The University of the State of New York

The State Education Department
State Review Officer

No. 08-064

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Neal Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request that respondent (the district) reimburse her for her son's tuition costs at the Mary McDowell Learning Center (MMLC) for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing in May 2008, the student was attending first grade in a special class at MMLC with approximately nine other students (Tr. p. 162). MMLC has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The evidence in the hearing record indicates that during the 2005-06 and 2006-07 school years, the student attended a district school in a collaborative team teaching (CTT) setting with two teachers, a paraprofessional and approximately 24 students, seven of whom were receiving special education services (Dist. Exs. 3 at p. 1; 4 at p. 2).[1] During the 2006-07 school year, the

[1] "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

student repeated kindergarten (Dist. Exs. 2 at pp. 1-2; 4 at p. 2). During the beginning of the 2006-07 school year, at the request of the parent, the student was reevaluated due to what the parent believed was an apparent lack of progress and the parent's desire to "fine tune" the student's services (Dist. Ex. 2 at p. 1).

In November 2006, the student's social history was updated by the district's social worker (Dist. Ex. 2). The social worker reported that the student had experienced multiple problems with physical development since birth, which may have influenced his "behavioral and academic progress" (id. at p. 2). According to the social worker, the student's teachers reported that he required "remediation in all areas" (id. at p. 1). According to the social history report, the student was not reading on grade level, but was beginning to recognize letters and sounds (id.). The social worker indicated that the student's math skills appeared to be better than his English language arts (ELA) skills (id.).

A private neuropsychological evaluation of the student was conducted over the course of five days in December 2006 (Dist. Ex. 4).[2] In an evaluation report dated January 5, 2007, the evaluator indicated that the primary areas of concern of the student's teachers were the student's high distractibility and poor attention (id. at p. 2). The teachers reported that the student loves "choice time," but does not enjoy academic activities (id.). The student was cooperative during testing; however, his attention and concentration were highly variable and he initiated tangential conversations during testing (id.). The evaluator observed the student in his classroom during a reading and discussion circle and an independent reading activity (id. at p. 3). Administration of the Wechsler Preschool and Primary Scale of Intelligence – third Edition (WPPSI-III) yielded a verbal IQ score of 98, a performance IQ score of 90 and a full-scale IQ score of 90, which placed the student's cognitive functioning in the average range (id.at pp. 4, 9). The student's processing speed IQ score was 75 (id. at p. 9). Upon analyzing several subtest scores, the evaluator noted that the student's performance in the verbal domain fell within the average range of functioning (id. at p. 4). Verbal deductive reasoning, cognitive flexibility and verbal concept formation skills fell within the high average range of functioning and were relative areas of verbal strength for the student (id.). His general fund of knowledge, verbal conceptualization and understanding of social norms and conventions were in the average range, while his vocabulary skills were an area of relative weakness (id.). The evaluator opined that the student's weakness in vocabulary skills was attributable to the unstructured nature of the testing, high expressive language demand and the student's relative weakness in expressive language skills (id. at pp. 4, 9).

Administration of the Woodcock-Johnson Tests of Achievement - Third Edition (WJ-III ACH) yielded standard scores of 117 in oral language and 111 in pre-academic skills (Dist. Ex. 4 at p. 10). The student's performance during academic testing placed him primarily at grade level expectation, with his short-term memory and receptive language skills reported as above grade level expectancy (id. at pp. 6, 10). However, the student's reading was below the kindergarten grade level and the evaluator attributed this to the student's demonstrated delays in phonological processing (id.).

Subtests of the Developmental Neuropsychological Assessment (NEPSY), the Illinois Test of Psycholinguistic Abilities (ITPA), the Test of Auditory Processing Skills-Third Edition (TAPS-3) and the Wide Range Assessment of Memory and Learning - Second Edition (WRAML-2) were

[2] Although the evaluation report is labeled as a "psychological evaluation," the evaluator administered several neuropsychological tests as part of her evaluation of the student (Dist. Ex. 4 at pp. 1, 2, 4-5, 9-10).

administered during the neuropsychological evaluation to further assess the student's verbal skills, visually-based reasoning, motor functioning, executive functioning and attention, and short term memory (Dist. Ex. 4 at pp. 9-10). According to the evaluator, the student's visual logic and analysis and his synthesis of abstract visual stimuli and short term memory were in the average range (id. at pp. 5-6). The student's abstract visual perception, reasoning and categorical reasoning abilities, visual rote learning, fine motor functioning, and attention were areas of weakness that fell in the below average range or below the level of expectation for his age (id.). His visual processing skills were an area of relative strength (id. at p. 5). The student's teachers provided responses to a test identified in the hearing record as the "Connors," indicating that he fell within the clinical range for cognitive problems and inattention, and needed consistent redirection and support to remain on task; however, the student's behavior was not disruptive to his class (id. at pp. 5-6).

The evaluator concluded that the student's overall cognitive performance was in the average range (Dist. Ex. 4 at p. 7). The evaluator summarized the student's areas of strength and weaknesses, noting the student's cooperation during testing and relatively low distractibility in the 1:1 testing environment (id.). Academically, the evaluator indicated that the only skill that fell below the kindergarten grade level was the student's reading, due to his demonstrated delays in phonological processing (id.). The evaluator recommended that the student be placed in a small, highly-structured classroom setting where his progress could be closely monitored and he would receive individualized attention (id. at p. 8). According to the evaluator, the parent's decision to provide tutoring in reading was supported by the findings in the evaluation (id.). The evaluator also recommended that the student receive occupational therapy (OT) and speech-language therapy (id.).

On March 22, 2007, a district social worker conducted a classroom observation of the student (Dist. Ex. 3). While engaged in "choice time," the student played alone with Legos and did not verbally interact with the other students, although the social worker noted that some of the other students were interacting nearby while engaged in similar play activities (id.). At the conclusion of the activity, the student put the Legos away and returned to wait for instructions (id.).

In an undated letter to the district's Committee on Special Education (CSE), the evaluator who conducted the neuropsychological evaluation indicated that the student also required a "nurturing school environment in which undue distractibility, noisy hallways, frequent transitions, and large groups of children are absent" (Parent Ex. D).[3] The evaluator reported that the student required a small, full-time special education setting, opining that the student's weaknesses have "significantly interfered with his ability to perform and learn within an integrated classroom" (id.).

The CSE convened on March 30, 2007 and April 13, 2007 for a requested review (Dist. Ex. 1 at p. 3; see Tr. p. 7). CSE meeting attendees at the March 30, 2007 CSE meeting included both of the student's parents, a district representative who was also the school psychologist, a special education teacher, an OT provider, the student's regular education teacher, and an

[3] The hearing record indicates that this letter was provided to the parent on March 22, 2007 (Tr. p. 113).

additional unidentified teacher (Dist. Ex. 1 at p. 3).[4] In attendance at the April 13, 2007 CSE meeting were the student's mother, the district representative who was also the school psychologist, a special education teacher and the student's regular education teacher (id. at p. 2). The resultant April 2007 individualized education program (IEP) noted that the student required ongoing teacher prompts and support to stay on task, that he could work independently for short periods of time, that his frustration while attempting to complete what was expected of him had become more apparent, and that he sometimes appeared "sullen" (id. at p. 7). According to the April 2007 IEP, the student called out loudly for help and often asked to go to the bathroom, which "appear[ed] to be attention-seeking" behavior (id.). The April 2007 IEP noted that the student's behavior seriously interfered with instruction, requiring additional adult support, and included a "behavior intervention plan" developed for the student (id. at pp. 7, 20). At the March 2007 meeting, the CSE discussed placing the student in either a 12:1 classroom or a 12:1+1 special class (Tr. pp. 8, 132); however, after the parent had the opportunity to consult with the private evaluator who conducted the neuropsychological evaluation, the April 2007 CSE ultimately recommended that the student's placement be changed from a CTT classroom to a 12:1+1 special class in a community school (Tr. p. 132; Dist. Ex. 1 at pp. 1-2). The April 2007 CSE also recommended that the student receive OT on a 1:1 basis twice per week for 30 minutes, and speech-language therapy twice per week for 30 minutes on a 1:1 basis and once per week in a group for 30 minutes in a 3:1 ratio (Dist. Ex. 1 at p. 19).

The district sent the parent a Final Notice of Recommendation (FNR) dated July 6, 2007 identifying the recommended district school and the special education services to be provided to the student (Dist. Ex. 6). In a letter to the district dated July 17, 2007, the parent indicated that the recommended school was not in session and requested a class profile and "any other information" about the program (Parent Ex. A at p. 2). In a letter to the district dated August 20, 2007, the parent indicated that she had not received the information she had requested in her July 17, 2007 letter, and that she planned to send the student to MMLC for the beginning of the 2007-08 school year and would visit the district's school when it opened (Parent Ex. B at p. 2). In a letter to the district dated September 17, 2007, the parent informed the district that she had visited the district's recommended school on September 7, 2007 (Parent Ex. C). According to the parent, she spoke with the parent-teacher coordinator and one of the teachers at the recommended school and was informed that the only class available for the student was a CTT class that did not follow a modified curriculum (id.). The parent indicated that the CTT class was an inappropriate placement for the student and that the student would attend MMLC for the 2007-08 school year (id.).

In a due process complaint notice dated October 16, 2007, the parent asserted that the April 2007 IEP "was both procedurally and substantively invalid" (Answer Ex. 1).[5] The parent alleged that the district failed to respond to the parent's requests for information made during summer 2007 and that after the recommended school opened, the parent was advised that the school did not have the self-contained 12:1+1 placement as recommended on the student's April 2007 IEP (id.). As

[4] The additional unidentified teacher did not indicate her title on the March 30, 2007 CSE sign-in sheet; however, a November 8, 2006 teacher progress report indicates this same individual was a "Teacher" at a district school (Dist. Ex. 5). Although the district infers in its arguments raised on appeal that she was a special education teacher of the student (see Dist. Mem. of Law at p. 4), her credentials or areas of certification are not contained in the hearing record.

[5] I note that the parent's due process complaint notice was not made part of the hearing record, but was attached as additional evidence to the district's answer (Answer Ex. 1). I remind the parties and the impartial hearing officer to include the due process complaint notice as part of the hearing record.

relief, the parent sought reimbursement for the costs of the student's tuition at MMLC for the 2007-08 school year (id.).

An impartial hearing was conducted on May 14, 2008.[6] In a decision dated May 29, 2008, the impartial hearing officer noted that there appeared to have been miscommunications between the district and the parent regarding the nature of the classroom that the parent observed in September 2007, but that the testimony of the parent and the teacher of the recommended classroom were consistent with the 12:1+1 special class recommended in the student's April 2007 IEP, and that the district's "mis-description" of the program did not render the placement inappropriate for the student (IHO Decision at p. 3).[7] The impartial hearing officer determined that the hearing record did not demonstrate that the placement offered by the district was inappropriate, and therefore he denied the parent's request for tuition reimbursement (id. at p. 4).

The parent appeals, contending that the impartial hearing officer ignored the procedural deficiencies raised by the parent and improperly placed the burden of proof that the student's IEP was substantively invalid upon the parent. The parent argues that the student was denied a free appropriate public education (FAPE) because a special education teacher of the student did not attend the March 2007 CSE meeting and that the March 2007 CSE did not consider or review sufficient evaluative data. Among other things, the parent asserts that the CSE improperly failed to contact the evaluator who conducted the neuropsychological and failed to adequately discuss 12:1, 12:1+1 and non-public school placement options with the parent. According to the parent, the April 2007 IEP arbitrarily changed the student's placement from a 12:1 to a 12:1+1 and failed to update the goals and objectives in the IEP to reflect this change in placement. The parent contends that the goals and objectives contained in the student's April 2007 IEP were not appropriate because there were no math goals and that many of the annual goals indicating that the student would achieve "at the kindergarten level" should have been modified to the first grade level. With regard to the behavior intervention plan developed for the student, the parent argues that there is no evidence that a functional behavioral assessment (FBA) was conducted, thus rendering the behavior intervention plan premature and incomplete. The parent also asserts that the school building in which the district recommended implementing the student's placement had approximately 250 students, which was too large to meet the student's needs because it did not

[6] I note that the hearing record contains no explanation whatsoever for the delay in conducting the impartial hearing. While the parent's due process complaint notice is dated October 16, 2007, it appears that the impartial hearing officer did not convene the impartial hearing for nearly seven months, noting only that it had been "calendared for a long time" (Tr. p. 4). I caution the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

[7] While the impartial hearing officer's decision is reasoned and sustainable, it is devoid of any specific cites to transcript pages, exhibit numbers, any statutory or regulatory law, and contains only one passing reference to case law to support his conclusions. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision. I note also that the failure to cite with specificity facts in the hearing record and law on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists to appeal. The impartial hearing officer is reminded to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that reference applicable law in support of his conclusions.

comport with recommendations for a small nurturing environment without undue distractibility, noisy hallways or frequent transitions.

With regard to MMLC, the parent contends that the placement was appropriate for the student because, among other things, his class consisted of ten students and two teachers and there were only 34 students attending school in the building. The parent also asserts that the student progressed to a mid/late first grade level in reading and a late kindergarten level in math. The parent also notes that the student received speech-language therapy in a 2:1 ratio twice per week; OT once per week in a 2:1 ratio, and combined push-in speech-language therapy in his class as a group. The parent argues that MMLC worked on minimizing the student's avoidance behaviors. In addition, the parent contends that equitable considerations support an award of tuition reimbursement, indicating that the district's school personnel had erroneously described to the parent the recommended classroom as a CTT classroom.

In its answer, the district denies many of the parent's allegations and urges affirmance of the impartial hearing officer's determination that the district offered the student a FAPE. The district also contends that MMLC was not appropriate for the student because it was not the least restrictive environment (LRE) for the student and the student's teachers were not State certified. According to the district, the equities do not support the parent's request for tuition reimbursement.

A 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[8] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. 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 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 (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]; O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a

[8] The term "free appropriate public education" means special education and related services that--

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

(20 U.S.C. § 1401[9]).

deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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). A student's educational program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that 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 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 child 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-

64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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 the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115 citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition

reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning first to the parent's claim that the impartial hearing officer's decision inappropriately failed to address alleged procedural violations, including the composition of the March 2007 CSE, the failure of the CSE to adequately discuss placement options with the parent, and the inadequate evaluation of the student, I find that these issues were raised during the impartial hearing and the school district did not object to the raising of these issues either at the impartial hearing or on appeal, therefore, I will address them on appeal. First, I will determine whether the district committed any procedural violations and then whether any of the alleged procedural violations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek, 471 F. Supp. 2d at 419).

With regard to parent's argument that the March 2007 CSE was improperly composed due to the lack of a special education teacher, the hearing record reflects that a certified special education teacher attended both the March and April 2007 CSE meetings, although I note that this individual was an "IEP coordinator" who did not provide instruction to students (Tr. p. 17; Dist. Ex. 1 at pp. 2-3). Therefore, the district did not fully comply with the requirements of the IDEA because the special education teacher in attendance at the March and April 2007 CSE meetings was not a special education teacher or provider of the student, such as the student's previous CTT special education teacher or the special education teacher from a proposed classroom (see 20 U.S.C. § 1414 [d][1][B][iii]; 34 C.F.R § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]).

Turning to the parent's procedural claims that the March 2007 CSE did not discuss with the parent the appropriateness of the 12:1 or 12:1+1 placement options and that the CSE arbitrarily changed the student's placement at the April 2007 CSE meeting from a 12:1 to a 12:1+1 program, I note that the hearing record indicates that the change was not arbitrary on the part of the district and occurred at the parent's request after she had consulted with the evaluator who conducted the neuropsychological (Tr. pp. 120, 132). Furthermore, the hearing record demonstrates that a 12:1 classroom was never formally recommended on the student's IEP (Tr. p. 22). Under the circumstances of this case, I find that the CSE did not improperly fail to discuss placement options with the parent and did not arbitrarily change the program recommendation to 12:1+1 on the April 2007 IEP.

With regard to the parent's argument that the CSE did not utilize sufficient evaluative data, I note that a neuropsychological evaluation, classroom observation and social history update had been conducted in order to assess the student's current needs, and were considered by the CSE in addition to a teacher progress report of the student (Tr. p. 12; Dist. Exs. 2-5). The present levels of performance in the student's April 2007 IEP are reflective of the results of the WJ-III ACH testing conducted in December 2006 and the observations of the student's teachers (Dist. Ex. 1 at pp. 4-5). The neuropsychological evaluation conducted in December 2006 noted that the student's cognitive functioning was in the average range, but was highly variable and that he exhibited weakness in expressive language skills and attention (Dist. Ex. 4 at p. 7). The evaluation report also noted that the student's overall performance in the academic domain was at grade level expectancy, with the exception of his reading skills (id.). Two classroom observations of the

student were conducted and a teacher progress report was considered (Tr. p. 12; Dist. Exs. 3; 4 at p. 3; 5). The hearing record does not otherwise contain evidence that persuades me that the CSE had insufficient evaluative data regarding the student in order to develop an IEP.

A procedural violation results in a denial of a FAPE to a student, only if one or more of the violations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In this case, the CSE was convened two times in response to the concerns identified by the parent, and the parent did not indicate disagreement with the recommendations made at either CSE meeting or with the composition of the two CSEs (Tr. pp. 6, 13-14, 21-22, 127, 132; Dist. Exs. 1 at pp. 1-3; 2; 3; 4). Although the district did not include a special education teacher of the student at the March or April 2007 CSE meetings, I note that there is no information in the hearing record that suggests that the "IEP coordinator," who attended and was certified as a special education teacher, in any way lacked knowledge regarding the special education program options for the student (Tr. p. 17). The parties' collaborative efforts at the CSE meetings resulted in significant modification of the student's special education program to provide him additional structure and individualized attention. There is insufficient information in the hearing record to conclude that the failure to include a special education teacher at the CSE meetings impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or deprived the student of educational benefits (Dist. Exs. 1 at pp. 1-8, 18-19; 6; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Accordingly I find that the procedural violation did not substantively result in denying the student a FAPE.

With regard to the parent's contentions that the student's April 2007 IEP did not contain math goals and that his reading goals were inappropriately kept "at the kindergarten level," the student's April 2007 IEP notes that he met all of his previous IEP goals in math for the school year (Dist. Ex. 1 at p. 5). The neuropsychological report noted that the student's counting skills were on target, and although the student did not complete certain subtests during the evaluation due to an inability to perform calculations, the evaluator testified that he could form numerals (Tr. pp. 117-18; Dist. Ex. 4 at p. 6). The evaluator did not describe any math related needs in her evaluation report, instead indicating that the student's only area of academic need was reading, due to his phonological processing delays (Tr. pp. 117-18; Dist. Ex. 4 at p. 7). This conclusion was consistent with the reports of the student's teachers, who indicated that his math skills were better than his ELA skills (Dist. Exs. 2 at p. 1; 5). Based on this evidence in the hearing record, I find that the CSE, at the time it met in March and April 2007, did not commit an error which rose to the level of a denial of a FAPE by not formulating specific goals for the academic area of math.

The four reading goals contained in the April 2007 IEP indicated that the student would achieve the goals "at a kindergarten level" (Dist. Ex. 1 at pp. 11-12). The district psychologist testified that student still "needed a lot of support" and was just beginning to recognize letters and sounds (Tr. p. 32). The evaluator who conducted the neuropsychological testing of the student reported weaknesses in the student's expressive language skills, knowledge of semantics, understanding of spoken analogies, and delayed reading skills, and she noted that his grasp of phonological processing was just emerging (Dist. Ex. 4 at pp. 4-5). In particular she noted that the student's reading skills still remained below the kindergarten level (id. at p. 6). In light of this evidence, I am not persuaded that the student's reading goals were inappropriate, given the undisputed reports of his delays in this area.

With respect to the parent's claim that the behavior intervention plan was deficient because it was not supported by an FBA, the behavior intervention plan noted that the student was "unable to sustain attention during reading, writing, small group [and] large group times" (Dist. Ex. 1 at p. 20). The plan stated that the expected changes in behavior were that the student should be able to remain on task in five-minute increments, and that these increments would increase as his attention to task increased (id.). A positive behavioral intervention strategy in the form of a sticker system would have been employed, in which the student would have been permitted to choose first at "choice time" if he received three stickers (id.). The student would also have received behavioral supports in the form of reminders from teachers and clear expectations of what would be required of the student during academic learning times (id.). I note that the behavior intervention plan is reflective of the neuropsychological evaluation report, which indicated that a primary area of concern was the student's high distractibility and poor attention (Dist. Ex. 4 at p. 2). The evaluation report indicated that during the evaluator's classroom observation of the student, the student did not participate in group discussion and did not appear to be following the dialogue, exhibited difficulty following through with tasks and required support and prompting (id. at p. 3). The evaluator also noted that the student could redirect himself independently during independent reading time (id.). The student interacted minimally with his peers during the observation; however, his teachers attributed this to a recent illness (id.). During testing, the evaluator noted that the student worked "exceptionally hard on a number of tests . . . yet on a few others his fatigue and/or distraction caused him to terminate prematurely" (id. at p. 2). The evaluator also noted that the student's pace was slow, and although he attempted to prematurely terminate tasks, he was able to persist with mild encouragement (id. at p. 5). The evaluator indicated that "on an individual level, he require[d] consistent redirection and support to keep him on task" (id. at p. 6). I also note that the evaluator recommended that additional evaluation was recommended if the student's distractibility and poor attention persisted after the student's educational setting was changed (id. at p. 8). In light of the evidence above, I find that the behavior intervention plan that was developed by the CSE to address the student's difficulty sustaining attention during reading, writing, and group activities was consistent with the evaluator's classroom observation and his assessment of the student's performance within the 1:1 setting and "relatively low distractibility" of the testing environment. The positive behavioral intervention services and supports were consistent with the requirements of 34 C.F.R. § 300. 324(a)(2)(i) and subject to change as needed in the student's proposed new environment (see also 8 NYCRR 200.4[d][3]). The hearing record does not support the parent's contention that the district's failure to conduct an FBA in the environment in which the student would not be taught for the 2007-08 school year rose to the level of denying the student a FAPE where the IEP addressed behavioral needs (see 8 NYCRR 200.22[a], 200.1[r]; see also Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027 [S.D.N.Y. July 3, 2008]; see also Cabouli v. Chappaqua Cent. School Dist., 202 Fed. Appx. 519, 522 [2d Cir. 2006]). Consequently, the parent's contention that the student was denied a FAPE because the district's behavior intervention plan was "premature and incomplete" without an FBA lacks merit.

Turning next to the parent's challenge that the recommended district setting was too large, the hearing record reflects that the student would have been placed in a classroom with 12 students, a teacher, and a paraprofessional (Tr. p. 46; Dist. Ex. 1 at p. 1). The evaluator who preformed the neuropsychological testing testified that the recommended 12:1+1 placement was appropriate for the student, but that she was concerned about the school building (Tr. p. 120). The special education teacher of the recommended 12:1+1 classroom indicated that during the 2007-08 school year the school had approximately 250 students, 30 percent of whom were eligible for special education programs and services (Tr. pp. 49, 60). According to the teacher, her students did not participate in "specials" (such as music, art or science) with other students, and the students in her

class had the opportunity to interact with general education students at lunch and recess, which consisted of approximately 75 students total, an administrative team member and between five and seven paraprofessionals (Tr. pp. 47-48, 59, 61-62). Although the March and April 2007 CSE considered placement of the student in a special class in a special school, this placement was rejected as too restrictive because the student would not have any interaction with typically-developing peers as role models (Dist. Ex. 1 at p. 18). The district's recommendation that the student attend a 12:1+1 setting for nearly all of the school day is consistent with the evaluator's opinion that the student required a small, highly-structured setting with individualized attention (Dist. Exs. 4 at p. 8; 6). Although the parent and evaluator who preformed the neuropsychological may have optimally preferred that the student be placed in a smaller school setting for the entire school day (Tr. p. 175; Parent Ex. D), the district was required to recommend a placement that was appropriate to confer educational benefits in the LRE to the student (Walczak, 142 F.3d at 132; Tucker, 873 F.2d at 567; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). The evidence in the hearing record does not persuade me that the student is unable to interact with general education peers in a larger setting (see Dist. Exs. 2; 6),[9] but only that instruction in a large setting such as a CTT was not appropriate for him during the 2007-08 school year (Tr. pp. 10-11). Because the hearing record is clear that the student would have spent virtually all of his instructional time in a setting of 12 students with substantial individual attention, I concur with the conclusion reached by the impartial hearing officer and find that the district offered an appropriate placement for the student (Tr. pp. 48, 59, 61-62; IHO Decision at p. 4).

In view of the forgoing, I find that the alleged procedural infirmities did not rise to the level of denying a FAPE to the student. In addition, I find as did the impartial hearing officer, that the April 2007 IEP, at the time it was formulated, was reasonably calculated to provide the student with educational benefits, and that the district appropriately offered the student a placement in a 12:1+1 classroom (see O'Toole, 144 F.3d at 701; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004); see also Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F. Supp. 2d 710, 724 (S.D.N.Y. 2003). Accordingly, the evidence in the hearing record does not persuade me that the district failed to offer the student a FAPE (M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]). Generally, having determined that the challenged IEP offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of her son at MMLC was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-017; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parent's remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 29, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

[9] Although the parent testified that at one point she observed the student during recess isolated and kicking rocks (Tr. p. 94), the student's CTT teachers reported that the student was very social in the classroom and that at times his socialization interfered with his academic work (Dist. Ex. 2 at p. 1).