondents indicated that the student experienced difficulty in school as early as kindergarten (id. at p. 1). The student's kindergarten teacher expressed concerns to respondents regarding the student's distractibility, listening comprehension, learning, and poor performance on exams (id. at pp. 1, 14). Respondents reported that the student exhibited severe anxiety, nervousness, and resistance to attending school, which often resulted in physical illness (id. at pp. 1-2). Respondents observed that, academically, their son demonstrated poor reading comprehension and difficulties with handwriting and written expression (id. at p. 2). Respondents expressed concern that their son's academic difficulties also contributed to his low self-esteem (id.). Respondents did not report any significant contributory developmental history, other than separation difficulties in preschool and a history of physical illness in the morning before going to school (id. at p. 3).

In addition to the interview, respondents also completed a Child Behavior Checklist (CBCL), which rated the student in the "clinical range" for the following: internalizing problems, externalizing problems, total problems, anxious/depressed, social problems, anxiety problems, somatic complaints, attention problems, and aggressive problems (id.). The CBCL ratings placed the student in the "borderline range" for the following: attention problems, withdrawn/depressed, social problems, affective problems, attention deficit/hyperactivity problems, and conduct problems (id.).

The report included information regarding a neurocognitive evaluation of the student in November 2004 and an assessment conducted by the Sylvan Learning Center in March 2006 (id. at pp. 2, 4). In November 2004, at age eight, the student's neurocognitive evaluation revealed normal intelligence and no signs of an attention deficit disorder (ADD) or an attention deficit hyperactivity disorder (ADHD) (id. at p. 4). Respondents reported that, as a result of this evaluation, the student received private psychotherapy from October 2005 through spring 2006

with no noticeable improvement in the student's academic functioning or emotional state (id. at p. 2). In March 2006, at age ten, the student's assessment by the Sylvan Learning Center revealed deficiencies in his oral reading rate and oral reading comprehension (id. at p. 4). In addition, the student scored significantly below grade level on measures of vocabulary, comprehension, computation, and concepts and applications (id.).

At the time of the evaluation in June 2006, the student attended a private parochial school, and the evaluator noted the following as the student's final grades for the fourth quarter: religious studies 70, reading 63, language arts 65, mathematics 68, social studies 77 and science 68 (id. at p. 1; see also Tr. pp. 88, 117-18). The student's teacher commented that he needed to improve his ability to follow class and school rules, listen attentively, improve his organizational skills, follow directions, remain focused and remember all of his school supplies (Parent Ex. H at p. 1).

Upon observation, the evaluator described the student as apprehensive, restless, and anxious, but also as polite, friendly, and cooperative (id. at pp. 4-5). The student maintained good eye contact, spoke in a "clear, logical manner," and displayed no difficulties with articulation (id.). The evaluator noted, however, that the student demonstrated grammatical errors, dysnomia, and "apparent" word-finding and oral expression problems (id.). At times, the student became restless but was easily redirected (id. at p. 4). The evaluator noted that at times it appeared difficult for the student to follow directions, often requiring repetition and additional explanations (id. at pp. 2, 5). The student also exhibited idiosyncratic behaviors, such as talking to himself and patting objects (id. at p. 5). The evaluator observed difficulties with the student's memory, ability to remain focused on self-administered tasks, and attention (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following index scores: verbal comprehension, 89 (23rd percentile); perceptual reasoning, 94 (34th percentile); working memory, 80 (9th percentile); processing speed, 75 (5th percentile) (id. at p. 6). The student's level of general cognitive functioning fell in the below average range with a full scale IQ score of 81 (10th percentile) (id.). The evaluator opined that the student's full scale IQ underestimated his level of intellectual functioning and, in general, the student's slow processing speed, variable attention and planning, and oral expression difficulties compromised his performance (id. at p. 13).

The evaluator assessed the student's academic achievement using the Woodcock-Johnson III Tests of Achievement (WJ-III), the Gray Oral Reading Tests, Fourth Edition (GORT-4), the Wide Range Achievement Test, Expanded Edition (WRAT-E) and the Test of Written Language-Third Edition (TOWL-3) (id. at pp. 23-24). The evaluator reported that the student performed in the low average range in his word-identification, decoding and spelling skills, as measured by the WJ-III (id. at pp. 10, 16). The evaluator noted that although the student demonstrated adequate word recognition and decoding skills, he exhibited slow and inaccurate oral reading skills as measured by the GORT-4 (id. at pp. 11, 16). In addition, he further noted that while the student's oral reading comprehension was average, the student performed in the borderline range on a longer silent reading test contained in the WRAT-E (id.). The evaluator indicated that the student demonstrated considerable difficulty remaining focused while reading, which he attributed primarily to the student's impairments in attention and working memory (id. at p. 16). According to the evaluator, the student's ability to express himself in writing was significantly impaired, and he exhibited sloppy and sometimes illegible handwriting (id. at pp. 11, 15).

As evidenced by his performance on the WJ-III and TOWL-3, the student made frequent, serious spelling and punctuation errors that compromised his writing ability, in addition to exhibiting grammatical errors and poor sentence structure (*id.*). The evaluator reported that the student's overall writing score on the TOWL-3 fell in the deficient range, and the student struggled to produce single sentences and write a composition (*id.* at p. 16). The evaluator noted that the student also reversed letters (*id.* at pp. 10-11). The evaluator opined that the student's attempts to express himself in writing were complicated by his poor graphomotor skills, expressive language disability and executive function deficits (*id.* at p. 16).

Regarding mathematics, the evaluator noted that the student had not mastered basic math facts and resorted to counting his fingers or making hash marks in order to complete computations (*id.* at p. 12). As measured by the WJ-III, the student's computational skills and ability to solve applied problems both fell within the low average range, while his ability to solve simple equations quickly fell within the below average range (*id.* at pp. 12, 23).

The evaluator assessed the student's language skills using the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) (*id.* at p. 9). The student's receptive, expressive, and core language scores all fell within the borderline range (*id.* at pp. 9, 24). The evaluator described the student's ability to follow directions as "deficient," and he opined that the student's working memory difficulties appeared to interfere with his ability to follow multi-step directions (*id.* at p. 9). In addition, the student's word-finding and grammar difficulties compromised his performance in the formulation of sentences, which the evaluator also characterized as deficient (*id.*). The student demonstrated an average ability to phonemically discriminate similar words, as measured by the Goldman-Fristoe-Woodcock Test of Auditory Discrimination (*id.*). The evaluator also noted that in the presence of noise, the student performed within the low average range (*id.*).

The evaluator administered the Conners' Continuous Performance Test (CPT), the Wisconsin Card Sorting Test (WCST), selected subtests of the Delis-Kaplan Executive Function System (D-KEFS), and selected subtests of the Developmental Neuropsychological Assessment Test (NEPSY) to assess the student's attention and executive functions (*id.* at pp. 7-8). According to the evaluator, the student's performance on tests measuring processing speed was highly variable and ranged from deficient to high average (*id.* at p. 14). The evaluator reported that the student's large number of omission errors, very slow response rate and high degree of variability in responding on the CPT indicated that the student had problems remaining focused (*id.* at pp. 7, 14). The student's attention further waned when the task became slower and less stimulating (*id.*). The student performed in the average range on a briefer test of auditory attention (NEPSY); however, his performance deteriorated on this task when the student was required to maintain a more complex response set (*id.* at p. 14). According to the evaluator, behavioral ratings from the student's parents, as well as anecdotal reports from school, indicated that the student exhibited a significant degree of attentional difficulties (*id.*). The evaluator concluded that the student was only able to sustain his attention to brief tasks that did not involve an area of cognitive weakness (*id.* at pp. 14-15).

On the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2), the student attained a general memory index score of 80 (*id.* at p. 28). The evaluator reported a "significant discrepancy" among the student's average verbal memory index, below average visual

memory index, and borderline attention/concentration index (id. at pp. 9-10, 28). On the visual memory index, the student's memory for picture details was in the below average range (id. at p. 10). On the attention/concentration index, the student scored in the below average range on a task that required him to remember the sequence of visuospatial locations and to recall orally presented number/letter sequences (id.). The evaluator noted that although the student's scores fell within the average range on the story memory subtest, he demonstrated fragmented and disorganized story recall (id.). Based on the results of the WRAML-2 and other tests, the evaluator concluded that the student demonstrated problems with consistently attending to, registering and recalling visually, as well as verbally, presented material (id. at p. 15).

On the Beery Test of Visual Motor Integration (VMI), the evaluator noted that the student rushed and failed to sufficiently plan while copying some of the more complex figures (id.). His reproduction of designs fell in the low average range (id. at pp. 10, 29). As measured by the Purdue Pegboard, the student exhibited deficient motor speed with the right hand and below average motor speed with the left hand (id. at p. 10). The student also had difficulty coordinating movements between both hands (id.).

To assess the student's social and emotional functioning, the evaluator administered the Thematic Apperception Test (id. at p. 12). The student's stories indicated a sense of vulnerability and fear regarding physical integrity (id. at p. 17). The evaluator opined that the student had little confidence in his ability to cope with academic and social challenges and, as a result, he was hyper-vigilant in scanning his environment for potential threats to his safety and self-esteem (id.). The student's anxiety and limited self-confidence led to the student depending on adults to take care of him, which perpetuated his view of himself as immature and ineffectual (id.). The evaluator opined that the student's learning disabilities and anxiety disorder reinforced the student's compromised self-image (id.). He noted that the student was considerably more anxious and distractible when presented with academic tasks (id. at p. 14).

Based upon his findings, the neuropsychologist offered the following diagnostic impressions about the student: ADHD, combined type; expressive language disorder; disorder of written expression; developmental coordination disorder; and separation anxiety disorder (id.). He opined that the student needed to be placed in a class with a very small teacher-to-student ratio (id. at p. 18). He further opined that the student required a high degree of individual attention to compensate for his attentional and learning difficulties, and that the student required an educational environment with a very low level of distractions in order to remain focused and learn (id.). According to the evaluator, the student needed to be placed in a supportive environment that could address his anxiety, poor self-esteem and avoidant behaviors (id.).

The evaluator also recommended numerous instructional strategies, accommodations, and speech-language therapy (id. at pp. 18-21). The evaluator noted that the student's teachers needed to be "aware of how his impairments in attention, working memory and verbal recall interfere with comprehending and retaining information in class (id. at p. 18). In addition, the evaluator recommended multimodal presentation of material; charts, diagrams and manipulatives to help reinforce concepts; repetition of instructions and verbal redundancy during the course of the day; provision of outlines and/or copies of notes or a scribe so that the student could "concentrate more fully on the lessons and class discussions"; individual tutoring by an Orton-Gillingham specialist to address his weaknesses in word identification, oral reading, phoneme/grapheme

correspondence, morphology, and underlying skills for reading comprehension; a focus on improving his decoding and encoding; an additional set of books for home use; a digital recorder and voice recognition software to reduce the strain on his working memory and improve delayed recall; writing instruction; development of computer and keyboard skills; a reduction in the student's writing requirements and extra time to complete written assignments; modeling problems in mathematics and repeated practice to generalize skills; a reasonable level of homework to prevent further emotional damage; untimed tests to accommodate the student's variable attention and anxiety; a special place to take exams or allowing the student to respond orally to tests; a psychiatric consult to assess the student's need for medication to address his attention, working memory, response inhibition, planning, excessive anxiety and somatic symptoms; and family psychotherapy to assist family members in understanding the student's abilities and disabilities (id. at pp. 18-21). In addition, the evaluator recommended an OT evaluation in light of the student's "handwriting, graphomotor coordination, and impaired fine-motor speed," and an assistive technology evaluation to determine if he required a laptop computer (id. at p. 21).

As a result of respondents' referral of June 8, 2006, petitioner conducted a social history and psychoeducational evaluation of the student on July 6, 2006 (Dist. Exs. 3 at p. 1; 4 at p. 1). In addition to receiving respondents' consent on July 6, 2006 to conduct the psychoeducational evaluation of the student, petitioner also received respondents' consent to perform a speech-language evaluation (Tr. p. 233).

Respondents reported the same information about their son to petitioner's social worker as they provided to the private evaluator in June 2006 (compare Parent Ex. H at pp. 1-3, with Dist. Ex. 3 at pp. 1-6). In addition, respondents noted that the student exhibited "terrible" reading comprehension and "weak" math skills (Dist. Ex. 3 at p. 3). Respondents included information about the student's significant anxiety related to school and the associated physical illness (id.). In addition, respondents reported that on three occasions they brought their son to the hospital for dehydration (id. at pp. 3, 6). Respondents also indicated that the student received private tutoring, attended summer school every year since kindergarten, and fought yearly with the school to promote him from grade to grade (id. at p. 2).

Respondents reported that the student struggled with homework and on some evenings he would have private therapy, two hours of tutoring and then homework (id. at p. 4). As reported to the social worker, the student demonstrated inconsistent work and disorganization (id.). Respondents described their son as "extremely sociable" with many friends (id. at p. 5).

Respondents indicated that at parochial school, the student attended a general education classroom with over 30 students (id. at p. 3). According to the social history, the student's parochial school teacher refused to accommodate the student's needs (id.).

On July 6, 2006, petitioner conducted a psychoeducational evaluation of the student (Dist. Ex. 4). The evaluating psychologist noted that during testing the student was, at times, restless and easily fatigued, with a short attention span (id. at p. 2). Administration of the WISC-IV yielded the following index scores: verbal comprehension, 102 (55th percentile); perceptual reasoning, 94 (34th percentile); working memory, 86 (18th percentile); and processing speed, 112 (79th percentile) (id. at pp. 1, 3). According to the WISC-IV, the student's full scale IQ score of 99 (47th percentile) fell within the average range (id. at pp. 3-4). With the exception of the perceptual

reasoning index score, the intelligence scores reported by petitioner differed significantly compared to the scores reported by the private evaluator in June 2006 (compare Dist. Ex. 4 at pp. 3- 4, with Parent Ex. H at pp. 6, 22).

As measured by the Bender-Gestalt II, the student's motor integration skills were in the low average range (Dist. Ex. 4 at p. 4). According to petitioner's psychologist, the student demonstrated difficulties with organizational skills, poor fine motor skills, and errors of integration and rotation (id.). The psychologist observed that the student used an awkward grasp to hold a pencil (id. at p. 2).

Achievement testing conducted by petitioner revealed deficits in the student's reading fluency, math fluency and spelling (id. at p. 6). On the WJ-III, the student's standard score for broad reading was 83 (13th percentile) and for broad math 93 (31st percentile) (id.). The evaluator noted that because the student was missing basic math concepts and exhibited limited overall mathematics ability, he would have difficulty with mathematics tasks above the 3.8 grade level (id. at pp. 2, 4). She further noted that the student had difficulty with word identification and his performance was very limited on tasks requiring efficient operation of reading processes (id.). The evaluator reported that the student's social skills development was age appropriate; however, she also noted that the student had difficulty dealing with the challenges of testing due to poor self-esteem and his own insecurities (id. at p. 4). The student was described as having a low tolerance for frustration (id. at pp. 2, 4).

Petitioner's psychologist opined that the student would benefit from reading instruction that focused on extension of the basic alphabetic principle into more complex rules that govern word structural analysis, such as an Orton-Gillingham oriented program (id. at p. 5). She recommended that the student's teachers interrupt his daydreaming or off-task remarks and refocus his attention to task (id. at p. 4).

In addition to the psychoeducational evaluation, petitioner conducted an evaluation of the student's language functioning on August 7, 2006 (Dist. Ex. 5 at p. 1). The evaluating speech-language therapist reported that the student required extra time to process information and that he appeared frustrated as he tried to process and retrieve specific information (id.). The student attained a core language standard score of 98, which was significantly higher than the core language score reported by the private evaluator using the same evaluation tool two months earlier (id. at p. 2; compare Dist. Ex. 5 at p. 2, with Parent Ex. H at p. 24). The student's performance on numerous subtests also varied significantly from the private evaluator's report, with petitioner's evaluator reporting significantly higher scores (compare Dist. Ex. 5 at p. 2, with Parent Ex. H at p. 24).

Petitioner's evaluation revealed that the student had difficulty on subtests that required working memory (Dist. Ex. 5 at pp. 2-4). The evaluator noted that among other weaknesses, the student had difficulty repeating sentences without changing morphology or syntax (id. at p. 3). The student also exhibited difficulty understanding oral narrative and text, answering questions about the content of information given, and thinking critically to arrive at logical answers (id.). Based on additional assessments the evaluator concluded that the student was able to decode and encode grade level words and broadly summarize a paragraph he had read (id. at p. 4). However, the student was unable to answer detailed questions (id.). The evaluator concluded that the student

exhibited an auditory processing delay that affected his ability to process and interpret orally presented information (id.). She further concluded that the student's working memory was compromised (id.).

Petitioner's CSE convened for the student's initial review and to prepare his 2006-07 IEP on August 11, 2006 (Dist. Exs. 2; 6). The CSE reviewed the social history, psychoeducational evaluation and speech-language evaluation conducted by petitioner (Tr. pp. 62-63, 118-19, 232-33). Petitioner's psychologist, who attended the CSE meeting, testified at the impartial hearing that he "read through" the student's private neuropsychological evaluation report (Tr. pp. 86-87). Petitioner's general education teacher, who also attended the CSE meeting, testified that the private evaluation report was available for her review during the CSE meeting (Tr. p. 128). Petitioner's special education teacher, who also attended the CSE meeting, testified that she had "looked through" the private evaluation report (Tr. p. 241). The CSE determined that the student was eligible for special education as a student with a learning disability (Dist. Ex. 2 at p. 1). The CSE recommended that the student attend a general education classroom with special education teacher support services (SETSS) five periods per week in an 8:1 setting, along with related services of twice weekly group speech-language therapy and group counseling for one session per week (id. at pp. 1, 12, 14). The IEP included the results of petitioner's evaluations and noted that the student's academic management needs could be met in a part-time remedial, small group setting (id. at pp. 3-7). With respect to the student's social and emotional performance, the CSE noted that his behavior did not seriously interfere with instruction and could be addressed by the general education and/or special education teacher (id. at pp. 5-6).

In addition, the IEP contained objectives related to numerical operations and mathematical reasoning, reading fluency and language development (id. at pp. 8-11). The CSE recommended the following testing accommodations: time extended by 1/2 on all tests over 45 minutes and separate location; questions read aloud on all tests, except for those measuring reading; and directions read and reread aloud (id. at p. 14). The IEP also documented that the CSE considered and rejected placement in a 12:1 special class because it was "too restrictive at this time" (id. at p. 13). Testimony by petitioner's psychologist, who attended the CSE meeting, indicated that respondents felt the student should attend a small class for students with learning disabilities (Tr. p. 77). Petitioner's psychologist also testified that respondents did not express a "definite disagreement" with the proposed program, but rather sensed that respondents would take everything into consideration (Tr. pp. 93-94).

By letter dated August 11, 2006 and mailed on August 17, 2006, petitioner sent respondents a Final Notice of Recommendation (FNR)² notifying them of the student's proposed placement at P.S. 48, a community school located within the student's "home zone" (Tr. p. 164; Dist. Ex. 7; Parent Ex. E). By letter dated August 23, 2006, respondents indicated that they attempted to

² By letter dated November 1, 2006, petitioner offered respondents a second proposed placement in another community school (Parent Ex. I). In an undated letter to petitioner, respondents indicated that they had visited the two proposed placements and found both to be inappropriate for their son (Parent Ex. J). In particular, respondents concluded the two proposed placements were too large and overwhelming an environment, that the general education classes were too large and distracting, and that being pulled out of class for SETSS everyday would be more overwhelming and distracting for their son (id.). Respondents opined that the student required a small school, a small class environment with minimal distractions, and full-time special education with students with similar learning styles (id.).

contact the proposed placement, but could not visit or view the program (Parent Ex. D). In the same letter, respondents advised that they could not make a decision at that time about the proposed program (id.).

By letter dated August 25, 2006, respondents notified petitioner that because they had not received a valid IEP or an appropriate placement to visit, their son would attend MMCL for the 2006-07 school year beginning in September (Parent Ex. C). Respondents also advised that they would seek tuition reimbursement, the provision of related services and special education transportation (id.).

By letter dated September 1, 2006, respondents requested an impartial hearing to immediately address the provision of special education transportation due to petitioner's failure to offer a FAPE to the student for the 2006-07 school year (Dist. Ex. 1). Respondents asserted that procedural and substantive violations invalidated the 2006-07 IEP, including petitioner's failure to timely mail the FNR, which effectively denied respondents the opportunity to visit the recommended program (id.). Respondents proposed the provision of transportation to MMCL for the 2006-07 school year as a resolution, and further noted in the letter that they would address their right to tuition reimbursement, the provision of related services "and the merits of the case. . . at a later date in the school year" (id.).

The impartial hearing commenced on October 12, 2006, and concluded after four days of testimony, on December 12, 2006 (Tr. pp. 1, 103, 194, 224). Prior to the presentation of witnesses, the impartial hearing officer discussed his view of the impact of the recent U.S. Supreme Court decision in Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005) on the impartial hearing process (Tr. pp. 5-6). The impartial hearing officer stated that in accord with Schaffer, the burden of persuasion rested on the moving party, which in this case was the parent (Tr. p. 6). He then went on to state that Schaffer did not "change the protocol that we have here of having the District go first and bear the burden of showing that it's appropriately provided or offered a Free Appropriate Public Education for the child" (id.). Petitioner, who was not represented by an attorney at the impartial hearing, proceeded to present its case first (id.).

Petitioner presented witnesses, including the school psychologist, the general education teacher, and the special education teacher who participated as members of the CSE that developed the student's 2006-07 IEP, as well as documentary evidence at the impartial hearing (Tr. pp. 57-99, 107-70, 227-45; Dist. Exs. 1-8). Petitioner's school psychologist testified that at the time of the CSE meeting, he had petitioner's psychoeducational evaluation report, speech-language evaluation report, and the social history available for review (Tr. pp. 62-63, 84-85). He further testified that he had read the private neuropsychological evaluation report (Tr. pp. 86-87). Petitioner's school psychologist testified that the CSE discussed the student's graphomotor skills at the August 11, 2006 meeting, but the CSE determined that student's low average abilities in "graphomotor skills, perceptual [sic] reasoning, potential motor skills and visual integration skills," were not "low enough" to warrant an OT evaluation (Tr. p. 93). The psychologist did not recall the parent requesting an OT evaluation at the CSE meeting (Tr. p. 97).

With respect to the CSE's recommended placement in a general education setting, the psychologist testified that "given the [student's] profile, we felt that at least we should try this to see because nobody knows for sure, and it was only fair for him to be given an opportunity in a

general ed class with resource room services or SETSS" (Tr. p. 79). The psychologist also testified that the CSE considered but rejected placement in a full-time special education program in a 12:1 special class because those students "were probably much further delayed" than the student in question (Tr. p. 78). On cross-examination, petitioner's school psychologist testified that the student's speech-language goals "may be considered to address some of his concentration and focusing skills" (Tr. pp. 89-90). He also testified that the student's IEP did not address the student's organizational skills needs (Tr. p. 90).

The general education teacher testified that in addition to petitioner's evaluations and the social history, she also had the private neuropsychological evaluation report available for her review at the CSE meeting (Tr. pp. 119, 128). In her testimony, she noted that all of the scores reported in the private neuropsychological evaluation, with the exception of the student's perceptual reasoning score, were "significantly lower" than those reported in petitioner's evaluations (Tr. pp. 129-30, 135; compare Parent Ex. H at pp. 22-29, with Dist. Ex. 4 at p. 6). In addition, the general education teacher testified that the student attained a processing speed score of 75 on the private evaluation and a processing speed score of 112 on petitioner's evaluation, which she described as significantly different (Tr. pp. 129-130).

The special education teacher testified that at the CSE meeting she had the student's social history, psychoeducational report, and speech-language evaluation report available for review (Tr. pp. 232-33). The CSE recommended a general education setting with SETSS, speech-language therapy and counseling because "[the student] never had any of these other services before to see whether or not they could help him improve. And I just--we just actually, the team, felt that this would be a better environment for him to be exposed to the General Education students and the General Education curriculum" (Tr. pp. 239-40). She also testified that she "looked through" the private neuropsychological evaluation report (Tr. p. 241).

Petitioner also presented the principal of P.S. 48, the student's proposed placement, as a witness (Tr. pp. 171-91). She testified that the student's mother visited P.S. 48 in spring 2006 and asked to visit an "SETSS program" (Tr. pp. 172, 175). The student's mother indicated that her son was in private school but required some "SETSS services, resource room services" (Tr. p. 175). The student's mother toured P.S. 48 with an "IEP teacher" at the school, but was unable to observe an actual class because the students were not "in session" at that time (id.). The student's mother met with the "school assessment team," who recommended enrolling her son in the fall because it was already so late in the school year (Tr. pp. 175-76). The principal also testified that the student's mother visited P.S. 48 for a second time in the November/December 2006 timeframe to observe the SETSS program (Tr. p. 176). The principal met with the student's mother to discuss resources available at P.S. 48 and the "push-in" service model used in the fifth grade classes for SETSS services (Tr. p. 177). She estimated that the visit lasted 1 to 1 1/2 hours (id.).

In addition to cross-examining petitioner's witnesses, respondents presented testimonial and documentary evidence (Tr. pp. 21-52, 246-77, 277-90, 290-330, 331-54; Parent Exs. A-K). In addition to acknowledging the visit to P.S. 48 in spring 2006 prior to referring her son to petitioner's CSE for an evaluation, the student's mother testified that she visited MMCL and applied for admission during spring 2006 (Tr. pp. 25, 33, 332-33, 345, 350). The student's mother also testified that she determined P.S. 48 was not an appropriate placement for her son after she visited in spring 2006 (Tr. p. 345). Respondents submitted a signed enrollment contract into

evidence, dated May 20, 2006, which documented the student's acceptance at MMCL for the 2006-07 school year (Tr. pp. 261, 343; Parent Ex. K).

In his decision, the impartial hearing officer determined that petitioner failed to offer the student a FAPE for the 2006-07 school year, respondents met their burden to establish the appropriateness of the services obtained for their son at MMCL, and equitable considerations supported respondents' claim for tuition reimbursement (IHO Decision at pp. 6-14). In addition, the impartial hearing officer found respondents' son was entitled to transportation services to and from MMCL (*id.* at pp. 14-15). Based upon these findings, the impartial hearing officer directed petitioner to reimburse respondents for the costs of their son's tuition at MMCL for the 2006-07 school year, to provide transportation services, and to reconvene a CSE meeting to consider all available evaluations of the student and any related services needed to produce an appropriate IEP (*id.* at p. 15).

The impartial hearing officer invalidated the 2006-07 IEP because petitioner failed to conduct an OT evaluation of the student and failed to include counseling goals in the student's IEP (*id.* at pp. 8-11).

On appeal, petitioner contends that the impartial hearing officer improperly placed the burden to establish that petitioner offered the student a FAPE for the 2006-07 school year on petitioner, and that therefore he applied an incorrect legal standard to the evidence. Petitioner argues that the impartial hearing officer erred when he determined that petitioner failed to offer the student a FAPE for the 2006-07 school year. In addition, petitioner asserts that the impartial hearing officer erred when he found that respondents met their burden to establish the appropriateness of the educational services obtained for their son at MMCL and that equitable considerations supported respondents' claim for tuition reimbursement. Petitioner also challenges the impartial hearing officer's finding that petitioner provide transportation services for the student.

Respondents contend that the impartial hearing officer's decision should be upheld in its entirety and that petitioner's appeal should be dismissed.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast., 126 S. Ct. 528, 531 [2005]; Bd. of Educ Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17;³ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22). 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 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist.,

³ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

142 F.3d 119, 132 [2d Cir. 1998]). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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 parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "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 developed a proper IEP" (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148[c]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the IDEA does not, itself, articulate any specific level of educational benefits that must be provided through an IEP (Rowley, 458 U.S. at 189; Walczak, 142 F.3d at 130), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE

standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at *15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of a Child with a Disability, Appeal No. 07-008, Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. 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).

When a child suspected of having a disability is referred to a CSE, the CSE must ensure that an individual evaluation of the referred child is performed (Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047); Application of a Child Suspected of Having a Disability, Appeal No. 04-063; Application of a Child Suspected of Having a Disability, Appeal No. 04-059). A "full and individual initial evaluation" must be conducted (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]) and must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the child and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v]; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063). The child must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; see 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation the IEP team must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; see 8 NYCRR 200.4[b][5][i]).

Initially, I will address petitioner's contention that the impartial hearing officer viewed the evidence through an incorrect legal standard because he improperly placed on petitioner, in direct conflict with the Schaffer decision, the burden to demonstrate that petitioner offered the student a

FAPE for the 2006-07 school year. At the beginning of the impartial hearing, the impartial hearing officer stated that although the Schaffer decision placed the burden of persuasion on respondents as the "moving party," petitioner would present its case first "and bear the burden of showing that it's appropriately provided or offered a Free Appropriate Public Education for the child" (Tr. p. 6). Thus, the record indicates that the impartial hearing officer incorrectly placed the burden of persuasion to establish the first criterion of the Burlington/Carter tuition reimbursement analysis on petitioner.

After an independent review of the record, I find that regardless of the impartial hearing officer's error in assigning the burden of persuasion to establish the first criterion of the Burlington/Carter analysis on petitioner, the evidence in the record supports the impartial hearing officer's conclusion that petitioner failed to offer the student a FAPE for the 2006-07 school year. For reasons explained more fully below, petitioner's CSE relied upon insufficient evaluative information and did not properly and sufficiently identify and address the student's needs. In particular, the CSE failed to adequately consider the results of respondents' private evaluation, failed to conduct an OT evaluation, and failed to develop and incorporate counseling goals into the student's IEP. These failures resulted in an IEP that did not sufficiently identify and address the student's documented needs in the areas of attention, working memory, and processing skills, all of which compromised the student's academic, behavioral, social, and emotional functioning. Without sufficient evaluative information, the CSE developed an inadequate IEP, thereby denying the student a FAPE for the 2006-07 school year.

As part of the student's initial evaluation, a CSE shall review, if appropriate, existing evaluative information about the student, including evaluations and information provided by the student's parents (see 20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; see 8 NYCRR 200.4[b][5][i]). Prior to petitioner's evaluations in July and August 2006, the student underwent an extremely thorough neuropsychological evaluation in June 2006 (Parent Ex. H at pp. 1-29). Although three members of petitioner's CSE testified that they individually reviewed the private evaluation report, the record contains little, if any, evidence that petitioner's CSE discussed the private evaluation report at the CSE meeting. The record does demonstrate, however, that petitioner's CSE included only the results of petitioner's evaluations of the student in the 2006-07 IEP and developed goals and objectives based upon these evaluation results without adequately considering or discussing the "significantly different" results obtained by the private neuropsychological evaluation (Dist. Ex. 2 at pp. 3-6, 8-11, 14-16; see also Dist. Exs. 4; 5). While I do not make a finding as to whether one evaluation more accurately describes the student, the record contains undisputed evidence that petitioner's evaluation portrayed the student's academic, behavioral, social, and emotional functioning at higher and "significantly different" levels than revealed by respondents' private evaluation (Tr. pp. 129-30, 135; compare Dist. Exs. 4 at pp. 1-6, and Dist. Ex. 5 at pp. 1-4, with Parent Ex. H at pp. 1-29).

In addition, a child must be assessed in all areas of suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (see 20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). Petitioner failed to comply with this requirement when it failed to conduct an OT evaluation to assess an area of suspected disability given the student's documented problems with "handwriting, graphomotor coordination, and impaired fine-motor speed" (Parent Ex. H at p. 21). Similarly, the results of the student's speech-language

evaluation performed by petitioner, which identified an "auditory processing delay that appears to affect [the student's] ability to process information in the area of processing and interpreting orally presented information," indicate another area of suspected disability that petitioner failed to fully evaluate (Dist. Ex. 5 at p. 4). Although petitioner noted that the IEP addressed the student's deficits in attention and concentration, processing speed, and auditory/verbal working memory through speech-language therapy and strategies such as repetition, visual association, drawing connections to topics presented, and chunking, I find the recommendations do not adequately or sufficiently meet the student's documented needs (District Ex. 2 at p. 14). In addition, petitioner failed to identify the student's needs in attention and organization, as well as the student's diagnosis of ADHD, on the IEP. Finally, the IEP does not include any program modifications, accommodations or supplementary aids or services to address the student's attending, processing or memory deficits in the classroom.

With respect to the student's counseling needs, the CSE did not include any goals for counseling in the IEP. The private evaluation in June 2006 reported that the student performed in the clinical range for anxiety, depression, and social difficulties on behavior scales completed by respondents (Parent Ex. H at p. 17). Based on rating scales and the results of projective testing, respondents' neuropsychologist identified several social and emotional factors affecting the student, including anxiety, a sense of vulnerability, poor self-esteem, and limited self-confidence (*id.*). The neuropsychologist diagnosed the student with a separation anxiety disorder and noted that high levels of anxiety and self-consciousness led the student to engage in self-defeating, avoidant behavior (*id.*). He opined that the student's pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation placed the student at risk for developing an avoidant personality disorder in the future (*id.*).

Petitioner's own psychologist reported that limited personality testing suggested that the student had diminished self-esteem with feelings of inner tension and anxiety (Dist. Ex. 4 at p. 4). Because emotional factors were identified as a significant contributory factor of the student's academic difficulties, the lack of counseling goals on the student's IEP further contributed to the formulation of an inappropriate 2006-07 IEP and a denial of FAPE for the 2006-07 school year.

Having determined that the first criterion of the Burlington analysis supports respondents' claim for tuition reimbursement, I now turn to the second criterion of the Burlington analysis to consider whether respondents satisfied their burden of proving that MMCL was appropriate to meet their son's special education needs for the 2006-07 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). In order to meet that burden, the parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; *see also* Burlington, 471 U.S. at 370), i.e., that "the private education services obtained by the parents were appropriate to the child's needs" (Walczak, 142 F.3d at 129; *see also* Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192; Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 04-108; Application of a Child with a Disability, Appeal No. 01-010). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000], *cert. denied*, 532 U.S. 942 [2001]).

A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Based upon the evidence contained in the record, I find that respondents failed to meet their burden to establish that the educational services obtained for their son at MMCL were appropriate. Although the record provides general information about MMCL, the record contains insufficient information regarding the educational services provided to respondents' son or how the educational services at MMCL meet the student's special education needs.

According to the record, MMCL is a private school for children with learning disabilities; MMCL operates lower elementary, elementary, and upper elementary school divisions (Tr. pp. 249, 275, 309-10). Generally, the classrooms consist of 12 students and two teachers (Tr. p. 249). The teachers utilize multi-sensory teaching methods at all times (Tr. p. 294). MMCL offers related services of speech-language therapy and OT, but does not provide counseling services (Tr. pp. 249-50). Instead, the school is described as a "total therapeutic milieu" and employs three psychologists to work with teachers and with students in crisis, and to teach conflict resolution skills (Tr. pp. 250, 289).

For the 2006-07 school year, the student attended a 12:2 classroom with six boys and six girls who were all approximately ten years old and functioning academically between the second and sixth grade levels (Tr. pp. 294, 324). The head teacher testified that she instructed the student in social studies and her co-teacher instructed the student in English language arts (ELA) (Tr. p. 313). In language arts, the students learn about the parts of speech and how to construct sentences (Tr. p. 295). Neither the head teacher nor the co-teacher instructed the student in reading, math, science, music, gym, or art (Tr. pp. 312-13).

The record indicates that for math and reading, the students receive instruction in small groups of four or six students with one teacher (Tr. p. 295). Teachers at MMCL use several reading curricula, including Preventing Academic Failure (PAF) and the Wilson Reading System (Tr. pp. 310-11). The reading groups combine both elementary and upper elementary divisions (Tr. pp. 311-12). Math curricula include "Stern Structural Math" and Saxon math programs (Tr. p. 311).

The student's head teacher, who was not his reading teacher, testified that the student's reading group currently worked at approximately a second grade level (Tr. pp. 301, 313). She estimated the student's writing skills to be at approximately a second grade level and his math skills at a high second grade level (Tr. p. 301). The head teacher testified that the student's reading group focused on the Orton-Gillingham methodology and comprehension (Tr. pp. 315, 317, 325).

With regard to the student's anxiety, the head of MMCL testified in general terms about how MMCL staff spent time talking to students about anxiety and the causes of anxiety (Tr. p. 251). To help students deal with anxiety, staff employed relaxation and "Brain Gym" exercises (id.). In an effort to improve students' self-esteem, staff spoke to students about strengths and weaknesses and what it meant to have a learning disability (Tr. p. 250). The student's head teacher opined that because there were two teachers in the classroom, MMCL was able to address students'

anxiety issues by providing a student with 1:1 attention upon arrival and helping the student transition into the day (Tr. p. 297). She noted that if a student became too uncomfortable in the classroom he could go to the nurse's office to lie down and rest (id.).

According to the record, MMCL's staff employed a variety of strategies to address the student's attending and processing difficulties. The head of MMCL testified that two teachers per classroom allowed one teacher to teach while the second teacher worked with other children (Tr. p. 251). MMCL used small group instruction and room dividers to eliminate distractions (id.). The head teacher reported that within her classroom, the student sat on a special cushion to help him remain grounded and focused, was allowed a fidget item, and was also allowed to chew gum because he had a tendency to chew on his hair or shirt collar (Tr. p. 300). Both of the student's teachers used FM units (id.). If the student had difficulty remaining focused, the teachers allowed him to leave the classroom and to engage in a sensory activity (Tr. p. 317). The head teacher reported using additional strategies, such as verbal and physical prompting, to regain the student's attention (Tr. p. 320).

In this case, the record does not provide information regarding the frequency or duration of the student's math and reading instruction, nor does it identify the skills targeted, materials used, activities presented, or instruction provided by MMCL. In addition, although the student was identified as having speech-language needs, the record does not indicate whether he received speech-language therapy at MMCL or if his speech-language needs were otherwise being addressed. At MMCL, the student underwent an OT evaluation and received OT two times per week (Tr. p. 300). The record does not describe the OT the student received or how the therapy addressed the student's identified needs. In addition, although MMCL is described as a "therapeutic milieu," the record contains insufficient information to determine whether this "therapeutic milieu" meets and addresses the student's academic, social and emotional functioning, or teaches the student cognitive-behavioral strategies to cope with his anxiety and anxiety-producing situations as recommended by the private evaluator (Parent Ex. H at p. 21). Based upon the record, MMCL does not provide counseling or speech-language therapy to the student, and although it provides OT, there is insufficient information about the therapy provided or how it meets the student's special education needs. I find, therefore, that respondents did not meet their burden to establish the appropriateness of the educational services at MMCL and are not entitled to tuition reimbursement for those services. In light of this finding, the impartial hearing officer's order to provide transportation services to MMCL for the 2006-07 school year also is unwarranted.

Having determined that respondents did not meet their burden to establish the second criterion of the Burlington/Carter analysis for tuition reimbursement, I need not reach the issue of whether equitable considerations support respondents' claim for tuition reimbursement, the third criterion of the Burlington/Carter analysis, and the necessary inquiry is at an end (Application of a Child with a Disability, Appeal No. 07-015; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

I have considered petitioner's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it ordered petitioner to reimburse respondents for the costs of their son's tuition at MMCL for the 2006-07 school year and to provide transportation services to MMCL for the 2006-07 school year.

Dated: Albany, New York
March 27, 2007

PAUL F. KELLY
STATE REVIEW OFFICER